

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

**JOINT EXPEDITED MOTION TO EXTEND THE STAY OF PART 3
ADMINISTRATIVE PROCEEDINGS, MOVE THE EVIDENTIARY HEARING DATE,
AND ADOPT THE ATTACHED SCHEDULE OF PRETRIAL PROCEEDINGS**

Pursuant to Rule 3.41 of the Commission Rules of Practice, Complaint Counsel and Respondent Louisiana Real Estate Appraisers Board (the “Board”) respectfully move the Commission to issue the following orders: (1) extend the stay of these Part 3 Administrative Proceedings through November 26, 2017, (2) move the starting date for the evidentiary hearing to May 30, 2018, and (3) adopt the attached schedule of pretrial proceedings.

Expedited consideration of this motion is necessary because a 90-day stay issued by Judge Chappell will expire on October 26, 2017. The Board anticipates that efforts by the Board and the State of Louisiana to execute certain actions (as explained below) that will be considered in an evidentiary hearing will be complete within approximately 30 days thereafter. The parties request that the Commission extend the stay through November 26, 2017. Additionally, to allow the parties the same amount of pretrial discovery and preparation as under the original schedule,

the parties request that the Commission move the starting date for the evidentiary hearing to May 30, 2018, and adopt the attached schedule of pretrial proceedings.

BACKGROUND

On May 30, 2017, the Commission issued a Complaint against the Board alleging that the Board had violated Section 5 of the FTC Act by unreasonably restraining price competition in real estate appraisal services provided to appraisal management companies in Louisiana. In its June 16, 2017 Answer to the Complaint, the Board denied any violation of Section 5 and raised several affirmative defenses, including a defense of state action immunity. On July 11, 2017, the Governor of the State of Louisiana issued an Executive Order requiring the Board and state agencies to take certain actions intended to address state active supervision over the Board in connection with regulating the customary and reasonable fee requirement. On July 17, 2017, the Board issued a resolution to implement this Executive Order and to address past and pending investigations under the appraisal fee regulation at issue. Arguing that these actions change the factual and legal basis for the proceeding, on July 18, 2017, the Board sought a 120-day stay of the proceedings to provide the State of Louisiana time to implement the Governor's and the Board's directives. Complaint Counsel opposed this motion, arguing that these developments would not yield an effective supervision regime and did not eliminate the need for Commission intervention. On July 28, 2017, the Court granted a 90-day stay of the proceedings based on "recent developments in the state law challenged in the Complaint that fundamentally change the factual and legal basis of this proceeding" that may "help narrow the claims, defenses, and discovery to those limited issues, and avoid wasteful effort and expense." Complaint Counsel

disagree, and submit that these efforts do not and will not exempt all of the Board's past or future actions from the antitrust laws. The 90-day stay will expire on October 26, 2017.

The Board is currently in the process of replacing and re-adopting a customary and reasonable fee rule (hereinafter "Replacement Rule"). Pursuant to the Governor's Executive Order, the Board has submitted the Replacement Rule to the Louisiana Commissioner of Administration for approval, modification, or rejection. The Louisiana Senate and House Commerce Committee oversight committees may also elect to hold hearings regarding the proposed regulation. The Board anticipates this review will be completed in time for the Replacement Rule to be published in the November 20, 2017 Louisiana Register.¹ Upon publication, the Replacement Rule will be in effect.²

ARGUMENT

The Board's Answer in this proceeding raised affirmative defenses including that its regulatory activities are immune from federal antitrust oversight under the state action doctrine. The Board submits that additional efforts by the State of Louisiana and the Board raise significant new factual and legal issues regarding whether future Board conduct, implementation and enforcement of the Replacement Rule, is immunized by the state action doctrine. Complaint Counsel disagree, and submit that these efforts do not and will not change the factual and legal issues relevant to this case or the appropriate remedy. The parties nevertheless agree that the state action immunity defense may present significant issues for discovery and hearing in this case.

¹ Under APA rules, publication of the Louisiana Register occurs on the 20th day of each month.

² However, if the Commissioner of Administration or the Legislature reject or modify the rule, additional delay in promulgating a new rule means that the rule will not go into effect on November 20, 2017, but rather that the Board will have to re-start the process of promulgating a revised rule.

Good cause exists for the Commission to move the hearing date from January 30, 2018 to May 30, 2018. Moving the hearing date ahead by 120 days and adopting the attached schedule of pretrial proceedings to account for the 90-day stay of these proceedings granted by the Court, as well as the 30-day stay requested here by the parties, will provide sufficient time for both Complaint Counsel and Respondent to complete discovery and prepare a full record for the Final Hearing.

For these reasons, good cause exists for a short extension of the stay through November 26, 2017. Because the Board expects that changes to the challenged state regulatory regime will be completed within a relatively short period, and given the Court's expressed interest in extending the stay so that discovery will not close prior to this regime being completed, Complaint Counsel is agreeable to a brief stay until November 27, 2017.

CONCLUSION

For good cause shown and the reasons stated above, Complaint Counsel and Respondent respectfully request that the Commission (1) extend the stay through November 26, 2017, (2) move the administrative hearing date to May 30, 2017, and (3) adopt the attached schedule of pretrial proceedings.

Dated: October 16, 2017

Respectfully submitted,

/s/ W. Stephen Cannon
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Counsel Supporting the Complaint

**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

**[PROPOSED] ORDER ON JOINT EXPEDITED MOTION TO EXTEND THE STAY OF
PART 3 ADMINISTRATIVE PROCEEDINGS AND MOVE THE EVIDENTIARY
HEARING DATE**

On October 16, 2017, the parties filed a joint expedited motion extend the stay and move the evidentiary hearing. The joint motion is GRANTED:

- 1) The stay is extended through November 26, 2017;
- 2) Commencement of the evidentiary hearing in this matter is moved from January 30, 2018 to May 30, 2018; and
- 3) The attached schedule of pretrial proceedings is hereby adopted.

By the Commission.

Donald S. Clark
Secretary

ISSUED:

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

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**[PROPOSED]
REVISED SCHEDULING ORDER**

- December 1, 2017 - Respondent's Counsel provides preliminary witness list (not including experts) with a brief summary of the proposed testimony.
- January 19, 2017 - Deadline for issuing document requests, interrogatories and subpoenas *duces tecum*, except for discovery for purposes of authenticity and admissibility of exhibits.
- February 9, 2018 - Complaint Counsel provides expert witness list.
- February 23, 2018 - Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits.
- February 26, 2018 - Respondent's Counsel provides expert witness list.
- March 9, 2018 - Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits.
- March 26, 2018 - Deadline for Complaint Counsel to provide expert witness reports (to be provided by 4 p.m. EDT).
- April 9, 2018 - Deadline for Respondent's Counsel to provide expert witness reports (to be provided by 4 p.m. EDT). Respondent's expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s).

- April 13, 2018 - Complaint Counsel provides to Respondent's Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.
- Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
- April 23, 2018 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s) (to be provided by 4 p.m. EDT). Any such reports are to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondent).
- April 27, 2018 - Respondent's Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondent's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.
- Respondent's Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.
- April 27, 2018 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must

provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).¹ *See* Additional Provision 7.

- May 10, 2018 - Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits.
- May 10, 2018 - Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. The Parties are directed to review the Commission's Rules on admissibility of evidence before filing objections to exhibits.
- May 11, 2018 - Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 9.
- May 16, 2018 - Deadline for filing motions for *in camera* treatment of proposed trial exhibits.
- May 16, 2018 - Complaint Counsel files pretrial brief supported by legal authority.
- May 16, 2018 - Deadline for filing responses to motions *in limine* to preclude admissions of evidence.
- May 17, 2018 - Exchange proposed stipulations of law, facts, and authenticity.
- May 18, 2018 - Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits.
- May 23, 2018 - Respondent's Counsel files pretrial brief supported by legal authority.
- May 24, 2018 - Final prehearing conference to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

¹ Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days' notice of the proposed use of such material. To resolve this apparent conflict, the Scheduling Order requires that the parties provide 10 days' notice to the opposing party or third parties to allow for the filing of motions for *in camera* treatment.

The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits. To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the conference. At the conference, the parties' list of stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed by the parties.

Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a list identifying each exhibit to which admissibility is agreed, marked as "JX2" and signed by each party, which list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required.

May 30, 2018 - Commencement of Hearing, to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date:

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2017, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

Donald S. Clark
Secretary
Federal Trade Commission
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Washington, DC 20580
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:

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Counsel for Respondent Louisiana Real Estate Appraisers Board.

Dated: October 16, 2017

By: /s/ Lisa B. Kopchik

Lisa B. Kopchik, Attorney