

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

RESPONDENT'S OPPOSITION TO
CLEARCAPITAL.COM'S PETITION TO QUASH OR LIMIT
SUBPOENA AD TESTIFICANDUM

Respondent Louisiana Real Estate Appraisers Board ("LREAB" or "Board") respectfully submits this brief in opposition to the petition of Third-Party ClearCapital.com ("Clear Capital") to quash or limit Respondent's subpoena *ad testificandum*. For the reasons set forth below, Clear Capital's motion should be denied.

Introduction

To "obtain discovery" that is "reasonably expected to yield information relevant to the allegations of the complaint," 16 C.F.R. § 3.31(c)(1), Respondent issued a subpoena *ad testificandum* to several appraisal management companies ("AMCs") that retained appraisers to perform residential appraisals for covered transactions in Louisiana, including Clear Capital. Alone among these AMCs, Clear Capital asks this Court to limit discovery pertinent to the Complaint on relevance grounds with a meritless petition to quash. *See* Pet. Quash. However, Clear Capital cannot carry the "heavy burden of showing why discovery should be denied." *In re Poypore International*, 2008 WL 4947490, at *6 (Nov. 14, 2008) (denying motion to quash subpoena *ad testificandum*). The testimony is squarely relevant to issues germane to this case,

including Respondent's ability to disprove the Complaint's theory of consumer harm, and the reasonableness of Respondent's challenged conduct. The petition should be denied.

Background and Procedural History

The Commission issued an administrative complaint on May 30, 2017 after finding "reason to believe" that Respondent "has violated Section 5" of the FTC Act. The Complaint alleges that Respondent "effectively" fixed the "customary and reasonable" prices that AMCs must, by federal and state law, pay to residential appraisers for real estate appraisal services in covered transactions. *See generally* Complaint. Unsurprisingly, ongoing discovery in the present matter has included: (1) how much lenders, AMCs, and consumers pay for such residential appraisals and related services; and (2) the process by which Louisiana implemented Dodd-Frank's mandate that appraisal fees be "customary and reasonable." *See* 15 U.S.C. § 1639e(i), 12 U.S.C. § 3353(a).

Clear Capital is an AMC based in Reno, Nevada, doing business in Louisiana and subject to Louisiana law regarding the payment of customary and reasonable fees. On January 30, 2018, LREAB sent Clear Capital an email message regarding its intent to subpoena Clear Capital for a deposition, and identifying the deposition topics, including the topics now in question, for discovery in the present matter. On February 16, 2018, Respondent noticed a deposition to be held on March 27, 2018.¹ { [REDACTED]

[REDACTED] }. Clear Capital has agreed to provide a Rule 3.33(c)(1) witness for this deposition, but has moved to quash or limit the scope of the testimony to exclude: (1) information pertaining

¹ The deposition was originally noticed for March 1, 2018, but based on the availability of counsel for Clear Capital and after obtaining consent from Complaint Counsel, the deposition date was rescheduled to March 27, 2018 (after the close of fact discovery).

to the fees paid to Clear Capital by lenders, and (2) information about Clear Capital's advocacy efforts in Louisiana regarding the adoption of laws and regulations about the payment of customary and reasonable fees.

Counsel for Respondent and counsel for Clear Capital met and conferred on February 5, 2018, during which time Clear Capital indicated its objections to Topics 6 and 7 of the deposition notice on grounds of relevancy. Additionally, counsel for Clear Capital expressed concerns regarding the scope of the May 31, 2017 Protective Order and whether it covered deposition testimony. Counsel for Respondent explained the relevance of lender fee information and advocacy efforts by AMCs in Louisiana regarding customary and reasonable appraisal fee laws and regulations, including relevance for the reasons articulated below. Counsel for Respondent also stated that it was their belief and intention that the Protective Order indeed covers testimony, a position which has subsequently been confirmed by Complaint Counsel through the method and practice of applying the Protective Order at depositions.

The deposition topics Clear Capital seeks to quash are directly relevant to Complaint Counsel's allegations in this matter and are critical to Respondent's defenses. Clear Capital's opinions about the relevancy of this information miss the mark completely; nor is it the province of a non-party to determine how or which defenses Respondent can invoke in this matter.

I. LREAB Is Entitled to Discovery About Lender Fees and AMC Advocacy.

A. Relevant Standards

Parties may "obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations in the complaint, to the proposed relief, or to the defenses of respondent." 16 C.F.R. § 3.31(c)(1). Thus, parties may discover information that is "relevant" if the evidence has "any tendency to make a fact more or less probable than it would

be without the evidence,” and “material,” where “the fact is of consequence in determining the action.” *Cf.* Fed. R. Evid. 401. Administrative Law Judges have applied this standard broadly, highlighting the importance of creating “a full record upon which to appraise [the] theory” of the case. *In re Kellogg Co.*, 99 F.T.C. 8, 30 (1982). Clear Capital’s petition cannot meet this “heavy burden of showing why discovery should be denied.” *In re Polypore Int’l*, 2008 WL 4947490, at *6; *see also In re Rambus Inc.*, 2002 WL 31868184, at *3 (Nov. 18, 2002) (denying third-party’s motion to quash subpoena).

B. Evidence Regarding Lender Fees is Relevant to the Allegations of the Complaint.

The crux of the Complaint is that LREAB’s promulgation of a Board Rule concerning “customary and reasonable” appraisal fees constituted an unreasonable restraint on price competition. Complaint ¶ 1. The Complaint alleges that AMCs were subject to investigation and enforcement actions that “effectively” required AMCs to match or exceed appraisal rates listed in an independent and objective survey, funded by the Board and posted on the Board’s website as a courtesy to AMCs and appraisers. Complaint ¶ 4. Importantly, the Commission alleges that LREAB’s actions *harmed consumers* by raising the prices they paid. Complaint ¶ 44. Respondent disputes each of these contentions.

Information regarding what lenders paid AMCs is directly relevant to consumer harm. Fees for residential appraisal services paid by consumers, as shown on mortgage disclosure and closing documents, include both the fees lenders pay to AMCs for arranging appraisals, and the fees AMCs pay to the appraisers to perform the residential appraisal. Although Clear Capital contends that only “fees paid by AMCs for appraisals in Louisiana” are relevant and not “what AMCs were paid by lenders for arranging the appraisals,” such an argument ignores the Complaint’s allegation of consumer harm. Pet. Quash 3. The Complaint explicitly alleges that

“AMCs act as agents for lenders in arranging for real estate appraisals”; and under LREAB regulations, AMCs may compensate appraisers determined by “a survey of fees recently paid by lenders in the relevant geographic area.” Compl. ¶¶ 1, 3. *See* La. Admin. Code tit. 46, pt. LXVII, Chapter 311 “Compensation of Fee Appraisers,” § 31101(A)(1). The Complaint further states that “lenders increasingly [have] turned to AMCs to arrange for required appraisal services” and that “lenders engage AMCs to obtain an appraisal in most residential real estate transactions.” Compl. ¶ 18. Thus whether and to what extent consumers pay higher fees due to lenders’ fees is clearly within the scope of any “harm[]” that “consumers” have suffered. Compl. ¶ 44.

Lender fees to AMCs are also relevant to test the Complaint’s market definition. The Complaint states that “the relevant market . . . consists of real estate appraisal services sold to AMCs in Louisiana.” Compl. ¶ 49. Further, the Complaint states that the Board effectively fixed prices via a third-party survey, and therefore that the “customary and reasonable” definition is based on “fees recently *paid by lenders* in the relevant geographic area.” Compl. ¶ 3 (emphasis added). Thus, the total charge to lenders, *including the AMC fee that some lenders paid*, is relevant to test the market definition’s sufficiency.

As a result, this discovery is relevant and should be allowed.

C. Evidence Regarding AMCs’ Advocacy Against LREAB’s Promulgation of Rules to Enforce the Mandate to Pay Customary and Reasonable Fees is Relevant.

Evidence of AMC advocacy in Louisiana regarding the “adoption of laws and regulations in Louisiana regarding payment of customary and reasonable fees” is also relevant. Subpoena Dep. Topic 7. The provisions that AMCs supported or opposed, and the reasoning behind that support or opposition, is relevant to show the restraint’s effect on competition. For example, many AMCs adamantly supported State regulation of the “customary and reasonable” fee

requirements of Dodd-Frank, and further supported the Board's clarification of these requirements (at least initially). Clear Capital argues that none of this information goes to Respondent's "state action defense" and "good faith compliance" in this litigation. This misses the point. The testimony sought by Topic 7 of the deposition subpoena is relevant to the fundamental rule of reason liability analysis this tribunal must perform: Was Respondent's challenged conduct an unreasonable restraint of trade?

AMCs advocated *in favor* of the AMC Act and Rule 31101, but *against* enforcement powers by the Board. Discovery concerning these efforts is relevant to show how market participants (*i.e.*, AMCs) perceived the alleged restraint's effect on competition, as well as to the AMCs' biases that affect the credibility of their testimony.

As a result, this discovery should be allowed.

II. Clear Capital's Crabbed Reading of the Protective Order Should be Summarily Rejected.

Clear Capital seeks to delay or limit the deposition by contending that the Protective Order protects the transcript of its deposition testimony, but not the testimony itself. *See* Clear Capital Motion at 6-7. Undersigned counsel have informed Clear Capital that we and Complaint Counsel concur that the Protective Order and past Commission practice safeguard confidentiality over testimony and not just the physical transcript document. To the extent the Court deems it necessary, we request that the Court so inform Clear Capital as well.

Conclusion

Clear Capital has filed a meritless petition to quash to conceal clearly relevant information regarding lenders' fees and Clear Capital's political advocacy in Louisiana. Clear Capital has not met the "heavy burden" required to foreclose relevant discovery. LREAB

respectfully requests that this Court deny its petition to quash or limit the subpoena *ad testificandum*.

Dated: March 2, 2018

/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

Notice of Electronic Service

I hereby certify that on March 06, 2018, I filed an electronic copy of the foregoing Respondent's Opposition to Clear Capital's Motion to Quash - 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 06, 2018, I served via E-Service an electronic copy of the foregoing Respondent's Opposition to Clear Capital's Motion to Quash - 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