

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

Docket No. 9374

**RESPONDENT’S OPPOSITION TO THE MOTION OF
REAL ESTATE VALUATION PARTNERS TO QUASH THE SUBPOENA**

Pursuant to 16 C.F.R. §3.34(c) and §3.22(d), Respondent Louisiana Real Estate Appraisers Board (“LREAB” or “Board”) respectfully submits that the December 22, 2017 motion of Real Estate Valuation Partners (“REVP”) to quash the subpoena should be denied.

I. Introduction

It is critical that LREAB obtain third party discovery in this case. The crux of the Commission’s Complaint is that LREAB’s enforcement of federal- and state-mandated regulation of customary and reasonable fees paid to appraisers by, primarily, Appraisal Management Companies (“AMCs”), allegedly constituted an unreasonable restraint on price competition. The Complaint alleges that these AMCs were subject to investigation and enforcement actions that “effectively” required AMCs to match or exceed appraisal rates listed in an independent and objective survey, funded by the Board and posted on the Board’s website as a courtesy to AMCs and appraisers. (Complaint ¶ 4). LREAB responds that use of such a

survey is presumptively compliant under federal and state regulations; that any AMC had the right to use any of the three possible methods of compliance provided under the regulations, or any objective survey or schedule; and that the decision of any AMC to use any method of compliance, including the survey funded by the Board, was the result of that AMC's independent business judgment.

REVP is an AMC that does business in Louisiana and is required to comply with Louisiana law regarding the payment of customary and reasonable fees. REVP was the subject of one of the LREAB investigations that forms the basis of the Commission's Complaint. LREAB requests from REVP discovery concerning that investigation and compliance with Board regulations that is relevant to the allegations in Complaint, and essential to LREAB's defense. REVP objects to most of LREAB's requests as irrelevant and overly broad, but has not provided any reasonable grounds for these objections. Indeed, REVP essentially has agreed to produce only documents that the LREAB likely already has in its possession regarding that investigation. REVP has refused to produce documents showing internal and third-party communications regarding the specific subject matters at issue in this case and has refused to provide data (exclusively in REVP's possession) necessary to determine whether there was cognizable market impact.

LREAB diligently has attempted to work with REVP to reach agreement on reasonable production pursuant to the subpoena. Understanding the unique burden on third parties, LREAB has worked closely with all third parties, accepting documents "sufficient to show," narrowing requests with search terms, and so on. With the exception of one telephonic conference on November 17, REVP has been unresponsive to LREAB's attempts to confer and narrow the issues prior to filing this motion to quash. This unresponsiveness has caused unreasonable delay

and potential prejudice to LREAB. LREAB remains willing to confer with REVP to reach agreement on compliance with the subpoena, but REVP's unresponsiveness thus far has made it difficult for the parties to reach agreement.

Thus, for the reasons set forth more fully below, LREAB respectfully requests that REVP's motion to quash the subpoena be denied.

II. Background

Because of the 120-day stay of this litigation, the timing for compliance with subpoenas that LREAB issued in July was delayed until after the stay lifted. The new compliance deadline became December 4, 2017 (120-days from the original August 4, 2017 date to respond to the subpoena). Prior to the stay lifting, counsel for REVP filed a motion to extend the deadline to move to quash the subpoena so that the parties would have time to meet and confer. Counsel for REVP left a message with counsel for LREAB requesting consent to file the extension motion only a few hours before filing the motion. REVP did not send an email with the contents of the motion nor did REVP follow up with counsel about the voicemail message before filing. Counsel for LREAB did not receive the voicemail until after REVP filed the motion, later that same day, and therefore could not confer or consent to the motion for an extension. To date, that unilateral motion for an extension has not been granted.

The parties met and conferred on November 17, 2017 to discuss the substance of the subpoena and to attempt to narrow the issues. REVP stated its position that several of LREAB's requests were not relevant. After explaining the basis for the requests in the Complaint allegations, counsel for LREAB suggested that certain documents may be sufficient to satisfy certain requests. Counsel for REVP represented that she would discuss with her client LREAB's position, and potential compromise for certain requests (particularly regarding fee data). LREAB

also requested that, given the tight timelines in this case, REVP agree to a December 14, rather than a December 22 extension. Counsel for REVP represented that she would confer with her client and get back to LREAB regarding a joint motion for a December 14 extension, but never did so.

Thereafter, counsel for LREAB followed up with Counsel for REVP multiple times, including on November 20, November 30, and December 18 to inquire whether counsel had discussed with her client production under the challenged requests and to propose times to confer regarding the same. LREAB received no response regarding the issues discussed on November 17 and REVP did not request that the parties meet and confer again. Finally, on December 20, counsel represented that REVP would be making a “substantial” production. That communication did not request that the parties schedule an additional conference and did not inform LREAB that REVP would be filing a motion to quash, leading counsel for LREAB to believe that REVP planned to comply fully with the subpoena. On December 22, 2017, REVP made a partial production to LREAB and filed a motion to quash LREAB’s subpoena.

LREAB remains willing to meet and confer to address these issues without intervention of the court. REVP represents that it will continue to discuss these issues with LREAB (Motion to Quash ¶5) – but REVP has not conferred with LREAB since November 17, even though LREAB has made multiple attempts to do so.¹

¹ REVP’s Motion facially fails to comply with Rule 3.22(g) requiring a statement identifying the dates, times and places of conferences between counsel and the names of all parties participating in each conference. The Motion also fails to specify which matters in controversy have been resolved by agreement.

III. The Motion to Quash Should be Denied.

Parties may “obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations in the complaint, to the proposed relief, or to the defenses of respondent.” 16 C.F.R. § 3.31(c)(1). The question is whether the subpoena seeks information that is reasonably expected to be “generally relevant to the issues raised by the pleadings.” *In the Matter of Rambus Inc., A Corp.*, 9302, 2002 WL 31868184, at *2 (MSNET Nov. 18, 2002) (internal quotations omitted). Thus, relevancy can be determined by “laying the subpoena along side” the pleadings. *Id.*

“[P]ublic interest requires that once a complaint issues ... Commission counsel (and respondent’s counsel when they put on their defense) be given the opportunity to develop those facts which are essential” to support or undermine the allegations in the pleadings. *In re Gen. Foods.*, No. 9085 C, 1978 FTC LEXIS 412 at *6 (April 18, 1978). The subpoenaed party bears the burden of showing that the requests are unreasonable. *In the Matter of Rambus Inc.*, 2002 WL 31868184, at *3 (denying third party's motion to quash subpoena). This is a heavy burden, even when the subpoena is directed at a non-party. *In re Flowers Indus., Inc.*, No. 9148, 1982 FTC LEXIS 96 at * 15 (Mar. 19, 1982); *accord F.T.C. v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) (“[T]hat burden is not easily met where, as here, the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose.”).

REVP’s motion to quash is facially inadequate. Far from meeting the “heavy burden” required of a party challenging a subpoena, REVP has asserted general, cursory objections with no justification for their non-compliance. Indeed, for most of the requests, REVP merely references its responses to Requests No. 1 and 2, rather than address why subsequent requests are

independently objectionable. Further, REVP provides no legal or factual support for any of its objections. REVP's failure to meet its initial burden alone is a sufficient basis to deny the motion to quash. However, LREAB will address why it is entitled to discovery pursuant to each challenged requests below.

a. Request No. 2 asks for documents and communications between REVP and the FTC relating to the FTC's investigation of LREAB. REVP's documents and communications between REVP and the FTC concern only the subject matter of this case and are directly relevant to the FTC's allegations and LREAB's defenses. Despite REVP's contention, this is not a burdensome request because these communications were likely limited to responding to document requests and a few other discrete communications. REVP has made no showing to the contrary.

b. Requests No. 4, 5, 6, and 11 ask for REVP's internal and external documents and communications regarding customary and reasonable fees, Rule 31101, and the October 20, 2010 Federal Reserve Board Interim Final Rules regarding customary and reasonable fees. REVP's communications and documents regarding the Board's customary and reasonable fee rule, as well as the federal rules regarding customary and reasonable fees, are relevant to both the FTC's allegations and LREAB's defenses, including the defense that LREAB complied in good faith with a Federal regulatory regime.² Additionally, REVP's communications with third parties regarding the impact of customary and reasonable fees are relevant to Complaint allegations that

² See, e.g., Complaint ¶¶ 16 – 26 (discussing at length the federal regulatory regime underlying LREAB's Rule 31101); ¶¶ 27 – 28 (discussing the Louisiana AMC Act requiring payment of customary and reasonable fees); Complaint ¶¶ 30 – 43 (alleging that the Board's promulgation and enforcement of Rule 31101 violated the antitrust laws); Complaint ¶ 44 (alleging that the Board's actions tended to restrain appraisal fee negotiations); Answer, Affirmative Defense ¶ 4 (asserting defense that LREAB acted in good faith to comply with federal regulatory mandates).

LREAB's Rule 31101 impacted pricing and competition. *See, e.g.*, Complaint ¶ 48 ("AMCs operating in Louisiana have increasingly used median fees reported in SLU Center surveys."). Finally, REVP was the subject of an LREAB investigation which the FTC has alleged was part of an anticompetitive scheme. *Id.* LREAB is entitled to discovery regarding REVP's response to that investigation.

c. Request No. 8 asks for documents and communications relating to activities to inform or influence the Louisiana legislature regarding customary and reasonable fees. The process of promulgating Rule 31101, the legislative process for passing the Louisiana AMC Act, and the industry understanding of customary and reasonable fees are relevant to, *inter alia*, the FTC's allegations (*see, e.g.*, Complaint ¶ 27-28 (discussing passage of the Louisiana AMC Law)) as well as LREAB's defenses of good faith compliance and state action immunity. (Answer, Affirmative Defenses ¶ 4, 9).

d. Request Nos. 9 and 10 ask for documents sufficient to show AMC compensation from lenders and the cost of appraisal management services. These requests are unquestionably relevant. The Complaint alleges that the prices of appraisal services have increased following LREAB's promulgation and implementation of Rule 31101. *See* Complaint ¶ 44. REVP, and other AMCs, are the only entities in possession of data that can support or refute this allegation. However, understanding that producing this data may be challenging for REVP, LREAB represented that it would be willing to accept data (in any form) sufficient to show the fees paid for residential real estate appraisal services in Louisiana from 2012 through the present. Counsel for REVP represented that she would discuss this compromise proposal with her client but never responded to LREAB's offer to accept this clearly relevant information in a less burdensome format. *See In re Gen. Motors Corp.*, No. 9077, 1977 FTC LEXIS 18 * 1 (Nov. 25, 1977) ("[A]

Federal Trade Commission subpoena seeking relevant data will not be quashed on the grounds that a burden is imposed on a third party, especially where the party initiating the subpoena has expressed a willingness to mitigate whatever burden may exist by negotiation and compromise.”).

e. Request No. 12 asks for documents and communications relating to investigations and enforcement actions in other jurisdictions regarding customary and reasonable fees. As discussed above, the heart of this case concerns the reasonableness of LREAB’s Rule 31101, which implements the federal regulatory regime requiring all states to require and enforce AMC payment of customary and reasonable fees for residential real estate appraisals. Compliance efforts in other states are relevant to these issues.

f. Additionally, REVP objects to Requests 2, 4, 5, 6, 8, 9, 10, 11, and 12 because they call for information that is “confidential” and “proprietary.” Counsel for LREAB has assured counsel for REVP that any concerns about confidentiality are fully addressed by designating documents in accordance with the Court’s May 31, 2017 Protective Order in this matter. REVP has not provided any basis for why the Protective Order is insufficient to protect the confidentiality of its information.

IV. Conclusion

REVP has not met the “heavy burden” required to quash the subpoena and has repeatedly ignored LREAB’s requests to confer in order to narrow the issues and avoid court intervention. For the foregoing reasons, REVP’s motion to quash the subpoena should be denied.

Dated: January 2, 2018

/s/ W. Stephen Cannon

W. Stephen Cannon

Seth D. Greenstein

Richard O. Levine

James J. Kovacs

Kristen Ward Broz

Constantine Cannon LLP

1001 Pennsylvania Avenue, NW

Suite 1300 N

Washington, DC 20004

Phone: 202-204-3500

scannon@constantinecannon.com

Counsel for Respondent, Louisiana

Real Estate Appraisers Board

Notice of Electronic Service

I hereby certify that on January 02, 2018, I filed an electronic copy of the foregoing Opposition to Motion to Quash Subpoena, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
Suite 172
Washington, DC, 20580

I hereby certify that on January 02, 2018, I served via E-Service an electronic copy of the foregoing Opposition to Motion to Quash Subpoena, upon:

Lisa Kopchik
Attorney
Federal Trade Commission
LKopchik@ftc.gov
Complaint

Michael Turner
Attorney
Federal Trade Commission
mturner@ftc.gov
Complaint

Christine Kennedy
Attorney
Federal Trade Commission
ckennedy@ftc.gov
Complaint

Geoffrey Green
Attorney
U.S. Federal Trade Commission
ggreen@ftc.gov
Complaint

W. Stephen Cannon
Chairman/Partner
Constantine Cannon LLP
scannon@constantinecannon.com
Respondent

Seth D. Greenstein
Partner
Constantine Cannon LLP
sgreenstein@constantinecannon.com
Respondent

Richard O. Levine
Of Counsel
Constantine Cannon LLP
rlevine@constantinecannon.com

Respondent

Kristen Ward Broz
Associate
Constantine Cannon LLP
kbroz@constantinecannon.com
Respondent

James J. Kovacs
Associate
Constantine Cannon LLP
jkovacs@constantinecannon.com
Respondent

Thomas Brock
Attorney
Federal Trade Commission
TBrock@ftc.gov
Complaint

**I hereby certify that on January 02, 2018, I served via other means, as provided in 4.4(b) of the foregoing
Opposition to Motion to Quash Subpoena, upon:**

Jennifer Dawson
Attorney
Marshall & Melhorn LLC
dawson@marshall-melhorn.com
Complaint

W. Stephen Cannon
Attorney