PUBLIC

ORIGINAL

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 THE MOTION OF ADAMS AND REESE AND ROBERT L. RIEGER 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 Parties Adams and Reese LLP ("Adams and Reese") and Robert L. Rieger ("Rieger") to quash, or in the alternative to limit, LREAB's subpoena *ad testificandum*.

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), [redacted] One such subpoena was issued and served upon REVAA's long-time outside lobbyist, Robert Rieger, who had actively represented REVAA from 2011 to November 2017 with respect to legislation and regulations pertinent to the issues in this case.[1] Mr. Rieger also represented before the Board the

[1] The deposition was originally noticed for March 2, 2018, which Respondent agreed to push back in light of this motion and counsel for Mr. Rieger's unavailability. After obtaining consent from Complaint Counsel, Respondent has proposed any date during the week of March 19 for Mr. Rieger's deposition (after the close of fact discovery).

two specific AMCs named in the Complaint in this action, Coester VMS and iMortgage Services. LREAB counsel has informed Adams and Reese that the Board does not seek discovery of any privileged matters or communications, and that its discovery concerns the many non-privileged interactions between Mr. Rieger and the Board, Louisiana government officials, and other persons Mr. Rieger does not represent.

Mr. Rieger and his law firm, Adams and Reese, nevertheless ask this Court to quash the LREAB subpoena *in toto*, contending that Mr. Rieger's membership in the Louisiana bar effectively insulates him from responding to civil discovery. Adams and Reese and Mr. Rieger, however, cannot carry the "heavy burden of showing why discovery should be denied." *In re Poylpore International*, 2008 WL 4947490, at *6 (Nov. 14, 2008) (denying motion to quash subpoena *ad testificandum*).

The testimony the Board seeks is not privileged under any theory that the Commission has adopted and is squarely relevant to issues germane to this case, including the reasonableness of the purported restraint – here, LREAB's adoption and enforcement of a "customary and reasonable fee" rule in accordance with the Louisiana Legislature's mandate to do so. The motion 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, a board of the State of Louisiana, "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 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).

Adams and Reese and Mr. Rieger were retained as a lobbyist in Louisiana for REVAA with respect to the implementation of Dodd-Frank by LREAB and the Louisiana Legislature. Specifically, on REVAA's behalf Mr. Rieger advocated *in favor* of the AMC Act, and made extensive public comments and gave testimony concerning the Board's customary and reasonable fee rule, Rule 31101. As this court held, these advocacy efforts "may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of" the Board by indicating 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. Order Denying Clear Capital's Mot. Quash 2-3. Mr. Rieger is the *sole* source of testimony regarding certain non-privileged interactions between REVAA and the Louisiana Legislature, and REVAA and the Board. Moreover, Mr. Rieger presented the Board with the proposals to resolve both the Coester and iMortgage enforcement actions, so his interactions with LREAB are crucial to the Complaint's allegation that the Board's enforcement actions "effectively" constituted price fixing.

LREAB made clear to Adams and Reese that it does not seek testimony from Mr. Rieger regarding privileged communications with or on behalf of his clients.

I. LREAB Is Entitled to Non-Privileged Discovery About REVAA Advocacy.

Adams and Reese and Mr. Rieger assert a blanket and absolute privilege, purportedly barring <u>any</u> testimony by a Louisiana attorney, based on the Louisiana Code of Evidence 508 ("LCE 508"). LCE 508 does not immunize a fact witness in a federal enforcement action from providing relevant non-privileged information. And, not surprisingly, the FTC Rules do not

recognize this unbridled expanse of the concept of "privilege." As a result, the Court should deny their motion so the Board may fairly defend itself in this matter.

A. Relevant Standards

In an FTC action, 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). Discovery may be limited to preserve privilege "as governed by the Constitution, any applicable act of Congress, or the principles of the common law as they may be interpreted by the Commission in light of reason and experience." 16 C.F.R. § 3.31(c)(2). The present motion asserts a privilege they claim only originates out of Louisiana statute, is contrary to the notions of broad factual discovery authorized under federal law, and is exempted by none of the categories enumerated by the FTC rule. This expansive, contrary and counter-intuitive notion of privilege must be denied.

B. Louisiana's State Privileges Do Not Control Here.

The motion incorrectly argues for application of the Federal Rules of Evidence to the present dispute. *See* Mot. Quash 4 ("the subpoena to Mr. Rieger implicates the attorney-client privilege as embodied in Federal Rule of Evidence 501"). Here, the FTC Rules are the relevant binding authority. *In re American Med. Ass'n*, 94 F.T.C. 701, 965, at 1979 WL 199033, at *203 (1979) (initial decision) (noting that proceeding is governed by the FTC's Rules rather than the Federal Rules of Evidence). The FTC Rules of Practice allow for more liberal discovery than the Federal Rules of Evidence. *See In re Phoebe Putney Health System*, 2013 WL 2444708, at *5 (May 28, 2013) (even if respondent-hospitals could assert a state privilege over 'sensitive' information, nonetheless "a validly issued federal subpoena would preempt" the state statute's

protections). Mr. Rieger cites no authority where the Commission has granted a privilege analogous to LCE 508.

Even under the authority of the Federal Rules of Evidence, there is no basis to quash the subpoena. Federal Courts have incorporated LCE 508 into FRE 501, but only when "***state law supplies the rule of decision***." Fed. R. Evid. 501 (emphasis added). Here, a district court would not apply Louisiana law because subject-matter jurisdiction would occur via federal question (the FTC Act). *See* Administrative Complaint ("the Commission having reason to believe that [the LREAB] has violated Section 5 of the [FTC] Act"). Thus state law would not supply the rule of decision here. *See Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) (federal court sitting in diversity jurisdiction applies state substantive law to resolve claims under state law). Indeed, the motion cites only diversity cases for the proposition that federal courts occasionally incorporate LCE 508. *See* Mot. Quash 4 (citing *Util Constructors, Inc. v. Perez*, 2016 U.S. Dist. LEXIS 111206 (E.D. La. 2016) (incorporating LCE 508 under FRE 501 in diversity action); *Plotkin v. North River Ins. Co.*, 2012 U.S. Dist. LEXIS 81054 (E.D. La. 2012) (same); *Keybank Nat'l Ass'n v. Perkins Rowe Assocs., LLC*, 2010 U.S. Dist. LEXIS 28708 (W.D. La. 2010) (same).

Accordingly, this Court should reject Mr. Rieger's assertion of an LCE 508 privilege.

C. Mr. Rieger has relevant, discoverable information.

The Board does not seek testimony from Mr. Rieger that is protected by the attorney-client or work product privileges.[2] Rather, the Board seeks factual information pertaining to REVAA's advocacy efforts in Louisiana and Mr. Rieger's interactions with the Board

[2] *See* Restatement (Third) of Law Governing Lawyers § 68 ("the attorney-client privilege may be invoked [] with respect to: (1) a communication; (2) between privileged persons; (3) in confidence; [and] (4) for the purpose of obtaining or providing legal assistance for the client"); *id.* § 87 ("work product consists of tangible material or its intangible equivalent in unwritten or oral form, other than underlying facts prepared by a lawyer for litigation then in progress or in reasonable anticipation of future litigation").

concerning the resolutions of the Coester and iMortgage investigations. The Board recognizes that deposing an attorney is disfavored. But this is an exceptional case. [redacted] If Mr. Rieger believes any deposition question improperly interferes with those recognized privileges, he may raise an objection at that time during the deposition. To the extent that Mr. Rieger or Adams and Reese believe that deposition testimony would cause them "annoyance, embarrassment, [or] oppression," 16 C.F.R. § 3.31(d), this Court already allows third parties to designate "privileged, competitively sensitive information, or sensitive

[3] [redacted]

[4] [redacted]

personal information" as subject to the protective order. *See* Protective Order, May 31, 2017. There is no chilling effect "on advocacy before the Board" here; the Constitution wisely does not bar disclosure of political advocacy. *Cf. Citizens United v. Federal Election Com'n*, 558 U.S. 310, 367 (2010) (public has interest in learning who is speaking in order to make "informed choices") (citing *McConnell v. Federal Election Com'n*, 540 U.S. 93, 197 (2003)).

II. Mr. Rieger Is Not Entitled to Impose His Hourly Rate on Respondent.

As an alternative to quashing his deposition in this matter, Mr. Rieger and his counsel pray for an order compelling Respondent to pay Mr. Rieger's "hourly rate" as an attorney (or lobbyist) for the deposition time "so that the Firm's clients are not burdened with this expense." Mot. Quash at 5. This is a novel position, but one that finds no support in the FTC Rules of Practice, the Federal Rules, case law or elsewhere. Indeed, Mr. Rieger and his law firm cite no authority to support their endeavor. *Id.* The imposition on a lawyer/lobbyist is no greater than on any other fact witness called upon to provide testimony in a matter such as this.

Under Commission rules, "witnesses whose deposition are taken and the persons taking the same shall be severally be entitled to the same fees as are paid for like services in the courts of the United States." 15 USC § 49. Mr. Rieger is sought as a fact witness, not an expert witness. Accordingly, as in all courts of the United States, he is entitled to "an attendance fee of $40 per day," a "mileage allowance" (calculated per GSA rule), "toll charges," "taxicab fares," and "parking fees." 28 U.S.C. § 1821(b)-(c). As Respondent is prepared to accommodate Mr. Rieger's deposition in the place of his choosing, travel and overnight fees are not an issue.

Accordingly, the motion should be denied.

Conclusion

Mr. Rieger and Adams and Reese have filed a meritless petition to quash a legitimate subpoena seeking the discovery of relevant, non-privileged information. Movants have 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 14, 2018

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Confidential Exhibit A

REDACTED IN ITS ENTIRETY

Confidential Exhibit B

REDACTED IN ITS ENTIRETY

Notice of Electronic Service

I hereby certify that on March 16, 2018, I filed an electronic copy of the foregoing Opposition to Motion of Adams and Reese and Robert L. Riger to Quash or Limit Subpoena Ad Testificandum, with:

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I hereby certify that on March 16, 2018, I served via E-Service an electronic copy of the foregoing Opposition to Motion of Adams and Reese and Robert L. Riger to Quash or Limit Subpoena Ad Testificandum, upon:

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