

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
Louisiana Real Estate Appraisers Board,)	Docket No. 9374
a state agency.)	
)	

**OPPOSITION OF RESPONDENT LOUISIANA REAL ESTATE APPRAISERS BOARD
TO COMPLAINT COUNSEL’S
MOTION FOR LEAVE TO SUBSTITUTE EXPERT WITNESS**

Respondent Louisiana Real Estate Appraisers Board (“LREAB”) consistently has told Complaint Counsel, directly and in a district court proceeding, that it would not object to their naming a substitute expert witness to adopt and present the opinions and arguments in their prior expert’s April 30, 2018 rebuttal report. But Complaint Counsel’s motion asks far more than “Leave to *Substitute* Expert Witness,” as the caption of their motion asserts. Instead, Complaint Counsel seek a free, extra bite at the expert apple – to *supplement* their prior expert’s rebuttal with three new and extensive econometric analyses.

LREAB also notified Complaint Counsel (and that court) it would object to using “substitution” as a backdoor opportunity to supplement. Previous Scheduling Orders gave LREAB a minimum of *four months* between rebuttal reports and the deadline for expert depositions. Now, Complaint Counsel springs Dr. Osinski’s new analyses on LREAB counsel just *three weeks* before the new expert deposition deadline.¹ Their belated attempt at supplementation would prejudice LREAB’s ability to prepare its case, and should be denied.

¹ See Fifth Scheduling Order (dated Feb. 19, 2021) (setting expert deposition deadline of March 19, 2021).

The ambush effect on LREAB is all the more severe given that Complaint Counsel, when moving the Commission for an accelerated hearing date, failed to disclose to the Commission (or LREAB) its intent to supplement its expert opinions. Had LREAB known of Complaint Counsel's intention to introduce new rebuttal expert opinions, LREAB would have informed the Commission that it needed more pretrial preparation time than the aggressive schedule Complaint Counsel proposed. And had the Commission been made aware of this salient information, they could have considered whether, in fairness, LREAB should have been granted more time to prepare its case.

The prejudice to LREAB lies not only in timing, but in cost. Given the novel approach and detailed analyses presented by Complaint Counsel's new rebuttal report, LREAB would be put to the expense of tens of thousands of more dollars in expert and attorney fees to critique Complaint Counsel's additional arguments and prepare for deposition.

Accordingly, LREAB's proposed solution is also the most equitable: Allow Dr. Osinski to present the opinions and findings in Dr. Dutta's initial and rebuttal expert reports, and preclude Complaint Counsel from introducing into evidence the additional elements in Dr. Osinski's report.

FACTUAL BACKGROUND

The Complaint alleges that LREAB's enforcement of federal mandates and state laws requiring residential real estate appraisers to be paid a "customary and reasonable fee" for their services,² were "effectively" efforts to increase prices.³ Complaint Counsel's case relies heavily on its expert economist's analysis of appraiser fees in Louisiana and other states.

² See 15 U.S.C. §1639e; 12 C.F.R. §226.42 ("Valuation independence"); La. Stat. Ann. §§37:3415.15; 37:3415.19.

³ Complaint ¶¶ 4, 5, 32, 51. LREAB reserves for its pretrial brief and hearing its refutation of Complaint Counsel's inaccurate characterizations of LREAB's regulatory actions.

Their prior expert, former FTC economist Dr. Antara Dutta, submitted her rebuttal report on April 30, 2018. The then-operative Third Scheduling Order allowed four-and-a-half more months to complete expert depositions.⁴ The Fourth Scheduling Order similarly reset the expert deposition deadline for four-and-a-half months after the recommencement of the schedule.⁵ Those depositions did not occur because the U.S. District Court for the Middle District of Louisiana stayed this proceeding, upon a finding *inter alia* that LREAB was likely to prevail on its state-action immunity defense.⁶

During that stay, Complaint Counsel notified LREAB counsel that Dr. Dutta soon was leaving the Commission's employment, and her new employer would not permit her to testify in a future proceeding. FTC counsel asked LREAB's consent to lift the stay and conduct a deposition *de bene esse* of Dr. Dutta. LREAB counsel did not agree, but confirmed they would not oppose a substitution of "an expert *who adopts and presents* Dr. Dutta's findings."⁷ Similarly, when FTC counsel moved a U.S. District Court to temporarily lift the stay and for leave to take Dr. Dutta's deposition, LREAB stated that "it would consent to the substitution of another expert, e.g., *to present and support* Dr. Dutta's findings, if the FTC's administrative proceedings restart."⁸ The district court denied FTC counsel's motion as unsupported by the Federal Rules of Civil Procedure or case law; unnecessary to prevent injustice; and

⁴ See Third Revised Scheduling Order (dated May 1, 2018, resetting deposition deadline as September 13, 2018).

⁵ See Fourth Revised Scheduling Order (dated March 26, 2019, resetting expert deposition deadline as August 15, 2019).

⁶ *La. Real Estate Appraisers Bd. v. FTC*, No. 19-cv-214, 2019 U.S. Dist. LEXIS 126165 (M.D. La. July 29, 2019).

⁷ See Email to FTC Counsel, March 3, 2020, attached as Exhibit 1 to Affidavit of Seth Greenstein (emphasis added).

⁸ See LREAB's Memorandum in Opposition to the FTC's Emergency Motion for Leave to Temporarily Lift the Stay, *La. Real Estate Appraisers Bd. v. U.S. Fed. Trade Comm'n*, Civ. No. 3:19-cv-00214-BAJ at 4 (M.D. La. Mar. 27 2020) (emphasis added), attached as Ex. A to Complaint Counsel's Motion.

jurisdictionally improper inasmuch as the FTC's appeal had removed jurisdiction over the stay order to the Fifth Circuit.⁹

On December 18, 2020, Complaint Counsel asked the Commission to lift the stay (which LREAB did not oppose) and to commence the hearing within 10 weeks (which LREAB did oppose). Complaint Counsel did not inform the Commission of their intention to supplement their prior expert's rebuttal report through a substitute expert. The Commission granted Complaint Counsel's motion on February 12, and set a nine week pretrial schedule.

One week ago, Complaint Counsel disclosed Dr. Osinski's proposed rebuttal report to LREAB counsel, and gave LREAB counsel 24 hours to consider whether to oppose a motion to substitute expert witness.¹⁰ Dr. Osinski's proposed report includes three new econometric analyses – including at least 14 new regressions or correlations and additional challenges to the opinions of LREAB's expert. Dr. Osinski's 20 pages of new and heretofore undisclosed analyses effectively *double* the length of the comparable analysis in Section III of Dr. Dutta's April 2018 rebuttal report. Thus, substantial detailed work would be required to check and then counter Dr. Osinski's work in preparation for deposition and trial—consuming precious pretrial preparation time and costing LREAB tens of thousands more dollars in expert and attorney fees.

The next day, LREAB counsel told Complaint Counsel LREAB consented to the substitution of Dr. Osinski only to the extent that he adopts Dr. Dutta's expert reports (i.e., paragraphs 1-12 of his report), plus his curriculum vitae. But LREAB opposed introduction of

⁹ *La. Real Estate Appraisers Bd. v. U.S. Fed. Trade Comm'n*, Civ. No. 3:19-214-BAJ-RLB (M.D. La. Apr. 9, 2020).

¹⁰ When Complaint Counsel presented Chief Judge Chappell with a joint proposed Fifth Revised Scheduling Order on February 18, LREAB was aware of Complaint Counsel's need to substitute experts. But Complaint Counsel did not disclose to LREAB counsel their definitive intent to introduce new supplemental rebuttal analyses.

additional analyses at this late date, in light of the compressed pretrial schedule Complaint Counsel urged the Commission to adopt.

ARGUMENT

I. Complaint Counsel's Request to Supplement Dr. Dutta's Rebuttal Report Should Be Denied as Contrary to Case Law and Unduly Prejudicial.

Dr. Osinski's three new proffered analyses are too extensive in scope, too different in substance, and come far too late in the game to be admissible without irreparable prejudice to LREAB's pretrial preparation. As the cases cited by Complaint Counsel observe, "[t]he purpose of allowing substitution of an expert is to put the movant in the same position it would have been in but for the need to change experts; it is not an opportunity to designate a better expert." *United States ex rel. Agate Steel, Inc. v. Jaynes Corp.*, No. 2:13-01907, 2015 WL 1546717, at *2 (D. Nev. Apr.6, 2015) (requiring new expert to provide opinions "substantially similar" to prior expert). Thus, where substitution is permitted, courts set affirmative limits on the scope of permissible changes. *Id.*; *Morel v. Daimler-Chrysler Corp.*, 259 F.R.D. 17, 22 (D. P.R. 2009) (permitting substitution without "meaningful changes" in testimony); *Syngy, Inc. v. ZS Assocs., Inc.*, 2015 WL 4578807, at *3 (E.D. Pa. July 30, 2015) (allowing substitution of report that defendants represented would "cover the same ground" as their prior expert's report); *United States ex rel. Suter v. Nat'l Rehab Partners, Inc.*, No. 03-15-S-BLW, 2006 WL 3531647, at *2 (D. Idaho Dec. 6, 2006) (warning movant of potential sanctions for "completely changing their expert analysis").

Further, allowing Complaint Counsel to supplement its expert's opinions at this late date will unavoidably prejudice LREAB. "The ability to mitigate the prejudice depends on how long before trial the disclosure is made." *Morel*, 259 F.R.D. at 22 (allowing substitution where no trial date had been set, and the earliest possible trial date was at least three months away). *See*

Ferrara & DiMercurio v. St. Paul Mercury Ins. Co., 240 F.3d 1 (1st Cir. 2001) (three months' prior notice not prejudicial where the new expert had provided similar testimony in two prior cases involving the same events and parties); *Agate Steel, supra* (granting motion to substitute more than a year before the court ruled on motions for summary judgment); *Lincoln Nat'l Life Ins. Co. v. Transamerica Fin. Life Ins. Co.*, No. 1:04-CV-396, 2010 WL 3892860 (N.D. Ind. Sept. 30, 2010) (allowing substitution five and a half months before trial, with five weeks for depositions); *Millenkamp v. Davisco Foods Int'l Inc.*, No. CV-03-439-S-EJL, 2005 WL 1863183 (D. Idaho Aug. 5, 2005) (permitting substitution five months before trial). As noted above, the Third and Fourth Scheduling Orders in this proceeding allowed more than four months between the submission of the rebuttal report and completion of expert depositions.

Meeting the deposition deadline in the Fifth Scheduling Order will be challenging enough based on Dr. Dutta's prior report. But Dr. Osinski's supplemental rebuttal presents at least 14 new regression and correlation analyses, plus additional questions concerning Dr. Langenfeld's data classifications and approaches. Three weeks to evaluate Dr. Osinski's new analyses and to then depose him is too short a time, and the deadline as it currently stands will be unfair and prejudicial. In reality, LREAB counsel have *less* than three weeks to prepare, inasmuch Dr. Osinski must be deposed before LREAB's economic expert, Dr. Langenfeld, can prepare for his own deposition. There simply is not enough time for the meticulous preparation necessary to depose Complaint Counsel's sole economic witness based on new analyses and arguments.

In each of the above cases, the movant promptly brought its request to a judge with authority to mitigate the potential prejudice through control of both the pre-trial *and* trial schedule. When considering whether to allow or condition substitution of a party's expert, courts therefore balance the potential prejudice to the non-moving party, and their ability to

mitigate that prejudice by adjusting the pending case schedule. Those considerations should preclude Complaint Counsel from supplementing Dr. Dutta's report here. When Complaint Counsel moved the Commission for an accelerated hearing schedule, they withheld highly material information from the Commission and LREAB. That ambush denied LREAB any opportunity to explain to the Commission how this new development could prejudice LREAB's ability to prepare for trial. And it deprived the Commission of its right when setting the hearing schedule to balance a request for supplemental expert rebuttal against the potential prejudice to LREAB. Such gamesmanship should not be rewarded.

CONCLUSION

Complaint Counsel have good cause to substitute the identity of their economic expert, as the heading of their motion requests. However, they have shown no legitimate reason to supplement their prior expert's analyses so late in the game, and should not be permitted to do so. LREAB therefore respectfully requests that Complaint Counsel be allowed to substitute Dr. Osinski as their expert, but that his report and testimony at hearing be limited to the opinions, facts, and arguments presented in the report and rebuttal report of Dr. Dutta, as adopted in paragraphs 1-12 of the Osinski report plus his curriculum vitae.

Date: March 2, 2021

Respectfully submitted,

/s/ W. Stephen Cannon

W. Stephen Cannon

Seth D. Greenstein

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Counsel for Respondent,

Louisiana Real Estate Appraisers Board

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of)	
)	
Louisiana Real Estate Appraisers Board,)	Docket No. 9374
)	
Respondent.)	
)	

[PROPOSED] ORDER

Upon consideration of the Motion of Complaint Counsel for Leave to Substitute Expert Witness, and the opposition of Respondent Louisiana Real Estate Appraisers Board (“LREAB”), it is hereby

ORDERED that the Motion is granted in part and denied in part. Complaint Counsel shall be permitted to substitute Dr. David Osinski as its expert witness, good cause for the substitution having been shown. Complaint Counsel shall be permitted to identify Dr. Osinski as their expert witness and to provide Dr. Osinski’s expert report no later than March __, 2021. Dr. Osinski’s report and his testimony shall be limited to the opinions and arguments set forth in the report and rebuttal report of Dr. Antara Dutta. Complaint Counsel shall serve on Respondent by March __, 2021 a report of Dr. Osinski consisting of the following portions of Exhibit D to the Motion of Complaint Counsel: Section I, Section II paragraphs 10-12, his curriculum vitae, the certification, and Exhibits 1 and 2 (the Expert Report and Rebuttal Report of Dr. Dutta).

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: March __, 2021

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF THE ADMINISTRATIVE LAW JUDGES**

In the Matter of)	
Louisiana Real Estate Appraisers Board,)	Docket No. 9374
a state agency.)	

Affidavit of Seth Greenstein

I, Seth D. Greenstein, do hereby declare as follows:

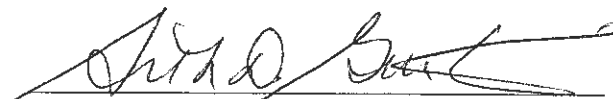
1. I am a member of the Bars of the District of Columbia and the State of Maryland, a partner in the law firm Constantine Cannon LLP in Washington, D.C., and an attorney of record in this proceeding.

2. I submit this Affidavit in support of the Opposition of Respondent Louisiana Real Estate Appraisers Board to Complaint Counsel’s Motion for Leave to Substitute Expert Witness.

3. Attached as Exhibit A to this Affidavit is a true and correct copy of an email I sent on March 3, 2020, in response to an email from FTC counsel Mark Hegedus and Complaint Counsel Lisa Kopchik.

I hereby certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date: March 2, 2021



Seth D. Greenstein

Exhibit A

Greenstein, Seth

From: Greenstein, Seth
Sent: Tuesday, March 3, 2020 2:53 PM
To: Hegedus, Mark S.; Kopchik, Lisa B.
Cc: Cannon, Stephen; Sheedy, Allison
Subject: RE: FTC v. LREAB: Follow-up regarding deposition de bene esse for Dr. Dutta

Mark and Lisa –

Thanks for the email. We have discussed your request, and LREAB will not consent to a motion to lift the stay. LREAB further opposes a deposition of the FTC’s economic expert in lieu of live trial testimony, inasmuch as that testimony addresses the key issues in the Complaint of whether LREAB’s enforcement of state law and regulations “restrained price competition” and “effectively required AMCs to pay appraisal fees that equal or exceed that median fees identified in the SLU Center survey reports.”

If there will be a hearing in the administrative proceeding, and if Dr. Dutta would be unavailable to present her findings at that hearing, we would consent to the substitution of another expert, e.g., an expert who adopts and presents Dr. Dutta’s findings. Substitution would not prejudice either party since no expert depositions have yet been conducted.

The Court found that a stay of all further proceedings against LREAB is justified on all four factors. We do not see equivalent justification to lift the stay, such as irreparable harm, particularly where we would agree to substitution of an expert witness.

If you do file a motion, you can represent to the Court that we would agree to file LREAB’s opposition within 14 days of service rather than the 21 days provided by Local Civil Rule 7(f). As a courtesy, we will endeavor to file sooner if possible.

Best regards, Steve, Seth and Allison

Seth D. Greenstein
[Constantine Cannon LLP](#)
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From: Hegedus, Mark S. <mhegedus@ftc.gov>
Sent: Friday, February 28, 2020 5:41 PM
To: Greenstein, Seth <sgreenstein@constantinecannon.com>; Sheedy, Allison <asheedy@constantinecannon.com>
Cc: Kopchik, Lisa B. <LKOPCHIK@ftc.gov>
Subject: FTC v. LREAB: Follow-up regarding deposition de bene esse for Dr. Dutta

Seth and Allison:

To follow-up on our call, we contemplate asking the court to authorize, via a limited lifting of the stay, two events:

1. A date on which (or by which) the Board would take the deposition of the FTC's expert, Dr. Dutta, assuming the Board wants to take her deposition.
2. A date on which (or by which), there would be a deposition de bene esse of Dr. Dutta, because she will be unavailable for testimony after April 24.

We would file such an motion as an emergency motion. We would prefer to do it unopposed, but will file an opposed motion if the Board does not consent.

Let me know if you have any questions. Given the hard deadline (April 24) created by Dr. Dutta's departure and her new employer's prohibition on future work on this matter, we need to get this issue before the court ASAP. I would appreciate your endeavoring to provide a response by Tuesday, March 3.

Let me know if you have any questions.

Sincerely,
Mark

Mark S. Hegedus
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Pronouns: he/him/his

CERTIFICATE OF ELECTRONIC FILING

I hereby certify that on March 2, 2021, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

April Tabor
Acting Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

Patricia M. McDermott
Lisa Kopchik
J. Alexander Ansaldo
Kenneth Merber
Wesley Carson
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wcarson@ftc.gov
rfrank@ftc.gov

Counsel Supporting the Complaint

DATED: March 2, 2021

/s/ Seth Greenstein

Seth Greenstein
CONSTANTINE CANNON LLP

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.

DATED: March 2, 2021

/s/ Seth Greenstein

Seth Greenstein
CONSTANTINE CANNON LLP