

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

**In the Matter of**

**Louisiana Real Estate Appraisers Board,  
Respondent**

**DOCKET NO. 9374**

**COMPLAINT COUNSEL’S MOTION FOR LEAVE TO SUBSTITUTE EXPERT  
WITNESS AND REQUEST FOR EXPEDITED TREATMENT**

Pursuant to Federal Trade Commission’s (“FTC” or “Commission”) Rules of Practice §§ 3.21(c)(2) and 3.31A(f), Complaint Counsel respectfully moves for leave to substitute its economic expert witness and to submit a replacement expert disclosure and report. Good cause exists for the requested substitution: during the recent 18-month stay of proceedings, Complaint Counsel’s previously designated economic expert, Dr. Antara Dutta, has taken on new employment that renders her unavailable to serve as an expert witness in this case.

Respondent previously opposed Complaint Counsel’s attempts to preserve Dr. Dutta’s testimony for use in this proceeding, and explicitly represented to a federal court that it would “consent to substitution of the FTC’s economic expert.”<sup>1</sup> Yet, Respondent now advises that it objects to Complaint Counsel providing any substitute expert disclosure beyond verbatim adoption of the reports written by Complaint Counsel’s original expert. As discussed below, the law regarding expert substitution is not so narrow. Consistent with Respondent’s previous

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<sup>1</sup> Plaintiff’s Op. to Emergency Mot. for Leave to Perpetuate Test., or in the Alternative, to Temporarily Lift Stay to Permit Dep. *De Bene Esse*, Dkt. No. 61, at 2, *La. Real Estate Appraisers Bd. v. FTC*, Civil Action No. 19-214-BAJ-RLB (M.D. La., Mar. 27, 2020) (attached as Exhibit A).

representations, Complaint Counsel should be allowed to offer substitute expert testimony that “present[s] **and** support[s]” the opinions of Dr. Dutta.<sup>2</sup>

The parties met and conferred on February 17 and 25, 2021. On February 23, 2021, Complaint Counsel disclosed to Respondent the identity of its substitute expert, Dr. David Osinski, and provided a copy of his report.<sup>3</sup> Respondent stated that it does not oppose Complaint Counsel’s use of a replacement expert generally, or the materials contained in Sections I and II of Dr. Osinski’s report (through paragraph 12), but objects to paragraph 13 and Sections III through V of Dr. Osinski’s expert report. To facilitate the timely planning and scheduling of expert depositions, Complaint Counsel seeks expedited treatment of this motion. Respondent has agreed to file its response by March 2, 2021.

## BACKGROUND

Complaint Counsel retained Dr. Antara Dutta as an expert witness in this matter in May 2017. At the time, Dr. Dutta was employed as an economist within the Bureau of Economics at the FTC. Pursuant to the then-operative Second Revised Scheduling Order, Complaint Counsel timely disclosed to Respondent on February 16, 2018 that it intended to call Dr. Dutta as an expert witness, and served Dr. Dutta’s opening and rebuttal expert reports on Respondent on April 2 and 30, 2018, respectively.

Since that time, this case has been subject to two lengthy stays at Respondent’s behest.<sup>4</sup> After an initial stay from July 2018 to March 2019, Respondent’s deposition of Dr. Dutta was scheduled to take place by August 15, 2019. That deposition never occurred, as the

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<sup>2</sup> *Id.* at 4 (emphasis added).

<sup>3</sup> Dr. Osinski’s February 23, 2021 expert report is attached as Exhibit D.

<sup>4</sup> In total, Respondent has requested at least six stays or continued stays of this proceeding. *In re La. Real Estate Appraisers Bd.*, Docket No. 9374, Commission Order Denying Stay Pending Appellate Review at n.5 (Mar. 21, 2019), [https://www.ftc.gov/system/files/documents/cases/d09374\\_lreab\\_ftc\\_order\\_lifting\\_stay\\_03212019\\_0.pdf](https://www.ftc.gov/system/files/documents/cases/d09374_lreab_ftc_order_lifting_stay_03212019_0.pdf).

administrative proceeding was again stayed on July 19, 2019 after Respondent filed a complaint in the United States District Court for the Middle District of Louisiana alleging that the Commission had violated the Administrative Procedure Act.<sup>5</sup>

On February 27, 2020, Dr. Dutta informed Complaint Counsel that she was leaving the FTC to take a position in the private sector, and that she would be unable to serve as an expert for Complaint Counsel after April 24, 2020.<sup>6</sup> Complaint Counsel promptly notified Respondent of this development and moved the district court to lift the stay temporarily to permit Complaint Counsel to depose Dr. Dutta and preserve her trial testimony.<sup>7</sup> Respondent opposed Complaint Counsel's motion on the basis that, among others, Respondent "would consent to the substitution of another expert" if the FTC's administrative proceedings restarted.<sup>8</sup> The district court denied the FTC's request on April 9, 2020, in part because the FTC could obtain "a new expert witness" to replace Dr. Dutta.<sup>9</sup>

On October 2, 2020, the United States Court of Appeals for the Fifth Circuit held that the district court lacked jurisdiction to hear Respondent's complaint and vacated the district court's

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<sup>5</sup> *La. Real Estate Appraisers Bd. v. FTC*, No. 19-cv-214, 2019 U.S. Dist. LEXIS 126165 (M.D. La. July 29, 2019). In recognition of the district court's action, the Commission subsequently issued its own order staying the proceeding pending further judicial action and a further order from the Commission. *In re La. Real Estate Appraisers Bd.*, No. 9374, Order Staying Admin. Proceedings (Aug. 5, 2019), [https://www.ftc.gov/system/files/documents/cases/d9374\\_lreab\\_commission\\_order-august\\_5-2019.pdf](https://www.ftc.gov/system/files/documents/cases/d9374_lreab_commission_order-august_5-2019.pdf).

<sup>6</sup> Emergency Mot. for Leave to Perpetuate Test., or, in the Alternative, to Temporarily Lift Stay to Permit Dep. *De Bene Esse*, Dkt. No. 58-2, *La. Real Estate Appraisers Bd. v. FTC*, Civil Action No. 19-214-BAJ-RLB (M.D. La., Mar. 13, 2020) (Declaration of Antara Dutta) (attached as Exhibit B).

<sup>7</sup> Emergency Mot. for Leave to Perpetuate Test., or in the Alternative, to Temporarily Lift Stay to Permit Dep. *De Bene Esse*, Dkt. No. 58, *La. Real Estate Appraisers Bd. v. FTC*, Civil Action No. 19-214-BAJ-RLB (M.D. La., Mar. 13, 2020).

<sup>8</sup> Op. at 2, Dkt. No. 61, *La. Real Estate Appraisers Bd. v. FTC*, Civil Action No. 19-214-BAJ-RLB (M.D. La., Mar. 27, 2020).

<sup>9</sup> Op. at 4, Dkt. No. 61 (Mar. 27, 2020); Order at 4-5, Dkt. No. 71, *La. Real Estate Appraisers Bd. v. FTC*, Civil Action No. 19-214-BAJ-RLB (M.D. La., Apr. 9, 2020) (Order attached as Exhibit C).

stay order.<sup>10</sup> On February 12, 2021, the Commission lifted its own stay and set April 20, 2021 as the date for commencement of the evidentiary hearing in this matter. Per this Court's request, Complaint Counsel and Respondent submitted a joint proposed revised prehearing schedule on February 18, 2021. The Court issued the Fifth Revised Scheduling Order on February 19, 2021, ordering in part that expert depositions take place on or before March 19, 2021.

## ARGUMENT

With the resumption of proceedings, Complaint Counsel seeks leave to substitute a new economic expert, Dr. David Osinski, in lieu of Dr. Dutta. In support of its motion, Complaint Counsel attaches a copy of Dr. Osinski's February 23, 2021 expert report as Exhibit D ("Osinski Rep."). Copies of Dr. Dutta's April 2, 2018 expert report ("Dutta Rep.") and April 30, 2018 rebuttal expert report ("Dutta R. Rep.") are exhibits to Dr. Osinski's report.

### I. GOOD CAUSE EXISTS FOR COMPLAINT COUNSEL'S EXPERT SUBSTITUTION

Under Rule 3.31A(f), this Court may, upon a finding of good cause, alter the pre-hearing schedule governing expert disclosures provided that the alteration does not affect the evidentiary hearing date set by the Commission. Here, good cause exists to allow the substitute expert disclosure outside of the prescribed schedule due to Dr. Dutta's unexpected unavailability to serve as Plaintiff's expert witness, Complaint Counsel's diligence in seeking and disclosing its substitute expert witness, and the significant prejudice to Complaint Counsel if not permitted to replace Dr. Dutta. Further, the proposed expert substitution does not affect the April 20, 2021 hearing date.

There is ample justification for the requested substitution. At the time that Complaint Counsel disclosed Dr. Dutta to Respondent, the administrative hearing in this matter was

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<sup>10</sup> *La. Real Estate Appraisers Bd. v. FTC*, 976 F.3d 597, 600 (5th Cir. 2020).

scheduled for June 11, 2018.<sup>11</sup> Complaint Counsel could not have reasonably foreseen that this case would be stayed on two separate occasions, that the administrative hearing date would be delayed almost three years, and that Dr. Dutta would leave the Commission and become unavailable to serve as an expert witness in the interim. These unanticipated developments provide “good cause” for substitution in this case.<sup>12</sup>

Complaint Counsel’s diligence in addressing Dr. Dutta’s withdrawal from the case further supports a finding of good cause. Upon learning of Dr. Dutta’s announced departure from the FTC and impending unavailability, Complaint Counsel immediately sought a temporary reprieve from the district court’s stay to conduct depositions that could later serve as Dr. Dutta’s trial testimony.<sup>13</sup> Respondent opposed those efforts, instead representing to Complaint Counsel and the federal district court at least six different times in its opposition brief that it would consent to the substitution of another expert when the FTC’s administrative proceedings restarted.<sup>14</sup> Additionally, after the Commission lifted the stay in this matter on February 12, 2021, Complaint Counsel promptly served Dr. Osinski’s substitute expert disclosure on Respondent on February 23, 2021, and filed this motion with the Court less than two weeks after the Commission lifted the stay. Federal courts have found this type of prompt response fully sufficient to warrant expert substitution.<sup>15</sup>

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<sup>11</sup> See Second Revised Scheduling Order (Jan. 24, 2018).

<sup>12</sup> See *Nat’l R.R. Passenger Corp. v. Expresstrak, L.L.C.*, No. CIVA 02-1773 RBW, 2006 WL 2711533, at \*3 (D.D.C. Sept. 21, 2006) (citing *Jackson v. Laureate, Inc.*, 186 F.R.D. 605, 609 (E.D. Cal. 1999)).

<sup>13</sup> See *supra* n.7

<sup>14</sup> See Op. at 2, 4, 5, 9, 10, Dkt. No. 61, *La. Real Estate Appraisers Bd. v. FTC*, Civil Action No. 19-214-BAJ-RLB (M.D. La., Mar. 27, 2020).

<sup>15</sup> See, e.g., *Morel v. Daimler-Chrysler Corp.*, 259 F.R.D. 17, 21 (D.P.R. 2009); *Millenkamp v. Davisco Foods Int’l, Inc.*, No. CV 03-439-S-EJL, 2005 WL 1863183, at \*2 (D. Idaho Aug. 4, 2005).

Finally, absent substitution, Complaint Counsel, through no fault of its own, would be unable to offer expert testimony on the important economic issues presented in this case, and would suffer significant prejudice. This alone constitutes good cause for permitting the requested substitution.<sup>16</sup>

## **II. ALLOWING COMPLAINT COUNSEL TO REPLACE ITS EXPERT WITNESS AND SUBMIT A SUBSTITUTE EXPERT REPORT WILL NOT PREJUDICE RESPONDENT**

Respondent will suffer no prejudice or unfair surprise from the proposed substitution and replacement report, as Dr. Osinski's report merely presents and supports the opinions offered in Dr. Dutta's opening and rebuttal reports. Dr. Osinski's report presents and supports Dr. Dutta's opinions in two ways. First, in Section II of his report, Dr. Osinski expressly adopts and incorporates by reference all substantive portions of Dr. Dutta's reports. Respondent does not object to this portion of Dr. Osinski's report (through paragraph 12).

Second, in Sections III through V of his report, Dr. Osinski independently and objectively reviews and evaluates Dr. Dutta's rebuttal opinions and critiques of the report of Respondent's economic expert (Dr. James Langenfeld). Despite Respondent's contention, courts do not require substitute experts to "merely adopt [the former expert's] opinions verbatim."<sup>17</sup> Substitute experts are "permitted to review all of the evidence, conduct [their] own independent analysis, and express [their] opinion in [their] own words," provided that the analysis is limited to "the same subject matter as [the original expert]'s report."<sup>18</sup>

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<sup>16</sup> See, e.g., *Nat'l R.R. Passenger*, 2006 WL 2711533, at \*4 (finding that prejudice to plaintiff from being unable to present credible expert testimony on an important issue in the case constituted good cause for expert substitution).

<sup>17</sup> *Lincoln Nat'l Life Ins. Co. v. Transam. Fin. Life Ins. Co.*, No. 04-396, 2010 U.S. Dist. LEXIS 103744, at \*5-6 (N.D. Ind. Sept. 30, 2010).

<sup>18</sup> *Id.*; see also *U.S. ex rel. Agate Steel, Inc. v. Jaynes Corp.*, No. 2:13-CV-01907-APG, 2015 WL 1546717, at \*2 (D. Nev. Apr. 6, 2015) ("it is not appropriate...to mandate that the new expert 'rubber-stamp' the expert report previously provided" so long as the new expert report does "not provide an opinion that is contrary to or inconsistent

Nothing in Dr. Osinski's report is contrary to or addresses a subject different from Dr. Dutta's reports. Dr. Osinski's analysis in Section III addresses the opinion in Dr. Dutta's reports that Respondent's conduct increased appraisal fees in Louisiana. In conducting his review and evaluation of the findings in Dr. Dutta's reports, Dr. Osinski ran a robustness check comparing fee data for Louisiana appraisal management companies ("AMCs") compelled to set appraiser fees in compliance with a survey commissioned by Respondent ("SLU Survey") with fee data for Louisiana AMCs that did not set fees based on the SLU Survey.<sup>19</sup> This mode of analysis is directly discussed in Dr. Dutta's rebuttal report.<sup>20</sup>

Similarly, Dr. Osinski's analysis in Section IV is consistent with and supports a critique previously disclosed in Dr. Dutta's rebuttal report: that Dr. Langenfeld's assertion that the relevant antitrust market should include appraisal services purchased by both AMC and non-AMC entities is flawed due to a failure to control for various factors in his correlation analysis.<sup>21</sup> Finally, Dr. Osinski's analysis in Section V directly supports the opinion offered in Dr. Dutta's rebuttal report that "Dr. Langenfeld's data analysis does not show any reliable relationship between improvements in appraisal quality and the Board's enforcement of [Rule 31101], or between appraisal quality and higher appraisal fees."<sup>22</sup> In short, there is no prejudice to

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with [the previous expert report"]; *Morel*, 259 F.R.D. at 22 (permitting substitute expert to testify to the "same subject matter [as the previous expert] without meaningful changes").

<sup>19</sup> Osinski Rep. at ¶¶ 15-18.

<sup>20</sup> See Dutta R. Rep. at ¶ 39 (comparing fee data for Louisiana AMCs that did and did not set fees based on the SLU Survey, concluding that the "pattern suggests...that the use of the SLU survey had the likely effect of increasing appraiser fees...").

<sup>21</sup> Compare Osinski Rep. at ¶¶ 19, 21 with Dutta R. Rep. at ¶ 16.

<sup>22</sup> Compare Dutta R. Rep. at ¶ 70 with Osinski Rep. at ¶¶ 30 ("results...overwhelmingly indicate that higher appraisal fees are not correlated with higher appraiser ratings"), 33 ("results indicate that the Board's conduct is not associated with a consistent change in appraiser ratings").

Respondent where, as here, the substituted expert's analyses are limited to and are consistent with the "same subject matter" as the original expert's reports.<sup>23</sup>

Finally, there is no prejudice to Respondent because Complaint Counsel's expert substitution is being made well in advance of trial and before any expert depositions have occurred. Indeed, Complaint Counsel disclosed Dr. Osinski's analysis 24 days before the deadline for expert depositions. This affords Respondent significantly more time to analyze Dr. Osinski's report than that between Complaint Counsel's deadline for serving rebuttal expert reports and the expert deposition deadline in each of the first three scheduling orders in this case.<sup>24</sup> In addition, Respondent has almost two months in advance of trial to prepare for Dr. Osinski's testimony—ample opportunity to assess Dr. Osinski's analyses, opinions, and qualifications.<sup>25</sup> Again, Sections III-V of Dr. Osinski's report all concern matters within Dr. Dutta's rebuttal report. As with any rebuttal material, Respondent is free to test and challenge Dr. Osinski's analysis in the same way it would have tested Dr. Dutta's rebuttal analysis—at deposition and through cross-examination at trial.

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<sup>23</sup> See *Lincoln Nat'l*, 2010 U.S. Dist. LEXIS 103744, at \*5–6.

<sup>24</sup> Scheduling Order (July 6, 2017) (18 days); Revised Scheduling Order (Nov. 14, 2017) (17 days); Second Revised Scheduling Order (Jan. 24, 2018) (17 days). In other recent FTC proceedings, the period between the service of expert rebuttal reports and the deadline for expert depositions has been even shorter. See *In re Altria Grp., Inc. and JUUL Labs, Inc.*, No. 9393, Scheduling Order (Aug. 4, 2020), [https://www.ftc.gov/system/files/documents/cases/d09393\\_alj\\_scheduling\\_orderpublic.pdf](https://www.ftc.gov/system/files/documents/cases/d09393_alj_scheduling_orderpublic.pdf) (11 days); *In re Axon Enter. and Safariland, LLC*, No. 9389, First Revised Scheduling Order (Mar. 17, 2020), <https://www.ftc.gov/system/files/documents/cases/03172020aljfirstrevisedschedulingorder597979.pdf> (10 days).

<sup>25</sup> See, e.g., *Ferrar & DiMercurio v. St. Paul Mercury Ins.*, 240 F.3d 1, 10 (1st Cir. 2001) (no prejudice when substitute disclosed three months in advance of trial); *Syngy, Inc. v. ZS Assocs., Inc.*, 2015 WL 4578807, at \*3 (E.D. Pa. July 30, 2015) (no "substantial" prejudice when opposing party provided four weeks to depose substituted expert); see also *In re Altria Grp., Inc. and JUUL Labs, Inc.*, No. 9393, Scheduling Order (Aug. 4, 2020), [https://www.ftc.gov/system/files/documents/cases/d09393\\_alj\\_scheduling\\_orderpublic.pdf](https://www.ftc.gov/system/files/documents/cases/d09393_alj_scheduling_orderpublic.pdf) (25 days between deadline for service of rebuttal expert reports and commencement of hearing); *In re Axon Enter. and Safariland, LLC*, No. 9389, First Revised Scheduling Order (Mar. 17, 2020), <https://www.ftc.gov/system/files/documents/cases/03172020aljfirstrevisedschedulingorder597979.pdf> (18 days between deadline for service of rebuttal expert reports and commencement of hearing).

## CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully requests that the Court issue an order granting Complaint Counsel leave to substitute Dr. Osinski as its economic expert witness and to replace its prior expert disclosures with the amended expert witness list and report of Dr. Osinski provided to Respondent on February 23, 2021.

Dated: February 25, 2021

By: /s/ Patricia M. McDermott

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

**In the Matter of**

**Louisiana Real Estate Appraisers Board,  
Respondent**

**DOCKET NO. 9374**

**[PROPOSED] ORDER GRANTING COMPLAINT COUNSEL LEAVE TO  
SUBSTITUTE EXPERT WITNESS**

Upon motion by Complaint Counsel pursuant to Federal Trade Commission's Rules of Practice 3.21(c)(2) and 3.31A(f), and for good cause shown, **IT IS HEREBY ORDERED** that Complaint Counsel's motion for leave to substitute Dr. David Osinski as its economic expert and to replace its prior expert disclosures with the amended witness list and report of Dr. Osinski provided to Respondent on February 23, 2021, is **GRANTED**.

ORDERED:

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D. Michael Chappell  
Chief Administrative Law Judge

Date:

**STATEMENT OF CONFERENCE**  
**PURSUANT TO PARAGRAPH 4 OF SCHEDULING ORDER**

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's counsel in a good faith effort to resolve by agreement the issues raised by Complaint Counsel's Motion for Leave to Substitute Expert Witness and Request for Expedited Treatment by telephone on February 17 and 25, 2021. The parties have been unable to reach an agreement on the issues raised in the attached motion.

Dated: February 25, 2021

Respectfully submitted,

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# EXHIBIT A

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA**LOUISIANA REAL ESTATE APPRAISERS  
BOARD,

Plaintiff,

vs.

UNITED STATES  
FEDERAL TRADE COMMISSION,

Defendant.

Civil No. 3:19-cv-00214-BAJ-SDJ

**PLAINTIFF LOUISIANA REAL ESTATE APPRAISERS BOARD'S MEMORANDUM  
IN OPPOSITION TO DEFENDANT'S EMERGENCY MOTION FOR LEAVE TO  
PERPETUATE TESTIMONY OR, IN THE ALTERNATIVE,  
TO TEMPORARILY LIFT STAY TO PERMIT DEPOSITION *DE BENE ESSE***

Plaintiff Louisiana Real Estate Appraisers Board ("LREAB") respectfully submits this Memorandum in Opposition to the Federal Trade Commission's ("FTC" or "Commission") Emergency Motion for Leave to Perpetuate Testimony or, in the Alternative, to Temporarily Lift Stay to Permit Deposition *De Bene Esse* ("Emergency Motion").

**INTRODUCTION**

After considering the arguments of LREAB and the FTC, this Court granted LREAB's Motion to Stay the start of the antitrust trial in the FTC's administrative proceedings. The Court determined that LREAB had satisfied each stay factor, including the required "strong showing" that LREAB is likely to establish its state-action immunity to antitrust trial and liability. ECF 32 at 8-9. The Court further determined that, without a stay, LREAB would incur irreparable harm to the State's dignitary interests—including the harm to LREAB's duty to enforce State laws to protect the integrity of the residential mortgage market and, thereby, Louisiana homeowners and home buyers. *Id.* at 9-10. The FTC already has asked the Court of Appeals to reverse the

Court's interlocutory stay order on jurisdictional grounds. Now, the FTC attempts an end run around the Court's stay order and its appeal by seeking to effectively start the administrative hearing by deposing their own economic expert witness (an FTC employee) in lieu of live trial testimony.<sup>1</sup> The FTC's Emergency Motion lacks legal authority, is completely unnecessary, and should be denied.

First, the Emergency Motion fails to meet the requirements of Federal Rule of Civil Procedure 27(b), which permits a court that has rendered a "judgment" to allow a deposition pending appeal "for use in the event of further proceedings in that court." Fed. R. Civ. P. 27(b)(1). No "judgment" has been rendered by this Court, only an interlocutory stay order, and the FTC's requested expert deposition cannot and will not be used in proceedings *before this Court*. Nor can the Commission meet Rule 27(b)(3)'s requirement to show any injustice from denying the motion. Experts have no unique factual knowledge that will be lost without a deposition, and the Commission has 40 more on-staff antitrust economists to present their expert opinions.<sup>2</sup> Moreover, the utility of that deposition is, at best, speculative. No testimony will be necessary if LREAB prevails before this Court; the FTC has not shown that substitution of experts is impossible or prejudicial, and LREAB would consent to substitution of the FTC's economist; and, as the FTC admits, there is no guarantee that the Commission's Administrative Law Judge ("ALJ") will deem the deposition testimony admissible. ECF 58-1 at 6.

Second, the Court should deny the FTC's alternative request to lift the stay. As a procedural matter, this Court has no jurisdiction to grant the FTC's Emergency Motion. Regardless of how it is postured, the purpose and effect of the Emergency Motion is to lift the

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<sup>1</sup> As the FTC's Memorandum observes, as a practical matter two depositions would be required: a discovery deposition for LREAB to prepare for cross-examination; and a deposition *de bene esse*. ECF 58-1 at 7.

<sup>2</sup> See, Bureau of Economics Biographies, FTC, <https://www.ftc.gov/about-ftc/bureaus-offices/bureau-economics/biographies> (last visited Mar. 27, 2020).

stay and allow the FTC's administrative proceedings to begin. But since the FTC's appeal divested this Court of subject matter jurisdiction over its Stay Order, the Court cannot alter the status of the stay as it rests before the Court of Appeals. On the merits, the unavailability of the FTC's in-house economist does not counterbalance this Court's assessment of the equitable factors supporting the stay. The start of trial, by deposition or otherwise, irreparably harms the very interests that state-action immunity protects—distracting LREAB officials from the performance of their duties, and further impeding LREAB's ability to enforce state laws.

For these reasons, the Court should deny the Commission's Emergency Motion.

### **BACKGROUND**

LREAB is a state governmental agency under the office of the Governor, empowered by the legislature to protect Louisiana homeowners and the residential mortgage market by ensuring the integrity of home appraisals. On April 11, 2019, LREAB filed its complaint in this Court challenging the Commission's order dismissing, in their entirety, LREAB's affirmative defenses of state-action immunity. ECF 1. To preserve its assertion of immunity pending review by this Court, LREAB filed in conjunction with its complaint a motion to stay the FTC's administrative proceedings. ECF 9. On July 29, 2019, this Court granted LREAB's request to stay those proceedings, holding that LREAB had made a sufficiently strong showing of likelihood of success on its assertion of state-action immunity and that LREAB would be irreparably harmed if trial commenced. ECF 32 at 8-9.<sup>3</sup> On September 26, 2019, the Commission appealed that stay order to the Fifth Circuit. ECF 37. The parties have fully briefed the appeal and in-person oral argument, set for April 28, 2020, has been cancelled pending further arrangements.

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<sup>3</sup> In accordance with this Court's order, the Commission issued a stay of the FTC's administrative proceedings. *See* [https://www.ftc.gov/system/files/documents/cases/d9374\\_lreab\\_commission\\_order-august\\_5-2019.pdf](https://www.ftc.gov/system/files/documents/cases/d9374_lreab_commission_order-august_5-2019.pdf).

Prior to the issuance of the stay, the parties had exchanged expert reports in the FTC's administrative proceeding. FTC complaint counsel identified as its testifying economic expert one of its on-staff antitrust economists, Dr. Antara Dutta. The FTC does not contend that Dr. Dutta has unique or first-hand factual knowledge of this case. They do not assert she has specialized expertise in the residential mortgage or appraisal industries in Louisiana or elsewhere. ECF 58-2. Nor does the Commission contend that Dr. Dutta's economic analyses, including her work product, underlying data, and work papers, could not be available to and utilized by a substitute expert. *Id.*

On February 28, 2020, FTC counsel asked LREAB's consent to lift the stays in this Court and the FTC for a discovery and *de bene esse* deposition of Dr. Dutta for use in the event that the FTC's administrative hearing proceeds. On March 3, LREAB declined, noting that lifting the existing stay would harm LREAB with no countervailing irreparable harm to the FTC. LREAB further asserted undue prejudice from a deposition of an expert concerning economic issues in lieu of live bench trial testimony before the ALJ. Specifically, LREAB would have to cross-examine Dr. Dutta before hearing the testimony of witnesses who provided the factual basis for her testimony; in the absence of any rulings on confidentiality of Dr. Dutta's report, LREAB would have to cross-examine her without input from LREAB's Executive Director or staff; the ALJ would have no opportunity to question Dr. Dutta; and ultimately, there was no certainty that the ALJ or the Commission would even deem the deposition admissible. Nonetheless, LREAB informed FTC counsel 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.

On March 11, FTC counsel suggested they might file their motion under Federal Rule of Civil Procedure 27 and again sought LREAB's consent. LREAB counsel responded that they

saw no basis for the motion in the language of Rule 27, and still considered their proposed motion a lifting of the stay. LREAB counsel again requested that FTC counsel reconsider their suggestion of substitution.

On March 13, the Commission filed the Emergency Motion with this Court, proposing a discovery deposition (“Week of April 13, 2020”) and a deposition *de bene esse* (“Week of April 20, 2020”) for Dr. Dutta. ECF 58-1 at 7. According to the declaration of Dr. Dutta, she intends to depart the FTC and begin employment at Amazon Inc. (“Amazon”) on April 27, 2020. ECF 58-2. While she states that Amazon considers her offering live expert testimony on behalf of the FTC “incompatible” with her new job responsibilities, she does not assert that Amazon would preclude her from assisting a substitute FTC economic expert during the remainder of her employment at the Commission or thereafter. *Id.* Notably, the FTC’s Emergency Motion and attached declarations fail to acknowledge LREAB’s willingness to consent to the substitution of another expert economist in Dr. Dutta’s absence.

## ARGUMENT

### **I. The Deposition is Improper Under Federal Rule of Civil Procedure 27.**

The Commission cannot invoke Federal Rule of Civil Procedure 27(b) to seek leave for a deposition for five reasons. First, Rule 27(b) does not authorize such a deposition where no judgment has been issued by the district court. The language of Rule 27(b) is clear: “The court *where a judgment has been rendered* may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.” Fed. R. Civ. P. 27(b)(1) (emphasis added). Therefore, a motion under Rule 27(b) is only proper where an existing judgment entered by the district court has been appealed. *See Shore v. Acands Inc.*, 644 F.2d 386, 389 (5th Cir. 1981) (reversing a district

court's grant of a Rule 27(b) motion, because there "was no judgment from which anyone had appealed."). The Court's stay order merely preserves the Court's ability to later render judgment in the litigation under review. *See Nken v. Holder*, 556 U.S. 418, 427, 429-30 (2009). As the district court has issued no judgment in this case, the Rule 27(b) motion must be denied.<sup>4</sup>

Second, Rule 27(b) is inappropriate as any deposition of Dr. Dutta would never be used in this Court. The Commission's contention that the "Rule 27 deposition would be noticed and conducted in the context of the APA case already before this Court" is incorrect. *See* ECF 58-1 at 7 n.3. Rule 27(b) applies only to depositions "for use in the event of further proceedings *in that court*." Fed. R. Civ. P. 27(b)(1) (emphasis added). Courts therefore deny Rule 27(b) motions where the testimony is not to be used in future proceedings in that Court, but for use in other pending proceedings. *See Canal Barge Co., Inc. v. Gulfstream Trading Ltd.*, 1999 WL 1277539, at \*1-2 (E.D. La. Dec. 22, 1999) (denying Rule 27(b) deposition for use in other pending proceedings). Dr. Dutta's testimony cannot be utilized in this action under Administrative Procedure Act ("APA"), where the Court will review only the record of the Commission's order denying LREAB's state-action immunity. *See Medina Cnty Env'tl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010) (noting that, in an APA action, the record only consists of "the order involved, any findings or reports on which that order is based, and the 'pleadings, evidence, and other parts of the proceedings before the agency.'") (citation omitted). The record in this APA action, which pertains to LREAB's assertion of state-action immunity, is already complete. Moreover, Dr. Dutta's expert economic testimony does

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<sup>4</sup> In passing, the Commission also references Rule 27(a) and (c). ECF 58-1 at 3. Neither is applicable to the Commission's motion. First, a Rule 27(a) petition to a district court can only occur "before an action is filed." Fed. Civ. R. P. 27(a). As this action has already been filed, the Commission cannot rely on Rule 27(a). Second, Rule 27(c) was only "intended to preserve the right to employ a separate action to perpetuate testimony under former section 644 of Title 28 that is now repealed. Section (c) of Rule 27 was not intended to expand the applicability of the other provisions of the Rule." *State of Nevada v. O'Leary*, 63 F.3d 932, 936-37 (9th Cir. 1995). Any broader application of Rule 27(c) would nullify the limitations of Rule 27(a) and (b).

not concern state-action immunity; it addresses pricing issues that would be reviewable, if at all, only before the Fifth Circuit. *See Louisiana Real Estate Appraisers Bd. v. FTC*, 917 F.3d 389, 391 (5th Cir. 2019) (holding under FTC Act Section 5(c) that Commission cease-and-desist orders are reviewable only via direct appeal to an appellate court). Accordingly, Rule 27(b) does not permit this Court to perpetuate testimony for use in a separate action before the FTC and that can never be used in this Court. *See also O'Leary*, 63 F.3d at 935 (upholding a district court's denial of a Rule 27(a) petition for deposition in administrative proceeding, which "could not be used to help develop a court record in a court of the United States within the meaning" of Rule 27) (quotation marks omitted).

Third, the Commission has failed to demonstrate that the unavailability of an expert witness due to her moving to corporate employment constitutes "a failure or delay of justice" required to invoke Rule 27(b). Fed. R. Civ. P. 27(b)(3); *see also Canal Barge Co.*, 1999 WL 1277539, at \*2 (holding that Rule 27(b) is only designed to prevent "injustice"); *Foy v. Dicks*, 1996 WL 745501, at \*2 (E.D. Pa. Dec. 20, 1996) (denying a Rule 27(b) motion to perpetuate testimony from other witnesses concerning an expert's credentials). In fact, in *In re Application of Checkosky*, a case relied upon by the Commission, the district court denied the Rule 27(a) petition to depose various Security and Exchange Commission employees by noting that "[t]he resignation and entry into private life of agency officials does not seriously interfere with any deposition or other timely discovery." 142 F.R.D. 4, 8 (D.D.C. 1992). Furthermore, the likelihood of this testimony ever being used in the FTC's administrative proceedings piles speculation upon speculation. Dr. Dutta's testimony could only be used at the FTC administrative proceedings *if* this Court ultimately decides this APA action against LREAB *and* both the ALJ and the Commission approve its usage in lieu of live testimony. *See* ECF 58-1 at 6

(the Commission concedes that LREAB can challenge the usage of *de bene esse* testimony of an expert at the FTC's administrative proceedings).

The only potential “injustice” faced by the Commission is the cost to prepare a new expert for the administrative trial. *See* ECF 58-3 ¶ 9 (acknowledging and opposing substitution as an alternative based on costs). But as the Commission has previously argued to this Court, the cost of litigation cannot form the basis of an injury to a party. *See* ECF 22-3 at 17 (stating, “[m]ere litigation expense, even substantial and unrecoverable cost, does not constitute irreparable injury.”) (quoting *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980)) (citation omitted). To the extent such costs are at all relevant, the costs to LREAB—which must retain outside counsel and economic experts—exceed any costs to the FTC from use of in-house counsel and in-house economists; and these impositions upon the citizens of Louisiana and upon LREAB's budget to enforce Louisiana laws deserve at least as much consideration as any impositions upon the FTC.

Fourth, the cases relied upon by the Commission do not invoke Rule 27(b) to take discovery or a deposition *de bene esse* of an unavailable expert. None of the cases cited by the FTC involves: (1) a motion under Rule 27(b); (2) a request for deposition in lieu of trial testimony; or (3) seeking to depose an expert. *See Ganz USA LLC v. United States*, 2016 WL 6777364, at \*3 (USCIT Nov. 15, 2016) (applying U.S. Court of International Trade Rule 27(a) and granting the petition based on the fact witness's declining medical condition.); *In re Application of Checkosky*, 142 F.R.D. at 6 (denying Rule 27(a) petition to depose Security Exchange Commission employees as fact witnesses); *Texaco, Inc v. Borda*, 383 F.2d 607, 609 (3d Cir. 1967) (overturning district court's denial of a Rule 27(a) petition for testimony from a 71-year-old fact witness). As this motion involves neither a fact witness nor a person

unavailable due to medical infirmity, the Commission's cited cases do not support its reliance on Rule 27(b).

Fifth, the Commission claims that deposition testimony under Rule 27(b) is warranted because there is "no guarantee" FTC counsel can find a replacement expert witness. ECF 58-1 at 6. That speculative argument is not only insufficient to support a claim of unavailability; it strains credulity. The Commission currently employs 40 other antitrust economists, presumably many of whom could substitute for Dr. Dutta. The FTC could also hire an economist from the private sector, as it has done in other cases and as LREAB has been compelled to do because of the FTC's administrative proceedings. And nothing prevents FTC complaint counsel or Dr. Dutta from assisting a substitute expert on matters concerning the FTC's administrative proceedings prior to or even after Dr. Dutta's departure.

In sum, the Commission has not met any of the Rule 27(b) criteria, and its Emergency Motion should be denied.

## **II. The FTC's Motion to Lift the Stay is Unjustified and Unwarranted.**

The Commission's request to lift the stay should be denied for four separate reasons. First, the FTC has appealed the Court's stay order to the Fifth Circuit, thus divesting this Court of jurisdiction to take further action affecting the stay. *See Dayton Indep. Sch. Dist. v. U.S. Mineral Prods. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990) (holding that a district court is "divested of jurisdiction" when an "aspect of a case is before the appellate court on interlocutory review") (citing *Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 820–21 (5th Cir. 1989)); *see also Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal . . . confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.").

Second, unavailability of an expert provides no basis to lift a stay for a deposition *de bene esse*. See *Wye Oak Tech. Inc. v. Republic of Iraq*, 2018 WL 4901075, at \*2 (D.D.C. Oct. 9, 2018) (denying a request for a deposition *de bene esse* of an expert and noting that allowing it would “prejudice” the plaintiffs). “[E]ven if one particular expert is unavailable . . . there will usually be other experts available to give similar testimony.” *Carter-Wallace, Inc. v. Otte*, 474 F.2d 529, 536-37 (2d Cir. 1972) (distinguishing availability of fact witnesses from expert witnesses as expert witness “generally has no knowledge of the *facts* of the case” but rather “is called upon to express a professional opinion upon the facts as they are presented to him”). Accordingly, *de bene esse* testimony of an expert witness cannot be used unless the offering party first shows that the witness is unavailable, and that no other expert of similar qualifications is available or that unavailable expert has some “unique” testimony to contribute. *Id.* The FTC has neither contended that Dr. Dutta has unique experience to contribute, nor shown that economic opinion testimony in the administrative proceeding cannot be offered by another economic expert.

Third, the Commission has failed to meet its burden as the moving party to demonstrate a need to lift the stay. The FTC has shown no cognizable irreparable harm at all, let alone any harm that outweighs the prejudice from lifting the stay to LREAB and the State of Louisiana. The Commission’s only asserted harm is the generalized cost to United States taxpayers to “retain” a substitute expert. ECF 58-1 at 6. While the FTC does not explain what “retention” or costs mean in the context of FTC employees, the FTC has previously argued to this Court that costs alone are no basis for a stay. *Supra* at 8.

More importantly, the Commission’s argument ignores the burdens from lifting the stay upon the State of Louisiana. A lifting of the stay will harm the sovereign interests of LREAB

and the State of Louisiana, as the deposition *de bene esse*, by definition, would be an abrogation of state-action immunity and the start of trial, which “may cause irreparable harm by forcing the State to engage in activities from which it might otherwise be protected.” ECF 32 at 9. These harms are not just costs; they are impositions upon State agency employees’ time and duties and State agency budgets that impede LREAB’s ability to implement and enforce state laws. *See Planned Parenthood of Greater Tex. Surgical Health Servs., v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) (granting stay and holding that “irreparable harm” includes “denying the public interest in the enforcement of its laws.”); *see also Martin v. Mem’l Hosp. at Gulfport*, 86 F.3d 1391, 1396 (5th Cir. 1996) (holding that the “consequences” of disregarding the application of state-action immunity include “subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service”) (citation omitted).

Finally, a deposition *de bene esse* of the FTC counsel’s expert economist prejudices LREAB’s ability to present a full defense should the FTC’s administrative proceedings occur. As this deposition *de bene esse* would occur prior to the trial testimony of any fact witnesses, LREAB could not cross-examine Dr. Dutta based on the testimony of those companies on whose data Dr. Dutta relied. The deposition also would occur prior to a ruling by the ALJ as to the confidentiality of information relied upon in Dr. Dutta’s report, which will constrain LREAB counsel’s ability to obtain valuable input from LREAB officials who best know the relevant market and the companies that provided data to Dr. Dutta. And the ALJ, as factfinder, will be deprived of the ability to question Dr. Dutta on material issues and to judge Dr. Dutta’s credibility.

## CONCLUSION

LREAB set forth above the legal, factual, and equitable reasons why the Court should deny the Federal Trade Commission's Emergency Motion. But LREAB also cannot ignore the imprudence and prejudice of conducting two depositions in these unprecedented times. The District of Columbia has closed all non-essential businesses through April 24. The FTC attorneys and undersigned counsel have been working remotely, and FTC orders require that all matters "will be conducted by telephone or videoconference rather than in-person."<sup>5</sup> Video deposition and cross-examination of an economic expert under current circumstances pose a host of novel legal and logistical challenges that inevitably would prejudice LREAB's ability to present its defenses most effectively; while in-person depositions would pose unnecessary risks to the witness, several counsel, videographer, and court reporter, and their respective families.

Given the ready availability of salutary alternatives, and for all these reasons, we respectfully submit the FTC's motion should be denied.

March 27, 2020

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<sup>5</sup> See FTC, CHANGES IN BUREAU PROCEDURE DURING COVID-19 CORONAVIRUS PANDEMIC (Mar. 16, 2020, 5:02pm), <https://www.ftc.gov/news-events/blogs/competition-matters/2020/03/changes-bureau-procedure-during-covid-19-coronavirus>. LREAB counsel in Washington, D.C. have been required to work remotely since March 14.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Memorandum of Louisiana Real Estate Appraisers Board in Opposition to the Defendant's Emergency Motion for Leave to Perpetuate Testimony or, in the Alternative, to Temporarily Lift Stay to Permit Deposition *De Bene Esse* was filed electronically with the Clerk of Court using the CM/ECF system. Notice of this filing will be sent to all known counsel of record via operation of the Court's electronic filing system.

Washington, DC, this 27th day of March 2020.

/s/ Seth D. Greenstein  
Counsel for Plaintiff,  
Louisiana Real Estate Appraisers Board

# EXHIBIT B

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

LOUISIANA REAL ESTATE APPRAISERS BOARD

CIVIL ACTION

VERSUS

19-214-BAJ-RLB

FEDERAL TRADE COMMISSION

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EMERGENCY MOTION FOR LEAVE TO PERPETUATE TESTIMONY  
OR, IN THE ALTERNATIVE, TO TEMPORARILY LIFT STAY  
TO PERMIT DEPOSITION *DE BENE ESSE*

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Pursuant to Fed. R. Civ. P. 7(b) and 27(b), and Local Civil Rule 7, Defendant Federal Trade Commission respectfully files this EMERGENCY MOTION for leave to perpetuate the hearing testimony of Dr. Antara Dutta or, in the alternative, to temporarily lift this Court's stay of the Commission's administrative proceeding to permit a deposition *de bene esse* of Dr. Dutta. While the FTC is prepared to address any questions, we respectfully submit that a hearing on this motion is not necessary and respectfully request that the Court rule no later than April 10, 2020. The FTC is contemporaneously filing its memorandum in support of this Emergency Motion. Plaintiff Louisiana Real Estate Appraisers Board opposes this Emergency Motion. The FTC is also filing a motion to shorten the time for the Board's response to 14 days, which the Board does not oppose.

UNITED STATES OF AMERICA, by

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Case 3:19-cv-00214-BAJ-SDJ Document 58-1 03/13/20 Page 1 of 9

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA****LOUISIANA REAL ESTATE APPRAISERS BOARD****CIVIL ACTION****VERSUS****19-214-BAJ-SDJ****FEDERAL TRADE COMMISSION**

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**MEMORANDUM IN SUPPORT OF EMERGENCY MOTION  
FOR LEAVE TO PERPETUATE TESTIMONY OR, IN THE ALTERNATIVE,  
TO TEMPORARILY LIFT STAY TO PERMIT DEPOSITION *DE BENE ESSE***

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The Federal Trade Commission respectfully submits this memorandum in support of its Emergency Motion for Leave to Perpetuate Testimony or, in the Alternative, to Temporarily Lift Stay to Permit Deposition *De Bene Esse*.

**I. BACKGROUND**

The Commission issued an administrative complaint against plaintiff Louisiana Real Estate Appraisers Board (“Board”) on May 31, 2017, alleging that the Board had violated the Federal Trade Commission Act when it promulgated and enforced a Board rule concerning fees paid by appraisal management companies to contract appraisers. In its answer, the Board asserted affirmative defenses, including two that relied on the state-action doctrine. The Commission’s counsel (known as “Complaint Counsel”) moved for summary decision on the Board’s two state-action defenses, which the Commission granted, leading to dismissal of them.

After an unsuccessful appeal to the U.S. Court of Appeals for the Fifth Circuit, the Board brought this action under the Administrative Procedure Act (“APA”) to set aside the Commission’s order, declare the Board “immune” from the antitrust laws, and direct the Commission to dismiss the complaint. ECF 1. The Board then asked this Court to stay the Commission’s administrative proceeding pending resolution of this APA action. ECF 9. This Court granted the stay motion on July 29, 2019. ECF 32. The Commission administrative

proceeding remains subject to the stay. Meanwhile, the Commission has appealed this Court's stay order to the Court of Appeals.<sup>1</sup>

Complaint Counsel retained Dr. Antara Dutta, a Commission economist, to offer expert opinions regarding the anticompetitive consequences of the Board rule at issue. In preparation for testimony in the administrative proceeding, Dr. Dutta prepared an expert report containing a complete statement of the opinions she had reached and disclosing the data and econometric work supporting her opinions. Dr. Dutta also prepared a rebuttal report addressing the opinions provided by the Board's economic expert. Depositions of both Dr. Dutta and the Board's economist were scheduled, but were not completed prior to imposition of the Court's stay.

On February 27, 2020, Dr. Dutta told Complaint Counsel that, because she had accepted an offer of employment in the private sector, she would be unavailable to participate in the administrative proceeding after her last day at the Commission, April 24, 2020. Dr. Dutta invested substantial time and resources into preparation for the proceeding, and it would be extremely difficult at this point for Complaint Counsel to replicate her efforts through another expert witness.

The Commission therefore seeks to preserve the opportunity for Complaint Counsel to rely upon Dr. Dutta's expert report and testimony by taking her deposition now to perpetuate her testimony pursuant to Fed. R. Civ. P. 27(b). Alternatively, the Commission respectfully requests a temporary and limited lifting of this Court's stay so that the parties may take Dr. Dutta's deposition *de bene esse* in the context of the administrative proceeding. Given the short time available, the Commission files this request as an emergency motion.<sup>2</sup>

Because Dr. Dutta will no longer be available after April 24, 2020, the Commission is simultaneously filing an unopposed motion to shorten to 14 days the time for the Board's response. The Commission respectfully requests that the Court rule no later than April 10, 2020.

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<sup>1</sup> Briefing in the appeal is complete. The Court of Appeals has indicated that it anticipates scheduling oral argument for the week of April 27, 2020.

<sup>2</sup> Commission counsel apprised Board counsel of the situation on February 28, 2020, and initiated discussions about perpetuating Dr. Dutta's testimony.

That timing will allow the parties sufficient time to take the requested depositions, according to the schedule set forth below. We have consulted with counsel for the Board, who have stated that the Board opposes the request to depose Dr. Dutta, whether under Rule 27 or by a temporary lifting of the stay.

## II. ARGUMENT

### A. The Court Should Permit a Deposition to Perpetuate Testimony Under Rule 27

Rule 27 codifies a court's traditional equitable power to perpetuate testimony where it may otherwise be lost. *See, e.g., Arizona v. California*, 292 U.S. 341, 347-48 (1934); *Richter v. Union Trust Co.*, 115 U.S. 55 (1885); Fed. R. Civ. P. 27, Advisory Committee Notes. The Rule sets forth three procedures for obtaining court approval to perpetuate testimony. The first involves a petition to perpetuate testimony before an action is filed. Fed. R. Civ. P. 27(a). The second involves a motion to perpetuate testimony pending appeal. Fed. R. Civ. P. 27(b). The third involves a court's inherent equitable power to entertain an action to perpetuate testimony. Fed. R. Civ. P. 27(c). The Commission files this motion under Rule 27(b) in recognition of the fact it has appealed this Court's order staying the administrative proceeding in which the perpetuated testimony would be offered.

Courts apply Rule 27 practically to respond to the needs presented, including situations closely resembling those here. In particular, it has been used to perpetuate testimony when the underlying proceeding has been stayed. *See Texaco, Inc. v. Borda*, 383 F.2d 607 (3d Cir. 1967). It is available to perpetuate testimony for later use in in the context of an administrative proceeding. *See In re Application of Checkosky*, 142 F.R.D. 4 (D.D.C. 1992). It has been used to perpetuate testimony of a witness who has left the federal government. *See Ganz U.S.A. LLC v. United States*, 2016 WL 6777364 (USCIT Nov. 15, 2016).

The Court should exercise its discretion here to perpetuate Dr. Dutta's testimony. She will not be available to testify if and when the Commission proceeding resumes. Perpetuating her testimony serves the interest of justice because it preserves Complaint Counsel's ability to rely

upon her testimony after she leaves the agency and the Commission's ability to decide whether to allow Complaint Counsel to do so. It thus maintains the status quo before the Commission while this Court's stay remains in effect. It also avoids the considerable burden of Complaint Counsel having to identify a replacement expert, who would then have to repeat much of the work already performed by Dr. Dutta. Finally, the Board would not be injured by a deposition to perpetuate Dr. Dutta's testimony.

**1. Dr. Dutta Will No Longer Be Available to Testify**

A party seeking to perpetuate a witness's testimony pending appeal must show "(A) the name, address, and expected substance of the testimony of each deponent; and (B) the reasons for perpetuating the testimony." Fed. R. Civ. P. 27(b)(2). The attached declaration of Complaint Counsel Dan Matheson satisfies those requirements. It identifies Dr. Dutta's name and address, explains that Complaint Counsel retain economists employed by the Commission to serve as experts, and describes the substance of the testimony to be perpetuated. Specifically, Dr. Dutta will provide expert economic analysis of the Board's actions, including opinions establishing market definition, market power, anticompetitive harm resulting from the Board's action, and the absence of procompetitive justifications. Testimony from expert economists is commonly presented in antitrust cases. The Board has retained an economist to present testimony at the administrative proceeding and provided an expert report disclosing the opinions he intends to offer. Dr. Dutta has prepared a rebuttal report in response.

There is ample reason to perpetuate Dr. Dutta's testimony. In her declaration, she explains that after being retained by Complaint Counsel as the expert economist in the administrative proceeding, Dr. Dutta submitted her expert report on April 2, 2018, and her rebuttal report on April 30, 2018. Thereafter, as Mr. Matheson explains in his accompanying declaration, the Board had not taken Dr. Dutta's deposition prior to this Court's stay. Meanwhile, as Dr. Dutta sets forth, her employment with the Commission ends on April 24, 2020, and she will be unable to complete her service as Complaint Counsel's expert after that time.

Dr. Dutta’s unavailability is precisely the kind that courts have found justifies a deposition to perpetuate testimony. For example, in *Borda*, 383 F.2d 207, the Third Circuit reversed a district court’s refusal to permit a deposition to perpetuate the testimony of a witness during the pendency of a stay ordered by the district court. The district court had stayed a civil antitrust proceeding pending determination of a criminal antitrust action against many of the same defendants, but refused to permit a deposition to perpetuate a witness’s testimony. *Id.* at 608. The court of appeals directed that the parties be given leave to take the deposition of an elderly witness whose possible illness or infirmity at the time the civil action re-commenced would make it impossible to take his deposition at that time. *Id.* at 610. Here, there is no question that Dr. Dutta is unavailable after April 24, 2020.

Similarly, in *Ganz*, the U.S. Court of International Trade ordered the deposition of a witness due to both his age and the fact that the witness had retired from the federal government, and was thus “not subject to the direction of his former employer to provide testimony.” *Ganz*, 2016 WL 677364, at \*3. The latter consideration applies directly here.

Further, while courts have denied requests to perpetuate testimony sought for purposes of pre-complaint discovery, *see, e.g., Ash v. Cort*, 512 F.2d 909, 913 (3d Cir. 1975), here the Commission seeks to perpetuate Dr. Dutta’s testimony not for discovery, but to “preserve testimony which could otherwise be lost,” *id.* Although the Commission is willing to make Dr. Dutta available for the Board to take a discovery deposition, if it so chooses, that willingness does not detract from the principal reason for perpetuating Dr. Dutta’s testimony—the preservation of her trial testimony.

## **2. Preserving Dr. Dutta’s Testimony is Equitable**

Under Rule 27(b), “[i]f the court finds that perpetuating the testimony may prevent a failure or delay of justice, the court may permit the deposition to be taken.” Fed. R. Civ. P. 27(b)(3). The Court should conclude here that justice requires the perpetuation of Dr. Dutta’s testimony.

When it granted the Board's stay request, the Court agreed with the Board that there would be no substantial injury to the public or other parties. ECF 32 at 10. It turns out, however, that Dr. Dutta's departure from the Commission will create an injury unforeseen by the Court and parties. The Commission invested substantial time and resources into Dr. Dutta's preparation, which was largely complete two years ago. Much, if not all, of that effort would be wasted if her testimony is not preserved. Moreover, at this point, Complaint Counsel has not been able to secure a replacement witness, and there is no guarantee that it will be able to do so. And as Mr. Matheson states in his declaration, even if a qualified Commission economist were available, the cost of preparing that economist to testify would be considerable. If Complaint Counsel had to turn to outside expertise, the costs would mount quickly – all at taxpayer expense.

Further, if Complaint Counsel cannot perpetuate Dr. Dutta's testimony, the stay will hinder Complaint Counsel's ability to decide on the best way to present its case to the Commission. Moreover, the decision about the admissibility of Dr. Dutta's testimony after her departure belongs to the Commission, if and when the administrative proceeding resumes. Disallowing the deposition would deprive the Commission of its opportunity to decide that matter. Thus, to preserve the choices that would be available to Complaint Counsel and to the Commission, *i.e.*, to preserve the status quo, this Court should permit a deposition to perpetuate Dr. Dutta's testimony.

The Board would not be prejudiced by allowing the deposition to perpetuate Dr. Dutta's testimony. First, the Board will be able to fully participate in it. Second, because the Board did not take a discovery deposition of Dr. Dutta prior to the Court's stay, the Commission is willing to make her available for such a deposition, if the Board so chooses. Third, if and when the stay is lifted and the administrative proceeding resumes, the Board will be free to argue that Complaint Counsel should not be able to rely upon Dr. Dutta's testimony, perpetuated via deposition, in lieu of live testimony.

**B. Alternatively, the Court Should Temporarily Lift the Stay for the Limited Purpose of Allowing a Deposition *De Bene Esse***

Although the Court's permitting a deposition to perpetuate Dr. Dutta's testimony is the most straight-forward way to proceed,<sup>3</sup> the Court in the alternative could lift the existing stay for the limited purpose of allowing the parties to take a deposition *de bene esse* under the auspices of the Commission's administrative proceeding. The factual basis for doing so is described above; below, we demonstrate the equitable basis for doing so.

This Court has considerable discretion whether to lift its stay for this limited purpose. *See, e.g., Landis v. North American Co.*, 299 U.S. 248, 254 (1936). The Court granted the stay largely to protect what the Board maintains is its immunity from administrative proceedings, citing the possible distraction of state officials and curtailing Louisiana's ability to make and enforce its policies. ECF 32 at 9. The limited lifting of the stay sought here implicates neither of these interests. A Commission employee, not a state employee or official, would be deposed. The participation of the Board's law firm in that deposition would in no way curtail the state's ability to make and enforce its policies. In short, there is no injury to any sovereign interest of the Board or the State of Louisiana, let alone irreparable injury, from allowing the requested deposition. By contrast, the injury to the Commission's interest is considerable, for all the reasons described above.

**III. PROPOSED SCHEDULE**

The Commission has prepared a proposed order that includes the following schedule design to allow the Board an opportunity to conduct a deposition of Dr. Dutta and to allow the parties to conduct a videotaped deposition needed to perpetuate her testimony.

Discovery Deposition:           Week of April 13, 2020, Washington, DC;

Trial Deposition:                Week of April 20, 2020, Washington, DC.

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<sup>3</sup> A Rule 27 deposition would be noticed and conducted in the context of the APA case already before this Court. It would not require any modification to the stay. The alternative path would require the Court to temporarily lift its stay so that the Commission could do the same. The parties would then conduct the deposition in the context of the administrative proceeding.

## CONCLUSION

For the foregoing reasons, the Court should grant the Commission's Emergency Motion.

Respectfully submitted,

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Washington, DC 20580

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the Emergency Motion for Leave to Perpetuate Testimony or, in the Alternative, to Temporarily Lift Stay to Permit Deposition *De Bene Esse* and Memorandum in Support thereof were filed electronically with the Clerk of Court using the CM/ECF system. Notice of these filings will be sent to all known counsel of record via operation of the Court's electronic filing system.

Baton Rouge, Louisiana, this 13th day of March 2020.

/s/ John J. Gaupp  
John J. Gaupp, LBN 14976  
Assistant United States Attorney

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

LOUISIANA REAL ESTATE APPRAISERS BOARD

CIVIL ACTION

VERSUS

19-214-BAJ-SDJ

FEDERAL TRADE COMMISSION

**Declaration of Antara Dutta**

I, Antara Dutta, declare as follows:

1. I am currently an economist at the Federal Trade Commission (“FTC”).
2. I was retained by counsel for the FTC in May 2017 to serve as an expert in *In the Matter of Louisiana Real Estate Appraisers Board*, Docket No. 9374 (F.T.C.).
3. I submitted an expert report in *Louisiana Real Estate Appraisers Board* on April 2, 2018, and a rebuttal expert report on April 30, 2018.
4. I will be leaving the employment of the FTC on April 24, 2020, and begin a new position at Amazon, Inc. (“Amazon”) on April 27, 2020.
5. I requested that Amazon allow me to continue to serve as an expert for the FTC in *Louisiana Real Estate Appraisers Board*. During my conversations regarding that request, I learned that that serving as a testifying expert for an external party would be incompatible with my new job responsibilities. Thus, I will be unavailable to serve as an expert for the FTC after April 24, 2020.
6. I informed counsel for the Federal Trade Commission on February 27, 2020 of my impending unavailability.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Date: March 12, 2020



Antara Dutta

UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA

LOUISIANA REAL ESTATE APPRAISERS BOARD

CIVIL ACTION

VERSUS

19-214-BAJ-SDJ

FEDERAL TRADE COMMISSION

**Declaration of Dan Matheson**

I, Dan Matheson, declare as follows:

1. I am currently the Deputy Chief Trial Counsel in the Bureau of Competition at the Federal Trade Commission (“FTC”).
2. I am lead Complaint Counsel for the FTC in *In the Matter of Louisiana Real Estate Appraisers Board*, Docket No. 9374 (F.T.C.).
3. In *Louisiana Real Estate Appraisers Board*, the FTC alleges that the Louisiana Real Estate Appraisers Board (“the Board”) has unreasonably restrained price competition for appraisal services in Louisiana in violation of federal antitrust law. Specifically, the FTC alleges that the Board required appraisal fees to equal or exceed the median fees identified in survey reports commissioned and published by the Board, and investigated and sanctioned companies that paid fees below the specified levels.
4. In May 2017, Complaint Counsel retained Dr. Antara Dutta to offer expert opinion testimony regarding the antitrust violation alleged by Complaint Counsel in *Louisiana Real Estate Appraisers Board*. Dr. Dutta was employed as an economist within the Bureau of Economics at the FTC at the time she was retained, and she continues to be employed by the Bureau of Economics. Her address is Bureau of Economics, Federal Trade Commission, 600 Pennsylvania Avenue NW, Washington, DC 20580.
5. Dr. Dutta informed me on February 27, 2020 that she would be unavailable to serve as an expert for the FTC in *Louisiana Real Estate Appraisers Board* after April 24, 2020, due to her departure for a new position in the private sector.
6. Complaint Counsel anticipates that Dr. Dutta’s testimony will provide expert economic analysis of the Board’s actions, including opinions establishing market definition, market power, anticompetitive harm resulting from the Board’s action, and the absence of procompetitive justifications.

7. Dr. Dutta's opinions are further described in her expert report, provided to the Board on April 2, 2018, and in her report rebutting the opinions disclosed by the Board's economic expert, which rebuttal report was provided to the Board on April 30, 2018.
8. The Commission's administrative proceeding was stayed, first by the U.S. Court of Appeals for the Fifth Circuit, then by this Court. At the time of this Court's stay, the Board had not deposed Dr. Dutta.
9. Complaint Counsel does not anticipate being able to obtain the testimony expected to be provided by Dr. Dutta from another witness. Expert disclosures were due in *Louisiana Real Estate Appraisers Board* in February 2018, and expert reports were due in April 2018. Even if Complaint Counsel were permitted to substitute another expert witness for Dr. Dutta, the FTC would incur substantial additional burden and costs to support the expert's review of the record and other relevant materials and to prepare an expert report. As noted above, Dr. Dutta has already reviewed the record, formed opinions based on her review, and prepared expert and rebuttal reports, which have been served on the Board.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Date: March 12, 2020



Dan Matheson

Case 3:19-cv-00214-BAJ-SDJ Document 58-4 03/13/20 Page 1 of 1

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF LOUISIANA**

**LOUISIANA REAL ESTATE APPRAISERS BOARD**

**CIVIL ACTION**

**VERSES**

**19-214-BAJ-SDJ**

**FEDERAL TRADE COMMISSION**

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**ORDER GRANTING EMERGENCY MOTION  
[FOR LEAVE TO PERPETUATE TESTIMONY]  
[TO TEMPORARILY LIFT STAY TO PERMIT DEPOSITION *DE BENE ESSE*]**

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Upon consideration of the Emergency Motion of Defendant Federal Trade Commission for Leave to Perpetuate Testimony or, in the Alternative, to Temporarily Lift Stay to Permit Deposition *De Bene Esse*,

IT IS ORDERED that Defendant's Emergency Motion [for Leave to Perpetuate Testimony] [to Temporarily Lift Stay to Permit Deposition] is hereby GRANTED.

IT IS FURTHER ORDERED that Plaintiff Louisiana Real Estate Appraisers Board shall have the opportunity to conduct a discovery deposition of Dr. Antara Dutta during the week of April 13, 2020, in Washington, DC.

IT IS FURTHER ORDERED that the parties shall conduct the deposition to perpetuate Dr. Antara's testimony the week of April 20, 2020, in Washington, DC.

Baton Rouge, Louisiana, this \_\_\_\_\_ day of \_\_\_\_\_, 2020

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Brian A. Jackson  
United States District Judge  
Middle District of Louisiana

# EXHIBIT C

## UNITED STATES DISTRICT COURT

## MIDDLE DISTRICT OF LOUISIANA

LOUISIANA REAL ESTATE  
APPRAISERS BOARD

CIVIL ACTION

VERSUS

NO. 19-214-BAJ-RLB

UNITED STATES FEDERAL TRADE  
COMMISSION**ORDER**

Before the Court is Defendant's Emergency Motion for Leave to Perpetuate Testimony, or, In the Alternative, to Temporarily Lift Stay to Permit Deposition *De Bene Esse*. (R. Doc. 58). The motion is opposed. (R. Doc. 61). Defendant filed a reply. (R. Doc. 68). Plaintiff filed a Surreply. (R. Docs. 69-1, 70).

**I. Background**

This matter arises from allegations that the United States Federal Trade Commission ("FTC" or "Defendant") is unlawfully attempting to force the Louisiana Real Estate Appraisers Board ("Board" or "Petitioner") to undergo federal antitrust enforcement proceedings. (R. Doc. 1). The Board brings this action under the Administrative Procedure Act, 5 U.S.C. § 701, *et seq.* ("APA"), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 ("DJA"). The Board seeks an order declaring that it has state-action immunity from the antitrust laws and further directing the FTC to dismiss the administrative complaint.

On July 29, 2019, the district judge stayed the FTC's administrative proceeding pending resolution of the instant APA action. (R. Doc. 32).<sup>1</sup> The FTC has appealed the district judge's ruling. (R. Docs. 37, 48).

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<sup>1</sup> *Louisiana Real Estate Appraisers Bd. v. United States Fed. Trade Comm'n*, No. 19-214, 2019 WL 3412162, at \*2 (M.D. La. July 29, 2019); see *In re Louisiana Real Estate Appraisers Board*, No. 9374, 2019 WL 3714449, at \*1 (F.T.C. Aug. 5, 2019).

On March 13, 2020, the FTC filed the instant motion. (R. Doc. 58). The FTC represents that its expert economist, Dr. Antara Dutta, will be leaving the FTC for private employment on April 24, 2020. The FTC further represents that Dr. Dutta has prepared an expert report and rebuttal report in the administrative proceeding, but expert depositions were not completed prior to the issuance of the stay. In an attached declaration, Dr. Dutta states that “serving as a testifying expert for an external party would be incompatible with [her] new job responsibilities” and, therefore, she is “unavailable to serve as an expert for the FTC after April 24, 2020.” (R. Doc. 58-2). The FTC argues that the Court should permit depositions to perpetuate Dr. Dutta’s testimony under Rule 27(b) of the Federal Rules of Civil Procedure while Dr. Dutta is still employed by the FTC because preserving her testimony would serve the interests of justice. In the alternative, the FTC seeks an order temporarily lifting the stay of the administrative proceeding for the limited purpose of allowing Dr. Dutta’s depositions to be taken in the context of the administrative proceeding. The FTC requests that the Court order a “discovery” deposition to take place during the week of April 13, 2020 in Washington, D.C., and a “trial” deposition to take place during the week of April 20, 2020, in Washington, D.C.

The Board opposes the relief sought. (R. Doc. 61). The Board argues that Rule 27(b) does not apply because the Court has not rendered a judgment and the FTC has not otherwise demonstrated any injustice would result from denying the motion. In particular, the Board argues that the FTC has several other on-staff antitrust economists who could present expert opinions in place of Dr. Dutta. Among other things, the Board also argues that the Court should not lift the stay for the purposes of the depositions because it lacks subject matter jurisdiction to do so and Dr. Dutta’s unavailability as an expert does not counterbalance the equitable factors supporting the stay of the administrative proceeding.

## II. Law and Analysis

### A. Rule 27(b)

Rule 27(b) provides that a court may authorize depositions to perpetuate testimony pending an appeal. In particular, the rule provides that “[t]he court where a judgment has been rendered may, if an appeal has been taken or may still be taken, permit a party to depose witnesses to perpetuate their testimony for use in the event of further proceedings in that court.” Fed. R. Civ. P. 27(b)(1). A motion to perpetuate testimony must show “the name, address, and expected substance of the testimony of each deponent” and “the reasons for perpetuating the testimony.” Fed. R. Civ. P. 27(b)(2).<sup>2</sup> The Court may permit such depositions to “prevent a failure or delay of justice.” Fed. R. Civ. P. 27(b)(3).

Having considered the record and the arguments of the parties, the Court will not authorize a deposition to perpetuate Dr. Dutta’s testimony during the FTC’s interlocutory appeal of the ruling staying the administrative proceeding. Foremost, Rule 27(b) only applies where a final judgment has been rendered. *See Shore v. Acands, Inc.*, 644 F.2d 386, 389 (5th Cir. 1981) (“It is beyond argument that the language of Rule 27(b) anticipates the filing of a motion or petition and the service of notice thereof after rendition of a judgment.”). No judgment has been entered in this action under Rule 58. Accordingly, Rule 27(b) is inapplicable.

Moreover, the FTC does not demonstrate how Dr. Dutta’s expert testimony would be used in any further proceedings in this Court. The FTC does not argue, much less demonstrate, that Dr. Dutta’s testimony as an expert economist is relevant to the claims and defenses in this APA action. *See* Fed. R. Civ. P. 26(b)(1) (defining the general scope of discovery).<sup>3</sup> While the

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<sup>2</sup> These requirements are satisfied by an attached declaration by the FTC’s counsel. (R. Doc. 58-3).

<sup>3</sup> The FTC states that “Dr. Dutta will provide expert economic analysis of the Board’s actions, including opinions establishing market definition, market power, anticompetitive harm resulting from the Board’s action, and the absence of precompetitive jurisdiction.” (R. Doc. 58-1). It does not appear that this testimony is relevant to whether the Board has state-action immunity from the antitrust laws.

Court recognizes that the administrative proceeding has been stayed in light of this APA action, the testimony sought does not appear to be destined for use in this Court and, therefore, falls outside of the scope of Rule 27(b). *See Canal Barge Co. v. Gulfstream Trading, Ltd.*, No. 97-2674, 1999 WL 1277539, at \*2 (E.D. La. Dec. 22, 1999). Indeed, the FTC’s alternative argument, which seeks an order providing a limited lift of the stay for the purposes of allowing Dr. Dutta to be deposed in the context of the administrative proceeding, underscores that the deposition is truly related to the administrative proceeding, not the APA action pending before this Court and on appeal.<sup>4</sup>

Even assuming that Rule 27(b) is applicable in this action, the Court, in exercising its discretion, concludes that perpetuating Dr. Dutta’s testimony is unnecessary to prevent a failure or delay of justice. Dr. Dutta is an expert witness, not a fact witness. While Rule 27(b) is not limited to depositions to perpetuate fact testimony, the unavailability of a particular expert witness does not raise the same issues as the unavailability of a fact witness. *See Cater-Wallace, Inc. v. Otte*, 474 F.2d 529, 536-37 (2d Cir. 1972) (“[E]ven if one particular expert is unavailable . . . there will usually be other experts available to give similar testimony.”). The FTC does not direct the Court to a single decision in which a district court issued an order to perpetuate an expert witness’s testimony under Rule 27(b). The FTC has also not convinced the Court that all of its other economists are unavailable or unqualified to serve as an expert in the administrative

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<sup>4</sup> In support of its assertion that “courts may perpetuate testimony for use in administrative proceedings,” the FTC relies primarily on *In re Application of Checkosky*, 142 F.R.D. 4 (D.D.C. 1992). (R. Doc. 58-1 at 3; R. Doc. 68 at 2-3). In that decision, the court found that it had jurisdiction to entertain relief under a Rule 27(a) petition because there was “sufficient likelihood that petitioners’ administrative action will be reviewed in the Court of Appeals,” which is a court of the United States. *Checkosky*, 142 F.R.D. at 6. Rule 27(a) provides that “[a] person who wants to perpetuate testimony about any matter cognizable in a United States court may file a verified petition in the district court for the district where any expected adverse party resides.” Fed. R. Civ. P. 27(a)(1) (emphasis added). In contrast, relief under Rule 27(b) appears to be limited to where the testimony is obtained “for further proceedings” in the court from which an appeal is taken. Fed. R. Civ. P. 27(b)(1) (pertaining to a Court where judgment has been rendered and from which an appeal has been taken, to perpetuate testimony “for use in the event of further proceedings **in that court.**”) (emphasis added).

proceeding. If it does not staff another available and qualified economist, the FTC may hire one from the private sector. While this would result in the expenditure of costs, it would not result in a failure or delay of justice.<sup>5</sup> Furthermore, any new expert would have the benefit of Dr. Dutta's analysis and would not need to duplicate all of her efforts.

Finally, the Board raises important concerns with respect to the logistics of taking Dr. Dutta's depositions prior to her departure from the FTC in light of the current COVID-19 pandemic. To be clear, Washington, D.C., Virginia, Maryland, and Louisiana are all subject to stay-at-home orders banning non-essential travel during the time period in which the FTC is seeking to schedule the depositions. *See* Washington, D.C. Mayor's Order No. 2020-054 (signed Mar. 30, 2020; effective April 1, 2020 through April 24, 2020); Virginia Governor's Executive Order No. 55 (signed Mar. 30, 2020; effective April 1, 2020 through June 10, 2020); Maryland Governor's Order No. 20-03-30-01 (signed Mar. 30, 2020; effective Mar. 30, 2020 with no end date); Louisiana Governor's Proclamation No. 33 JBE 2020 (signed April 2, 2020; effective April 2, 2020 through April 30, 2020).<sup>6</sup> The FTC asks the Court to "leave the details" of the depositions to the parties without any argument that the deposition would qualify as essential activity allowing for travel for an in-person deposition. (R. Doc. 68 at 1). It also does not appear that the Board will stipulate for the depositions to be taken by telephone, videoconference, or other means. (*See* R. Doc. 61 at 12). The FTC does not seek, and the Court finds no basis to

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<sup>5</sup> Indeed, it appears that the FTC has asked Dr. Dutta to provide expert testimony as a paid consultant after she leaves the FTC, and Dr. Dutta has turned down that offer in light of a conflict with her new employer. The FTC would have to incur costs in hiring an outside expert regardless of whether that individual is Dr. Dutta or some other economist. That the FTC is expending significant time and resources seeking an order to perpetuate the testimony of Dr. Dutta may be a testament to her particular qualifications. Nevertheless, the FTC is not without options with respect to securing a new expert witness. The FTC will have sufficient time to locate and secure a qualified replacement expert witness while the administrative proceeding is stayed.

<sup>6</sup> While the FTC suggests that the depositions would take place in Washington, D.C., it is unclear where the individuals who would participate in an in-person deposition – including Dr. Dutta, counsel, party representatives, the court reporter, and the videographer – reside for the purposes of the stay-at-home orders.

order, that any depositions be taken by telephone or other remote means under Rule 30(b)(4) of the Federal Rules of Civil Procedure.

For the foregoing reasons, the Court denies the FTC's motion for leave to perpetuate Dr. Dutta's deposition testimony under Rule 27(b)(2) of the Federal Rules of Civil Procedure.

**B. Temporary Lift of Stay**

In the alternative, the FTC seeks an order temporarily lifting the stay of the administrative proceeding for the purposes of taking *de bene esse* depositions of Dr. Dutta.

The Court need not determine whether the sought *de bene esse* depositions should be allowed under either the Federal Rules of Civil Procedure or the FTC's Rules of Practice for Adjudicative Proceedings.<sup>7</sup> That is because the Court lacks jurisdiction to lift the stay and otherwise concludes that even a temporary lift of the stay would be inappropriate for the purpose of allowing such depositions.

Foremost, a lift of the stay would be an improper exercise of this Court jurisdiction while the very issue of whether the stay is proper is on appeal. "When one aspect of a case is before the appellate court on interlocutory review, the district court is divested of jurisdiction over that aspect of the case." *Dayton Indep. Sch. Dist. v. U.S. Mineral Prod. Co.*, 906 F.2d 1059, 1063 (5th Cir. 1990) (citing *Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 820-21 (5th Cir. 1989));

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<sup>7</sup> As the FTC is seeking a lift of the stay for the purpose of taking the depositions in the context of the administrative proceedings, it appears that the FTC's Rules of Practice for Adjudicative Proceedings, 16 C.F.R. Part 3, are applicable for determining whether such depositions would ultimately be allowed in the administrative proceeding. The FTC does not reference these rules in its briefing. The Court notes that whether the concept of *de bene esse* depositions have a place within the current Federal Rules of Civil Procedure is questionable. See *Layton v. Mentor Worldwide LLC*, No. 16-161, 2016 WL 9136965, at \*1 (N.D. Fla. Oct. 19, 2016) ("When the Federal Rules of Civil Procedure were amended years ago, the concept of *de bene esse* depositions was abrogated so that the Rules now only contemplate depositions (whether to preserve trial testimony or to obtain discoverable information).") (citing *Chrysler Int'l Corp. v. Chemaly*, 280 F.3d 1358 (11th Cir. 2002)). *De bene esse* depositions are essentially depositions to be used at trial in place of live testimony as allowed by Federal Rule of Civil Procedure 32(a)(4). See *Crumb v. Stane*, No. 17-1471, 2019 WL 1508059, at \*2 (E.D. Cal. Apr. 5, 2019). Rule 32(a)(4) provides, in pertinent part, that "[a] party may use for any purpose the deposition of a witness, whether or not a party, if the court finds . . . on motion and notice, that exceptional circumstances make it desirable--in the interest of justice and with due regard to the importance of live testimony in open court--to permit the deposition to be used." Fed. R. Civ. P. 32(a)(4)(E).

*see also Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (“The filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.”).

The FTC’s interlocutory appeal of the stay of the administrative proceeding pursuant to 28 U.S.C. § 1292(a)(1) seeks relief with respect to what is essentially an injunction prohibiting further action in the administrative proceeding. *See Hamilton v. Robertson*, 854 F.2d 740, 741 (5th Cir. 1988) (“We have long recognized a clean distinction between injunctions prohibiting proceedings in other courts, which are appealable, and orders, whether or not styled “injunctions,” that control proceedings only in the court that issues the order.”). The powers of a district court over an injunction pending appeal is limited to maintaining the status quo. *Coastal Corp. v. Texas E. Corp.*, 869 F.2d 817, 820 (5th Cir. 1989).

Even assuming that the Court may properly exercise jurisdiction by temporarily lifting the stay for the limited purpose of allowing the sought depositions to maintain the status quo in the administrative proceeding, the FTC has not submitted a proper basis for lifting the stay. In granting the Board’s motion to stay the administrative proceeding, the district judge considered “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies.” *Louisiana Real Estate Appraisers Bd.*, 2019 WL 3412162, at \*2 (citing *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). Given that even a temporary lift of the stay of administrative proceeding “may cause irreparable harm by forcing the State to engage in activities from which it might otherwise be protected,” the stay should remain in place even if the Court has jurisdiction to temporarily lift it. *See Louisiana Real Estate Appraisers Bd.*, 2019

WL 3412162, at \*4. The potential harm to the FTC, which is ultimately a matter of locating a new expert witness, does not counterbalance the district judge's rational for emplacing a full stay of the administrative proceeding.

### III. Conclusion

Based on the foregoing,

**IT IS ORDERED** that Defendant's Emergency Motion for Leave to Perpetuate Testimony, or, In the Alternative, to Temporarily Lift Stay to Permit Deposition *De Bene Esse* (R. Doc. 58) is **DENIED**.

Signed in Baton Rouge, Louisiana, on April 9, 2020.



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**RICHARD L. BOURGEOIS, JR.**  
**UNITED STATES MAGISTRATE JUDGE**

# **EXHIBIT D**

**CONFIDENTIAL - REDACTED IN ENTIRETY**

**CERTIFICATE OF SERVICE**

I hereby certify that on February 25, 2021, I filed the foregoing document electronically using the FTC's E-Filing System, which will send notification of such filing to:

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

W. Stephen Cannon  
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*Counsel for Respondent Louisiana Real Estate Appraisers Board*

Dated: February 25, 2021

By: /s/ Patricia M. McDermott  
Patricia M. McDermott, 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: February 25, 2021

By: /s/ Patricia M. McDermott  
Patricia M. McDermott, Attorney