

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



ORIGINAL

In the Matter of)
)
Louisiana Real Estate Appraisers Board,)
)
Respondent.)

DOCKET NO. 9374

**ORDER DENYING MOTION TO QUASH OR
LIMIT DEPOSITION SUBPOENA**

I.

On February 26, 2018, pursuant to Rule 3.34(c) of the Federal Trade Commission’s (“FTC”) Rules of Practice, non-party ClearCapital.Com, Inc. (“Clear Capital”) filed a motion to quash or limit a subpoena *ad testificandum* served on Clear Capital by Respondent Louisiana Real Estate Appraisers Board (“Respondent” or “Board”) (“Motion”). Respondent filed its opposition on March 2, 2018. For the reasons set forth below, Clear Capital’s Motion is DENIED.

II.

The Complaint in this matter alleges that the Board’s promulgation and implementation of the Board’s Rule 31101, requiring the payment of “customary and reasonable fees” to appraisers by, primarily, appraisal management companies (“AMCs”), constituted an unreasonable restraint on price competition. Complaint ¶¶ 1, 4. Respondent states that it issued a subpoena *ad testificandum* (hereafter, the “deposition subpoena”) to several AMCs that retained appraisers to perform residential appraisals for covered transactions in Louisiana, including Clear Capital.

Clear Capital seeks to quash, or in the alternative to limit, the deposition subpoena to eliminate any questioning on matters designated in the subpoena as Topic 6 and Topic 7. In addition, Clear Capital asserts that the Protective Order issued in this case on May 31, 2017 does not adequately protect its competitively sensitive information.

III.

A.

Pursuant to Rule 3.31(c) of the Commission’s Rules of Practice, unless otherwise limited by order of the Administrative Law Judge, parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the

proposed relief, or to the defenses of any respondent. 16 C.F.R. § 3.31(c). The Administrative Law Judge may deny discovery or make any other order that justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding. 16 C.F.R. § 3.31(d). A party seeking to quash a subpoena has the burden of demonstrating why discovery should be denied. *In re Polypore Int'l, Inc.*, 2008 WL 4947490, at *6 (Nov. 14, 2008) (denying motion to quash subpoena *ad testificandum*).

Topic 6 requests deposition testimony on the following: “Fees paid to you by lenders for appraisals of covered transactions in Louisiana.” Clear Capital asserts that these fees are not relevant to the Complaint or to any defense because the relevant inquiry involves the fees paid by AMC’s for appraisals in Louisiana, not what AMC’s were paid by lenders for arranging the appraisals.

Respondent counters that the Complaint alleges that “AMC’s act as agents for lenders in arranging for real estate appraisals”; and that under Board regulations, AMC’s may compensate appraisers in accordance with a “survey of fees recently paid by lenders in the relevant geographic area.” Complaint ¶¶ 1, 4. Respondent further states that the Complaint also alleges that “lenders increasingly [have] turned to AMC’s to arrange for required appraisal services” and that “lenders engage AMC’s to obtain an appraisal in more residential real estate transactions.” Complaint ¶ 18. Thus, Respondent argues, whether and to what extent consumers pay higher fees due to lenders’ fees is within the scope of any harm that consumers have suffered. Complaint ¶ 44.

In addition, Respondent states that the Complaint alleges that the relevant market “consists of real estate appraisal services sold to AMC’s in Louisiana” and that the definition of “customary and reasonable” is based on “fees recently paid by lenders in the relevant geographic area.” Complaint ¶¶ 3, 49. Therefore, Respondent argues, the total charge to lenders, including the AMC fee that some lenders paid, is relevant to test the market definition’s sufficiency.

Respondent has demonstrated that the information sought in Topic 6 may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Respondent. Clear Capital has not carried its burden of showing why the discovery sought in Topic 6 should be denied.

Topic 7 requests deposition testimony on the following: “Advocacy efforts by you or any association regarding the adoption of laws and regulations in Louisiana regarding payment of customary and reasonable fees.” Clear Capital asserts first that this topic is overly broad because it calls for testimony regarding advocacy efforts by “any association,” and that because “association” is not a defined term in the subpoena, it is vague and confusing. Respondent does not address this argument. The parties are directed to confer on a reasonable, relevant definition of this term.

Next, Clear Capital asserts that its advocacy efforts are not relevant because its position regarding payment of customary and reasonable fees has no bearing on whether Rule 31101 restrained competition or whether the Board’s conduct can be deemed state action. Respondent replies that the provisions regarding payment of customary and reasonable fees that AMC’s supported or opposed, and the reasoning behind that support or opposition, is relevant to show the restraint’s effect on competition. Respondent further states that AMC’s advocated in favor of the

AMC Act and Rule 31101, but against enforcement powers by the Board, and that discovery concerning these efforts is relevant to show how market participants perceived the alleged restraint's effect on competition and is also relevant to show AMCs' biases that may affect the credibility of their testimony.

Respondent has demonstrated that the information sought in Topic 7 may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of Respondent. Clear Capital has not carried its burden of showing why the discovery sought in Topic 7 should be denied.

B.


The Protective Order issued in this matter pursuant to Commission Rule 3.31(d) protects "confidential material," which refers to "any document or portion thereof that contains privileged information, competitively sensitive information, or sensitive personal information." "Document" is defined as "any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party." Protective Order ¶ 1. Paragraph 7 of the Protective Order limits disclosure of "confidential material" to certain enumerated persons.

Clear Capital asserts that while the Protective Order protects the *transcript* of the deposition from disclosure, it does not protect the *testimony* provided in the deposition from disclosure to persons other than those specified in Paragraph 7 of the Protective Order. To the extent that Clear Capital is requesting that only those persons enumerated in Paragraph 7 be permitted to attend the deposition during portions where Clear Capital's confidential material is discussed, such request is granted. In all other aspects, Clear Capital's Motion is denied. The Protective Order entered in this case on May 31, 2017 adequately protects the deposition transcript. *In re Lab Corp.*, 2011 FTC LEXIS 5, at *3-4 (Jan. 28, 2011).

IV.

For the above stated reasons, the Motion is DENIED.¹

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: March 6, 2018

¹ The Board's Opposition states that the parties agreed to reschedule the date for the deposition from March 1, 2018, as originally noticed, to March 27, 2018. Under the Second Revised Scheduling Order, issued January 24, 2018, the deadline for completion of fact discovery is March 16, 2018. The parties' implicit request to extend the discovery deadline to March 27, 2018 for the purpose of taking the rescheduled deposition GRANTED.

Notice of Electronic Service

I hereby certify that on March 06, 2018, I filed an electronic copy of the foregoing Order Denying Motion to Quash or Limit Deposition Subpoena, with:

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Chief Administrative Law Judge
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Donald Clark
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I hereby certify that on March 06, 2018, I served via E-Service an electronic copy of the foregoing Order Denying Motion to Quash or Limit Deposition Subpoena, upon:

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