

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

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

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

**RESPONDENT LOUISIANA REAL ESTATE APPRAISERS BOARD’S
OPPOSITION IN PART TO COMPLAINT COUNSEL’S MOTION TO
LIFT THE STAY AND SET HEARING DATE**

Respondent Louisiana Real Estate Appraisers Board (“LREAB”), under Federal Trade Commission (“Commission”) Rule of Practice § 3.22, opposes in part Complaint Counsel’s December 18, 2020 Motion to Lift the Stay and Set Hearing Date (“the Motion”). At this time, LREAB does not oppose the request to lift the Commission’s August 5, 2019 stay of administrative proceedings.¹ However, LREAB opposes Complaint Counsel’s request to commence the administrative proceedings on March 15, 2021. In light of prevailing pandemic conditions and current expert guidance, commencing the proceeding then would be unsafe for all participants and prejudicial to LREAB’s ability to effectively prepare and present its case.

Given what’s at stake in this proceeding – a State agency’s ability to enforce a State law enacted under a federal mandate from the Dodd-Frank Act – LREAB is entitled to a safe, in-

¹ LREAB intends to file on an expedited basis a petition for certiorari to the Supreme Court in *Louisiana Real Estate Appraisers Bd. v. FTC*, 976 F.3d 597 (5th Cir. 2020). Should the petition be granted, LREAB will request a stay of this proceeding to avoid mootng the questions presented to the Court.

person proceeding that secures all “rights essential to a fair hearing.” 16 C.F.R. § 3.41(c). There is no practicable way for an in-person administrative hearing to safely take place in the District of Columbia by March 15. Certainly all individuals needed for this proceeding, including the Administrative Law Judge, witnesses, counsel, and staff, will not have received the COVID-19 vaccine by then. Every witness to be called by LREAB resides in Louisiana, where every parish reports recent spikes and highest risks of coronavirus cases and deaths.² Key LREAB witnesses (and several of its counsel and support staff) are in higher-risk age groups.

In requesting a March 15 start date, Complaint Counsel fails to acknowledge the realities of the pandemic. To read Complaint Counsel’s Motion one would believe the only risks posed by the pandemic are purely logistical—that third party witnesses might have changed addresses or counsel. Motion at 4. For that to be true by March 15, every counsel and every witness participating in the administrative hearing would have to participate remotely—which is patently prejudicial to LREAB and unacceptable.

LREAB cannot receive a fair hearing in a Trial by Zoom. The Commission has recognized that this case presents precedential legal issues requiring a fact-based determination. To fairly and fully present witness testimony in this case, and to cross-examine opposing witnesses, LREAB counsel must consult in real time with their client, and prepare their witnesses in person. To effectively prepare LREAB’s case, LREAB counsel and support staff need to convene in the office—which cannot safely occur within the next three months. And at this time neither Complaint Counsel nor the Commission has held, or much less offered detailed protocols or procedures for, such a proceeding.

² See COVID-19, Louisiana Department of Health, <https://ldh.la.gov/Coronavirus/> (last visited Dec. 28, 2020).

It is therefore imperative that the Commission select a start date when an administrative hearing can be conducted safely and in person. Current government guidance and medical expert advice suggests that the COVID-19 vaccines will not become generally available and widely administered until mid-summer. Accordingly, LREAB requests the Commission set a tentative commencement date no sooner than August 16, 2021. This offers at least the possibility that counsel can complete all pretrial tasks safely with a sufficient amount of time and effective client input, and that the parties might conduct a fair in-person hearing before the Administrative Law Judge.³ LREAB's proposed date will not prejudice either party, and will not harm the public interest since LREAB long ago committed not to enforce La. Admin. Code tit. 46 § 31101 ("Rule 31101") until the Part 3 administrative proceedings are resolved.

Therefore, for both "practicable" reasons and for "good cause," LREAB respectfully requests the Commission grant its alternative commencement date for the administrative hearing no sooner than August 16, 2021. 16 C.F.R. § 3.41(b).

ARGUMENT

1. A "fair hearing" in this case can only be held in person.

An in-person hearing is necessary in this case, given the nature of the legal issues involved and the practical concerns for preparing and presenting defenses to the Commission. At this juncture, with the Commission having (precipitously and wrongly, in our view) dismissed LREAB's state-action immunity defenses, LREAB's principal remaining defenses rely on determinations of fact, good faith, and credibility—particularly the defense of good-faith

³ LREAB acknowledges that any proposed date for the start of an in-person administrative proceeding is subject to potential alteration due to both everchanging projections of the virus and for the mass immunizations of the general populace. As a result, should the Commission grant LREAB's request and the need arise to change the start date due to the ongoing pandemic, LREAB will meet and confer with Complaint Counsel to propose a joint acceptable hearing date.

regulatory compliance. LREAB’s good-faith regulatory compliance defense presents the Commission with “an issue of first impression” that “requires an appreciation of the Board’s conduct in relation to both [the federal Dodd-Frank Act] and the antitrust laws, *an appreciation best derived following factual inquiry at trial.*” Order and Opinion of the Commission, at 7 (May 6, 2019) (emphasis added). Thus, “determining exactly how the good-faith regulatory compliance defense applies here requires additional factual development.” *Id.* Precedent cited by the Commission similarly recognized that the good-faith regulatory compliance defense “should be viewed as a factual inquiry.” *Id.*, citing *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 889 F.2d 224, 229 (9th Cir. 1989).

The issues in this proceeding—questioning a State’s authority to regulate its domestic commerce by delegating enforcement obligations to a State agency—are all the more important because of the source and the nature of that obligation. The Louisiana legislature only adopted the law at issue in this case because the Dodd-Frank Act⁴ *required* that LREAB enforce the federal mandate that lenders and their agents pay a “customary and reasonable” fee to residential real estate appraisers.⁵ And the nature of that obligation could hardly be more fundamental to the State’s interests, as it seeks to cure a root cause of the collapse of the residential housing market.

LREAB’s defenses depend upon LREAB’s ability to effectively present its witnesses and cross-examine adverse witnesses presented by Complaint Counsel. This further will enable the Administrative Law Judge to better assess witness credibility—which is particularly important

⁴ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 111–203, title XIV, subtitle F, 124 Stat. 1376, 2185 (2010).

⁵ *See* 15 U.S.C. § 1639e(i) (mandating the “customary and reasonable fee” requirement); 12 U.S.C. § 3353(a)(4) (requiring enforcement of that mandate by state boards that regulate lenders’ agents—a requirement applicable to Louisiana and to the majority of states).

since the Commission must rely on those assessments when reviewing the initial determination. Effective trial presentation and cross-examination in this case requires that key LREAB personnel must be present at counsel table to consult with counsel in real time, as they not only implemented the policies in question but interacted directly with the witnesses to be presented by Complaint Counsel. Further, effective witness preparation can occur only in person. That is especially vital here, where the majority of fact witnesses to be called by LREAB are private citizens and state employees who are not employed by LREAB.

2. A safe, in-person hearing cannot be held until mid-summer 2021, when all participants will have been vaccinated.

Complaint Counsel's requested hearing date would compel LREAB and the Commission to accept one of two unacceptable alternatives. The first—an in-person hearing in March—poses wholly unnecessary noxious risks to the lives and health of all participants and their families. Given the current anticipated roll-out for the two approved vaccines, all persons who need to be present in the hearing room will not have been vaccinated by March 15. According to recent contact tracing data for the District of Columbia, most exposures to COVID-19 occurred in the workplace.⁶ Therefore, the infection risk is unavoidable. And it is all the more acute in that LREAB key personnel and every fact witness in this case reside out of state, mostly in Louisiana, and would be forced to risk travel to appear at the hearing.

Until *all* participants in the administrative proceeding can be vaccinated, LREAB witnesses and counsel must, in accordance with their respective states' guidelines, continue to socially distance or quarantine, and to minimize travel to stop community spread of COVID-19. The Centers for Disease Control and Prevention advocates that states first prioritize available

⁶ Exposure Activities, Government of the District of Columbia, <https://coronavirus.dc.gov/page/exposure-activities> (last visited Dec. 28, 2020) (reporting from contact tracing that over the last month more than 30% of COVID-19 infections occurred at places of work).

vaccines to long-term care facility residents and healthcare professionals (Phase 1a); then people over 75 and essential frontline workers (Phase 1b); and finally people aged 16-64 with high-risk medical conditions, people aged 65-74, and other essential workers (Phase 1c).⁷ It is unknown when that Phase 1 will be complete, or when the vaccines will reach other persons involved in this proceeding. Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases, explained in a recent interview that, “if you vaccinate very aggressively in May, June, and July,” then “by the time you get to the end of August ... that’s when we should see an overwhelming majority.”⁸ *See also* Amy Graff, *UCSF doctor release timeline for COVID-19 vaccine: When will you get it?*, SF Gate, Dec. 2, 2020 (estimating that the entire country will be vaccinated by December 2021, but that sufficient communal immunity may be reached by mid-August to September 2021).⁹

The second alternative, a remote administrative proceeding in March 2021 cannot fulfill LREAB’s right to a fair hearing because LREAB, its counsel, and its witnesses will be prejudiced in their efforts to effectively present their evidence during the administrative hearing. As a matter of state and federal guidance, and in the exercise of common prudence, LREAB counsel cannot meet with our client or LREAB officers, or with state employees and numerous key private citizen witnesses located throughout Louisiana. The State of Louisiana currently reports more cases of COVID-19 than either Maryland or the District of Columbia, and more deaths from COVID-19 than Maryland, the District, or Virginia.¹⁰ Travel restrictions and unnecessary risks between this area and various parishes of Louisiana preclude LREAB’s

⁷ Kathleen Dooling, CDC, *Phased Allocation of COVID-19 Vaccines* (Dec. 20, 2020), https://www.cdc.gov/vaccines/a_cip/meetings/downloads/slides-2020-12/slides-12-20/02-COVID-Dooling.pdf.

⁸ Erin Banco, *Anthony Fauci Clarifies: Vaccine Will Get to Public by Spring*, *The Daily Beast* (Dec. 21, 2020), available at <https://www.thedailybeast.com/anthony-fauci-clarifies-that-covid-vaccine-will-get-to-the-public-by-spring>.

⁹ <https://www.sfgate.com/bayarea/article/COVID-vaccine-timeline-US-UCSF-Wachter-15770110.php>.

¹⁰ *See* <https://usafacts.org/visualizations/coronavirus-covid-19-spread-map> (last visited December 28, 2020).

counsel from the necessary in-person tasks of coordinating with its client and its witnesses, as neither LREAB's counsel nor LREAB will or should be required to risk spreading COVID-19 for prehearing tasks or an in-person administrative hearing. Indeed, consistent with local (and Constantine Cannon) requirements, LREAB counsel cannot even convene in the office to prepare LREAB's case.

Recognizing the limitations and the prejudicial effects of remote trials, federal courts across the country have routinely continued trial dates in lieu of ordering remote proceedings. This includes recent decisions concerning criminal matters, which implicate more pressing concerns than a rule that has been held in abeyance for more than three years. *See United States v. Babichenko*, No. 1:18-cr-00258, 2020 WL 7502456 (D. Idaho Dec. 21, 2020) (criminal proceedings continued until June 8, 2021); *see also United States v. Solakyan*, No. 18-cr-4163, 2020 WL 6799078, at *1 (S.D. Cal. Nov. 19, 2020) (continuing criminal trial until June 22, 2021 due to COVID-19 did not violate the Speedy Trial Act); *see also In re: EpiPen Marketing, Sales Practices and Antitrust Litig.*, MDL No: 2785, No. 17-md-2785-DDC-TJJ (D. Kan. Dec. 16, 2020) (continuing a civil jury trial scheduled for April 13, 2021, because the scope of intensity of COVID-19 made it "not feasible" or "prudent" for a spring trial).

3. LREAB's proposed August 16 date offers the possibility of a fair, in-person hearing while respecting the safety and health of all participants.

LREAB proposes a hearing commencement date of August 16, 2021. According to the best current predictions of leading medical experts, that date offers the potential that the Administrative Law Judge could conduct an in-person hearing when all essential persons are likely to have been vaccinated against COVID-19. This date is suitable because this case is

neither urgent nor time-sensitive.¹¹ While the Commission has approved usage of remote facilities in *merger* matters, it is our understanding the Administrative Law Judge has neither conducted a fully remote administrative hearing during the pandemic nor scheduled a remote hearing for a non-merger case.¹²

Unlike the Commission's published remote procedures for depositions,¹³ the orders permitting remote administrative proceedings contain scant details concerning any protocols or methods to ensure the parties' rights are protected to ensure a fair hearing. *See In the Matter of Axon Enterprise and Safariland LLC*, FTC Docket No. 9389, Order Regarding Remote Proceedings by Videoconference (Oct. 1, 2020) (providing no technical or procedural protocols).¹⁴ At most, the Commission has sought to limit the number of individuals in the hearing room to ten (10) persons;¹⁵ but that protocol: (1) was issued on September 1, 2020, prior to recent and anticipated spikes in the number of COVID-19 cases in the District of Columbia and nationwide, (2) does not account for restrictions of travel for the testifying witness or counsel, and (3) does not account for legitimate health concerns for those individuals who may be more gravely affected by the virus.

¹¹ Although Complaint Counsel cite Commission precedent discussing harm to the public interest, their motion identifies no facts necessitating immediate adjudication other than the mere fact this proceeding remains unresolved. Motion at 3-4. In light of LREAB's longstanding commitment to not enforce its Rule, Complaint Counsel's argument is mere conjecture.

¹² Press Release, Fed. Trade Comm'n, *Due to COVID-19 Pandemic, FTC Grants Public Access to Four Administrative Proceedings Via Telephone or Live Stream*, (July 6, 2020), <https://www.ftc.gov/news-events/press-releases/2020/07/due-covid-19-pandemic-ftc-grants-public-access-four>.

¹³ *In the Matter of Altria Group, Inc.*, FTC Docket No. 9393, Stipulation and Order Concerning Remote Deposition Practices and Protocols (Nov. 23, 2020), https://www.ftc.gov/system/files/documents/cases/d09393_jt_stipulation_and_proposed_order_concerning_remote_deposition_practices_and_protocols_public599867.pdf (joint stipulation containing 40 paragraphs of protocols and procedures pertaining to remote depositions)

¹⁴ https://www.ftc.gov/system/files/documents/cases/d09389_alj_order_regarding_remote_proceedings_by_videoconferencepublic599540.pdf.

¹⁵ *In the Matter of Axon Enterprise, Inc. and Safariland LLC*, Docket No. 9389, Supplemental Commission Order on Public Access to the Evidentiary Hearing in Light of the Public Health Emergency (Sept. 1, 2020). https://www.ftc.gov/system/files/documents/cases/d09389_supplemental_commission_order_on_public_access.pdf.

In contrast, LREAB’s proposed August 16 commencement date will allow sufficient time for individuals to be vaccinated and to travel safely, to ensure that the administrative proceedings may be conducted in person before the Administrative Law Judge. Moreover, an August 16 start date does not prejudice any party or the public interest. There can be no harm to the effective enforcement of the antitrust laws by starting trial a few months later than March. LREAB committed years ago not to enforce Rule 31101 until this matter is resolved, and there can be no conceivable residual effects from any facts alleged in Complaint Counsel’s Administrative Complaint.¹⁶ If any harm has occurred in the interim, it is that the FTC’s Complaint has impeded the ability of the State and LREAB to enforce state laws. *See Executive Order No. 17-16, Supervision of the Louisiana Real Estate Appraisers Board Regulation of Appraisal Management Companies* (July 11, 2017), noting that “federal antitrust law challenges to state board actions affecting prices ... may prevent the LREAB from faithfully executing mandates under the Dodd-Frank Act and Louisiana law.”¹⁷

Therefore, given the prejudice to LREAB of both preparing for and conducting an administrative trial remotely, there is good cause to forgo the March 15 date, and instead, to commence an in-person proceeding no sooner than August 16, 2021.

¹⁶ As LREAB has previously informed the Commission (and other courts), “[t]here can be no antitrust risk from the stay, since LREAB has halted all enforcement of Rule 31101 until this issue [on appeal] is resolved.” LREAB, Motion for Continuance of Stay at 5, <https://www.ftc.gov/system/files/documents/cases/190313respondentmotioncontofstay593930.pdf>. *See also*, Statement of Policy by the Louisiana Real Estate Appraisers Board Upon Adoption of Replacement Rule 31101, November 20, 2017 at 5-7, <http://www.lreab.gov/forms/11-20-17LREABPolicyStatement.pdf>.

¹⁷ <https://gov.louisiana.gov/assets/ExecutiveOrders/JBE-17-16.pdf> (emphasis added). *See also, Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)); *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013).

CONCLUSION

LREAB respectfully submits that no in-person administrative proceeding should take place until all participants, including the Administrative Law Judge, witnesses, counsel, and staff, are vaccinated against COVID-19. Accordingly, Respondent Louisiana Real Estate Appraisers Board respectfully moves the Commission for an order setting the date for the hearing in this matter no sooner than August 16, 2021.

Dated: December 28, 2020

Respectfully submitted,

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IT IS FURTHER ORDERED that the Administrative Law Judge shall establish a revised prehearing schedule that will permit the evidentiary hearing to commence on the date set by the Commission.

By the Commission.

April Tabor
Acting Secretary

SEAL

ISSUED:

CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2020, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

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Dated: December 28, 2020

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CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: December 28, 2020

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