

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson

ORIGINAL

In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

Docket No. 9374

**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION FOR A
CONTINUANCE OF A STAY AND CROSS-MOTION FOR AN ORDER
ESTABLISHING SCHEDULE**

Since the Commission voted out the Complaint nearly two years ago, Respondent has sought to stay this case seven different times. Respondent’s newest request, based on its plans to file an extraordinary request that a Court of Appeals reconsider en banc a panel’s unanimous *per curiam* decision, would accomplish nothing beyond further delay, contrary to the Commission’s oft-stated goal of expediting its administrative proceedings. *See* 73 Fed. Reg. 58833 (Oct. 7, 2008); 16 C.F.R. § 3.1. Therefore, Complaint Counsel respectfully ask the Commission to deny Respondent’s motion for a stay and to set a new schedule for the proceedings in this case. Specifically, Complaint Counsel respectfully request that the Commission order that the evidentiary hearing begin on September 16, 2019, and set a date for oral argument (if any) on Complaint Counsel’s Motion for Partial Summary Decision Dismissing Respondent’s Fourth Affirmative Defense (hereinafter, “Motion for Partial Summary Decision”). Due to a scheduling

conflict, Complaint Counsel respectfully request that any such oral argument not be set within the week of May 6-11, 2019.

ARGUMENT

Respondent's Motion is its fifth motion for a stay filed with the Commission, and its seventh effort to stall this administrative proceeding.¹ The Commission denied Respondent's three most recent requests,² and should likewise deny Respondent's instant Motion. The Commission's Complaint of May 30, 2017 set January 30, 2018 as the date of the evidentiary hearing, pursuant to Rule 3.11(b)(4). That date is of course long past.

No good cause exists for a further stay. Respondent's Motion ignores the extremely low chance that the Fifth Circuit Court of Appeals will grant rehearing en banc, and understates the delay that will result from its request for a stay while it pursues such an extraordinary procedure. Moreover, a stay is not necessary to avoid prejudice to Respondent while it pursues en banc review, as the same goal will be accomplished if the Commission grants Complaint Counsel's request to lift the current stay and order that the evidentiary hearing begin on September 16, 2019.³ The Commission should thus set a schedule that will "conduct . . . proceedings expeditiously" and "avoid delay." *See* Rule 3.1.

¹ Respondent also filed motions for stays with the Administrative Law Judge and the Fifth Circuit Court of Appeals.

² The Commission denied Respondent's requests for stays filed on January 11, 2018, January 31, 2018, and April 20, 2018.

³ Complaint Counsel requests this date due to scheduling difficulties currently anticipated by counsel and witnesses. Specifically, Respondent anticipates that counsel or/and witness scheduling conflicts would render a trial inconvenient in June and in August, while Complaint Counsel anticipates that counsel or/and witness scheduling conflicts would render trial inconvenient in July, the last week of August, and the first two weeks of September.

1. Respondent is Unlikely to Obtain Rehearing En Banc

The Internal Operating Procedures of the Fifth Circuit Court of Appeals clearly instruct that a petition for rehearing en banc is an “extraordinary procedure”:

Petitions for rehearing en banc are the most abused prerogative of appellate advocates in the Fifth Circuit. Fewer than 1% of the cases decided by the Court on the merits are reheard en banc; and frequently those rehearings granted result from a request for en banc reconsideration by a judge of the court rather than a petition by the parties.

Fifth Circuit Rule 35 I.O.P. Notwithstanding this guidance, Respondent intends to seek review of a unanimous, *per curiam*, opinion. Although Respondent may believe that the panel opinion constitutes “an exceptional error of public importance or an opinion that directly conflicts with prior Supreme Court, Fifth Circuit, or state law precedent,” Respondent has provided no basis for the Commission to conclude that Respondent is correct. *See* Fifth Circuit Rule 35 I.O.P.

Moreover, Respondent understates the time that may be required for resolution of its request for rehearing en banc. Respondent represents that it intends to file a petition “well before” the deadline of 45 days, but it has not provided any firm commitment to a filing date. *See* Motion at 2. And while Respondent makes reference to a provision of the Fifth Circuit’s I.O.P. involving “10 days,” *see* Motion at 2, this is only an interim deadline for “any active judge” of the Fifth Circuit to communicate with the writing judge, which is only the first step in the process. *See* Fifth Circuit Rule 35 I.O.P. In the event such a communication is made, the panel must reach a decision on whether to rehear the case,⁴ all active judges may be polled by written ballot, and numerous further steps may be necessary. Each of these steps takes time, even in the vast majority of instances in which rehearing is denied. The Commission will have

⁴ Indeed, the panel must decide whether to grant rehearing even if no active judge of the Circuit believes rehearing en banc is warranted, as the Fifth Circuit’s Internal Operating Procedures require the panel to treat every petition for rehearing en banc as a petition for panel rehearing. *See* Fifth Circuit Rule 35 I.O.P.; *see also* Fifth Circuit Rule 40.1.

jurisdiction over this matter while all of this is happening (potentially many weeks), and there is no good cause to avoid moving forward during this period, as Respondent will suffer no prejudice.

2. A Stay is Not Necessary to Avoid Prejudice to Respondent

Respondent suggests that a stay while it seeks rehearing en banc will “spare the Commission and the parties the wasteful expense of renewing preparations for trial.” Motion at 2. But the Commission can lift the stay and set a hearing date that will accomplish the same objective, while remaining consistent with the Commission’s policy “to conduct [Part 3] proceedings expeditiously.” See Rule 3.1 (“To the extent practicable and consistent with the requirements of law, the Commission’s policy is to conduct [formal adjudicative] proceedings expeditiously.”). Specifically, the Commission can grant Complaint Counsel’s request to set a date for oral argument (if any) on Complaint Counsel’s Motion for Partial Summary Decision, as well as a hearing date of September 16, 2019.

The parties need not expend any significant resources to resolve Complaint Counsel’s Motion for Partial Summary Decision. The issues have been extensively briefed, and even if the Commission determines that oral argument is warranted, a single oral argument will not impose any inconvenience on the parties that outweighs the Commission’s strong interest in conducting proceedings expeditiously and clarifying the issues for trial.

Once the Motion for Partial Summary Decision has been resolved, limited pretrial work remains. The parties have already exchanged expert reports, final proposed exhibit lists, and final proposed witness lists. The principal remaining pre-hearing tasks are limited to:

1. Providing notice to third parties regarding confidential material and any necessary motions regarding the *in camera* treatment of such materials;

2. Depositions of Complaint Counsel's single expert witness and Respondent's single expert witness;
3. Limited pretrial motions, such as *motions in limine* and motions to address any disputes over exhibit lists or witness lists (plus any out-of-time fact discovery ordered by the Administrative Law Judge to resolve such disputes);
4. Exchange of objections to exhibit lists and witness lists and proposed stipulations of law, facts, and authenticity;
5. Pretrial briefs.

Based on the schedule previously set by the Administrative Law Judge, the deadline for all of these tasks would fall within roughly six weeks of the start of the hearing. Thus, if the Commission orders the hearing to start on September 16, 2019, the Administrative Law Judge may set a schedule that in which all significant deadlines fall in August; thus, the parties can avoid expending any significant resources "renewing preparations for trial" until June or July.

Such a schedule should provide Respondent with sufficient time to pursue its appellate strategy before it incurs any significant burden in the administrative proceedings. In addition, a September 16, 2019 hearing date will provide adequate time for the Commission to resolve the Motion for Partial Summary Decision; it will provide the parties with certainty that will be helpful in securing witnesses and allocating resources; and it will accommodate all scheduling difficulties currently anticipated by counsel and witnesses.

CONCLUSION

For good cause shown and the reasons stated above, Complaint Counsel respectfully request that the Commission (1) deny Respondent's Motion to Continue the Stay; (2) order that the administrative hearing commence on September 16, 2019, and (3) if the Commission wishes

to hear oral argument on Complaint Counsel's Motion for Partial Summary Decision, set such oral argument on a date not within the week of May 6-11, 2019.

Dated: March 14, 2019

Respectfully submitted,

/s/Geoffrey M. Green
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**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

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In the Matter of

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Respondent**

Docket No. 9374

[PROPOSED] ORDER ESTABLISHING SCHEDULE

On March 14, 2019, Complaint Counsel filed a motion for an order setting the Evidentiary Hearing to begin on September 16, 2019, and a date for oral argument on Complaint Counsel's motion to dismiss Respondent's Fourth Affirmative Defense of regulatory compliance. The motion is GRANTED:

- 1) The evidentiary hearing shall begin on September 16, 2019; and
- 2) Oral argument on Complaint Counsel's Motion for Partial Summary Decision on Respondent's Fourth Affirmative Defense is hereby set for [time] on [date] in [location] [or: is hereby cancelled].

By the Commission.

April Tabor
Acting Secretary

ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on March 14, 2019, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

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The Honorable D. Michael Chappell
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Federal Trade Commission
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I also certify that I delivered via electronic mail a copy of the foregoing document to:

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Counsel for Respondent Louisiana Real Estate Appraisers Board

Dated: March 14, 2019

By: /s/ Daniel J. Matheson

Daniel J. Matheson, Attorney

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.

Date: March 14, 2019

By: /s/ Daniel J. Matheson

Daniel J. Matheson, Attorney