

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



ORIGINAL

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

Docket No. 9374

MEMORANDUM OF RESPONDENT LOUISIANA REAL ESTATE APPRAISERS BOARD IN OPPOSITION TO COMPLAINT COUNSEL’S MOTION FOR AN ORDER THAT RESPONDENT HAS WAIVED PRIVILEGE

Respondent Louisiana Real Estate Appraisers Board (“LREAB” or “Board”), believing its conduct to be completely lawful and, indeed, to be mandated by federal and state law and regulation, endeavored to respond fully in the Commission’s investigation. But the Board never waived its right to assert attorney-client privilege over its communications with Board counsel. LREAB took reasonable steps to prevent disclosure, and did not knowingly and intentionally waive any privilege.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].¹

¹ Affidavit of Bruce Unangst (“Unangst Aff.”) ¶ 12; Affidavit of Arlene Edwards (“Edwards Aff.”) ¶ 9.

Upon discovering the inadvertent production last month, undersigned counsel promptly took “reasonable steps to rectify the error” by identifying the documents and requesting their return. 16 C.F.R. § 3.31(g). Complaint Counsel’s motion contravenes the “maximum legal protection” accorded to attorney-client privilege. *In re Piedmont Health Alliance*, FTC Dkt. No. 9314, 2004 WL 390646, at *2 (Feb. 20, 2004) (allowing clawback to preserve privilege) (quoting *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992)). The motion should be denied.

BACKGROUND AND PROCEDURAL HISTORY

LREAB is a state governmental board mandated to license and regulate real estate appraisers and the appraisal management companies that procure residential real estate appraisals as agents for lenders. The Board is supported by legislatively-prescribed license fees. Unangst Aff. ¶ 5. The Board has a limited staff and budget and no in-house legal counsel. *Id.* ¶¶ 4-5.²

{ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. }

² During the Part 2 investigative and Part 3 adjudicative proceedings, LREAB has endeavored to conserve Board resources. As a result, LREAB and its counsel have attempted to minimize expenses during stays of discovery, and to resolve the case quickly via settlement and a Motion to Dismiss. Cannon Aff. ¶ 11; *see generally* Dkt. 9374.

{ [REDACTED]

[REDACTED].}

{ [REDACTED]

[REDACTED]

[REDACTED].} At no point did Mr. Unangst indicate an intent to waive any privilege of the Board. *Id.* { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].} Edwards Aff. ¶ 10; Cannon Aff. ¶ 4.

3 [REDACTED] } See Cannon Aff. ¶ 4; Ex. 1 (Email chain between { [REDACTED] } and L. Kopchik).

When the Part 2 investigation did not end the FTC's interest in the Board's activities, the Board retained Constantine Cannon LLP in March 2017. Cannon Aff. ¶ 1. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED].}

LREAB and Board members have produced additional documents in response to discovery requests issued by Complaint Counsel in the Part 3 proceeding. As part of these productions, the Board has withheld privileged documents and submitted privilege logs to Complaint Counsel in a timely fashion. Cannon Aff. ¶ 12.

[REDACTED]

[REDACTED]

[REDACTED].} Had LREAB or Ms. Edwards or Constantine Cannon known of the inadvertent production of privileged documents, they would have brought the matter to the attention of Complaint Counsel sooner. *Id.*; Unangst Aff. ¶ 6; Edwards Aff. ¶ 11. And had LREAB or Ms. Edwards or Constantine Cannon previously known that Complaint Counsel believed attorney-client privilege to have been waived, Constantine Cannon would have brought this matter to the attention of the LREAB and, if necessary, this Court.

Upon learning of the inadvertent disclosure, LREAB notified Complaint Counsel with a list of documents initially identified as attorney-client privileged. Cannon Aff. ¶ 13. LREAB

[REDACTED]

[REDACTED]

[REDACTED].}

did not then provide a full privilege log for the documents, reasoning that prompt notification to Complaint Counsel was more urgent.⁵

APPLICABLE LEGAL STANDARDS

FTC Rules limit discovery “to preserve the privilege of a witness, person, or governmental agency,” including to preserve attorney-client privilege. 16 C.F.R. § 3.31(c)(4). FTC Rule 3.31(g) allows a party to assert privilege over inadvertently-produced documents when the producing party took “reasonable steps to prevent disclosure,” and has promptly taken “reasonable steps to rectify the error.” *Id.* In applying this rule, the court balances the following factors: “(1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery; (4) the extent of the disclosure; and (5) the overreaching issue of fairness and the protection of an appropriate privilege.” *In re Hoeschst Marion Roussel, Inc.*, FTC Dkt. 9293, 2000 WL 33944049, at *3 (Oct. 17, 2000) (internal citations omitted) (denying complaint counsel’s motion regarding waiver of attorney-client privilege). “Waiver” of attorney-client privilege requires that the party “must have had both knowledge of the existing right and the intention of forgoing it.” *Waiver*, Black’s Law Dictionary (10th ed. 2014).

ARGUMENT

LREAB’s assertion of privilege satisfies all three elements of Rule 3.31(g) and the Court’s balancing factors.

I. The Board’s Disclosure Was Inadvertent.

LREAB had no intention to produce privileged documents or to waive its right to assert attorney-client privilege. Any alleged statement by Mr. Unangst { [REDACTED] } was

⁵ If the ALJ denies Complaint Counsel’s Motion and upholds LREAB’s right to assert clawback, LREAB will produce a privilege log within three business days thereafter.

intended to convey only that he believed LREAB had acted lawfully at all times and that the truth, when known, would terminate the investigation – not that he intended to knowingly and voluntarily waive LREAB’s right to assert privilege over any produced documents. Unangst Aff. ¶¶ 13-14; Cannon Aff. ¶ 14. To the contrary, Mr. Unangst took proactive steps to prevent disclosure. Unangst Aff. ¶ 6; Cannon Aff. 14. { [REDACTED]

[REDACTED] } *Id.* The Board’s production therefore meets the ordinary definition of “inadvertent disclosure” under *see* 16 C.F.R. § 3.31(g)(A) – an “accidental revelation of confidential information” – and does not meet the standard of a knowing and intentional waiver. *Inadvertent Disclosure*, Black’s Law Dictionary (10th ed. 2014).

II. LREAB Took Reasonable Steps to Prevent Disclosure.

{ [REDACTED] }, LREAB implemented “reasonable steps to prevent disclosure” under the circumstances. 16 C.F.R. § 3.31(g)(B); Cannon Aff. ¶ 14. { [REDACTED] } was reasonable under the circumstances, particularly given that the Board is a small state agency with limited resources. *Id.* ¶ 9; Unangst Aff. ¶ 5. The Board had no inside counsel, and its outside counsel had no experience with FTC investigations { [REDACTED] } Unangst Aff. ¶ 4; Edwards Aff. ¶ 7. Undersigned counsel have maintained the Board’s privileges over documents produced in Part 3 on behalf of the Board and Board members, and timely has provided comprehensive privilege logs for those documents. Cannon Aff. ¶ 12. Believing that privileged documents had been

withheld, and given the Board’s limited financial resources to conduct a second review, the Board and its counsel did not discover until recently the prior inadvertent disclosure. *Id.* ¶ 13.

III. LREAB Promptly Has Taken Reasonable Steps to Rectify the Error.

LREAB “promptly took reasonable steps to rectify the error,” by “notifying any party that received the information or communication of the claim and the basis for it.” 16 C.F.R. § 3.31(g)(C). Had LREAB, Ms. Edwards, or undersigned counsel discovered the inadvertent disclosure sooner, they would have so informed Complaint Counsel. Cannon Aff. ¶ 8. Upon discovery of the inadvertent disclosure, undersigned counsel immediately notified Complaint Counsel of the specific documents that had been inadvertently disclosed, and the basis for asserting privilege. *Id.* ¶ 13. Counsel notified Complaint Counsel of its assertion promptly, before Complaint Counsel attempted to use or disclose the documents during depositions.⁶ *Id.* Thus, LREAB’s clawback assertion is timely, with no prejudice to Complaint Counsel.

IV. Additional Balancing Factors Favor the Board’s Retention of Its Privilege.

The balancing factors counsel this Court to affirm the privilege. As discussed above, the Board took reasonable precautions “to prevent inadvertent disclosure,” and promptly notified Complaint Counsel “to rectify the error.” *In re Hoeschst Marion Roussel, Inc.*, 2000 WL 33944049, at *2 (internal citations omitted). Comparing the relatively small disclosure with the large “scope of discovery” in this matter, Complaint Counsel cannot show any need to rely on privileged information. *Id.*

⁶ LREAB will agree to not claim privilege over the two documents used in Complaint Counsel’s Motion for Partial Summary Decision. The first, while authored in part by Ms. Edwards, is the final version of a 2013 document that was submitted as part of the legislative oversight process for active supervision as required by the Louisiana Administrative Procedure Act. FTC-LAB-00003805. The second,

}

[REDACTED] .} Unangst Aff. ¶ 14; Cannon Aff.

¶ 3. Having detrimentally relied on misrepresentations by Complaint Counsel, it would be patently unfair under these facts to find a waiver by Mr. Unangst of the Board's privileges, or to unfairly prejudice LREAB's defense by throwing its well-taken privileges into jeopardy.

CONCLUSION

LREAB's assertion of attorney-client privilege meets all requirements of asserting privilege pursuant to FTC Rule 3.3(g). This Court therefore should deny Complaint Counsel's Motion, and allow the Board three business days to submit a privilege log for the documents.

Dated: March 6, 2018

Respectfully submitted,

/s/ W. Stephen Cannon

W. Stephen Cannon
Seth D. Greenstein
Richard O. Levine
James J. Kovacs
Allison F. Sheedy
J. Wyatt Fore
Constantine Cannon LLP
1001 Pennsylvania Avenue, NW
Suite 1300 N
Washington, DC 20004
Phone: 202-204-3500
scannon@constantinecannon.com

*Counsel for Respondent, Louisiana Real
Estate Appraisers Board*

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
 Terrell McSweeney

In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

Docket No. 9374

AFFIDAVIT OF BRUCE UNANGST

I, Bruce Unangst, in support of the Opposition of Respondent Louisiana Real Estate Appraisers Board to Complaint Counsel’s Motion for Expedited Motion for an Order that Respondent has Waived Privilege (“Motion”), do hereby declare as follows:

1. The facts stated in this affidavit are based on my personal knowledge and knowledge I have obtained by my employment with the State of Louisiana.
2. I am currently the Executive Director of the Louisiana Real Estate Commission (“LREC”). By law, I also serve as Executive Director of the Louisiana Real Estate Appraisers Board, the Respondent in this action (“LREAB” or “Board”). I have served as LREAB’s Executive Director since November 15, 2010.
3. I have reviewed the Declaration submitted by Complaint Counsel in support of the Motion.
4. I am not an attorney. The Board does not have in-house legal staff. The Board retains outside legal counsel as needed for its ordinary regulatory and administrative activities. Our counsel is Ms. Arlene Edwards of the firm of Delatte & Edwards LLC here in Baton Rouge. Ms. Edwards has advised the Board on matters of administrative procedure, interpretation of law, and enforcement. The Board seeks her advice by email and in non-public sessions of Board

meetings, and asks her to prepare correspondence and reports that require legal input. Ms. Edwards also assists the Board with respect to enforcement actions by the Board, including enforcement actions with the two appraisal management companies (“AMCs”) identified in the Complaint, Coester VMS and iMortgage Services. Ms. Edwards represented the Board in the enforcement hearing involving iMortgage, and represents the Board in iMortgage’s appeal of the Board’s Order in that proceeding. I understand that communications between Ms. Edwards and LREAB can be considered privileged communications.

5. The Board is not funded by legislative appropriation. Rather, the Board is self-funded from fees received from the entities it licenses, specifically appraisers and AMCs. Those fees are prescribed by the Louisiana legislature in our Appraisers Law and the AMC Act.

6. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. }

7. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].}

8. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].}

9. { [REDACTED]

[REDACTED].}

10. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].}

11. { [REDACTED]

[REDACTED].}

12. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

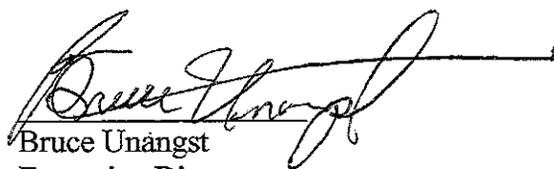
[REDACTED].}

13. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

14. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

VERIFICATION OF AFFIDAVIT OF BRUCE UNANGST

I certify under penalty of perjury that the foregoing is true and correct.



Bruce Unangst
Executive Director
Louisiana Real Estate Appraisers Board

March 5, 2018

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney

In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

Docket No. 9374

AFFIDAVIT OF ARLENE EDWARDS

1. My name is Arlene Edwards. I am an attorney licensed to practice in the State of Louisiana, and a partner in the law firm Delatte & Edwards, LLC located at 9247 Bluebonnet Blvd., Suite C, Baton Rouge, Louisiana 70810.

2. I am submitting this Affidavit in support of the Louisiana Real Estate Appraisers Board's Opposition To Complaint Counsel's Motion For Expedited Motion For An Order That Respondent Has Waived Privilege ("Motion").

3. The facts stated in this affidavit are based on my personal knowledge.

4. The Louisiana Real Estate Appraisers Board is one of my clients. I have represented the Board for more than twenty (20) years. In general, my representation of the Board includes providing legal advice to the Board on interpretations of law and regulations, administrative procedures, enforcement of the Board's rules, and the application of Louisiana statutes such as the Administrative Procedure Act, the Appraisers Law, and the AMC Act. I attend all Board meetings, and may provide advice to the Board on matters before or after a meeting or during a non-public portion of the meeting.

5. I also have assisted the Board in various enforcement matters. I was the lead attorney representing the Board at its investigational hearing into the complaint that iMortgage Services had failed to comply with the requirements of the AMC Act regarding payment of customary and reasonable fees to appraisers. I also assisted the Board in resolving the complaint regarding violation of the same requirements by Coester VMS.

6. I provide the Board with advice in a variety of ways. Some advice is given in response to emails. Other advice is given orally, and may be reflected in minutes or memoranda of the Board. On occasion, I am asked to create written work product for the Board's information or on the Board's behalf. All email correspondence I send to the Board is marked with a Notice that email may constitute privileged attorney-client communications and/or attorney work product. Documents I draft for the Board might not have that notation, but nevertheless would reflect legal advice and would be subject to attorney-client privilege. I also draft legal documents for the Board that may not be privileged, such as final versions of pleadings or documents required by law to be submitted by the Board to the Louisiana State government.

7. { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].}

8. { [REDACTED]
[REDACTED]
[REDACTED].}

9. In discussions with FTC counsel, Ms. Lisa Kopchik, { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].}

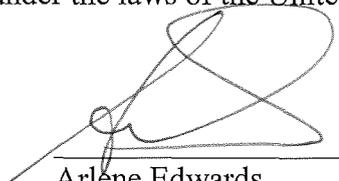
10. { [REDACTED] }
[REDACTED].}

11. { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].}

12. { [REDACTED] }
[REDACTED]
[REDACTED]
[REDACTED].}

I hereby certify under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Date: March 5, 2018



Arlene Edwards

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney

In the Matter of

Louisiana Real Estate Appraisers Board, Docket No. 9374
Respondent

AFFIDAVIT OF W. STEPHEN CANNON

I, W. Stephen Cannon, in support of the Opposition of Respondent Louisiana Real Estate Appraisers Board to Complaint Counsel’s Expedited Motion for an Order that Respondent has Waived Privilege (“Motion”), and specifically in response to Exhibit A, the Declaration of Lisa Kopchik in support of the Motion, do state upon my personal knowledge the following:

1. I am counsel in this action to Respondent Louisiana Real Estate Appraisers Board (“LREAB” or “Board”). Our firm was retained by LREAB in March 2017 to represent them in this action.

2. Prior to our retention, { [REDACTED]
[REDACTED]
[REDACTED].} The Board has no legal counsel on staff. It does retain an outside counsel, Ms. Arlene Edwards, to provide legal advice to the Board with respect to its official operations.

3. { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]
[REDACTED]
[REDACTED].}

4. { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].}

5. In a telephone call with Ms. Kopchik on or around March 31, 2017, { [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED].}

6. On April 6, 2017, { [REDACTED]
[REDACTED]}.

7. { [REDACTED]
[REDACTED]
[REDACTED].}

8. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].}

9. LREAB is a self-funded governmental regulatory board that is supported by legislatively-prescribed fees assessed upon licensees. As counsel to the Board, we have endeavored to target our efforts where possible to preserve the Board's limited resources.

10. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].}

11. Thereafter, as the Court is aware, in an effort to reduce costs to the Board, counsel have sought stays of these proceedings from both the Court and the Commission; and have attempted to resolve the case quickly by requesting a settlement conference with the Court, and by filing a dispositive motion.

12. { [REDACTED]

[REDACTED]

[REDACTED].}

13. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].}

14. { [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].}

I certify under penalty of perjury under the laws of the United States that the facts set forth in the foregoing Affidavit are true and correct to the best of my knowledge.

Dated: March 6, 2018

/s/ W. Stephen Cannon
W. Stephen Cannon

Confidential Exhibit 1

REDACTED IN ITS ENTIRETY

Notice of Electronic Service

I hereby certify that on March 09, 2018, I filed an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion That Respondent Has Waived Privilege - PUBLIC, with:

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

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

I hereby certify that on March 09, 2018, I served via E-Service an electronic copy of the foregoing Respondent's Opposition to Complaint Counsel's Motion That Respondent Has Waived Privilege - PUBLIC, upon:

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

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

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

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

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

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

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

Respondent

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

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

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

Kathleen Clair
Attorney
U.S. Federal Trade Commission
kclair@ftc.gov
Complaint

Allison F. Sheedy
Associate
Constantine Cannon LLP
asheedy@constantinecannon.com
Respondent

Justin W. Fore
Associate
Constantine Cannon LLP
wfore@constantinecannon.com
Respondent

W. Stephen Cannon
Attorney