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	:	FTC FILE No. 161 0068 Docket No. 9374

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

Pursuant to 16 C.F.R. § 3.34 and Rule 3.34(c) of the Rules of Practice for Adjudicative Proceedings before the United States Federal Trade Commission (FTC), ClearCapital.com, Inc. (Clear Capital), a non-party to this proceeding, hereby files the following Petition to Quash or Limit Respondent Louisiana Real Estate Appraisers Board (the "Board" or "Respondent")'s Subpoena Ad Testificandum (the "Deposition Subpoena").

I. Introduction

On May 31, 2017, the FTC filed an Administrative Complaint (the "Complaint" or "Compl.") against the Board. The Complaint alleges that the Board unreasonably restrained price competition for appraisal services in Louisiana, contrary to Federal antitrust law, by adopting and through its implementation of a regulation requiring the charging of appraisal fees that were equal to or exceeded median fees identified by the Board. Compl. ¶¶ 1-7. The Complaint alleges that because of the Board's unlawful restraint of price competition, appraisal management companies ("AMCs") paid more for appraisal services in Louisiana, that is, "above competitive levels." Compl. ¶ 44.

On July 17, 2017, Clear Capital received a Subpoena Duces Tecum from the Board.

Although Clear Capital objected to the scope of the Board's Subpoena Duces Tecum, it participated in a dialogue with the Board's counsel, and produced documents accordingly.

On January 30, 2018, Board counsel communicated by email an intent to depose a Clear Capital representative. Clear Capital's counsel objected to the scope of the deposition, and communicated objections to Board counsel. A meet and confer took place on Monday, February 5, 2018. Clear Capital indicated its objections, through counsel, that Deposition Topics 6 and 7 were outside the scope of permissible discovery in this case because they were not relevant to either the Complaint or the Board's defenses. At that time, Clear Capital counsel also described Clear Capital's concerns regarding the scope of the protective order entered in this matter on May 31, 2017 (the "Protective Order"). Board counsel refused to limit the scope of the Deposition Subpoena as suggested by Clear Capital, and did not offer any counter-proposal. In addition, despite acknowledging Clear Capital's concerns regarding the Protective Order and agreeing to confer both internally and with Complaint counsel regarding the Protective Order's scope, no proposal regarding the Protective Order was offered. The instant Deposition Subpoena then issued on February 16, 2018.

Accordingly, Clear Capital respectfully submits this petition to quash or limit the Deposition Subpoena.

II. Argument

Under the FTC Rules of Practice, a deposition must be "reasonably expected to yield information within the scope of discovery under § 3.31(c)(1). . ." 16 C.F.R. §3.33(a). The scope of discovery is limited to "information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent." 16 C.F.R. § 3.31(c)(1). The ALJ accordingly has the discretion and the power to modify a subpoena and limit the scope of the

discovery sought. 16 C.F.R. § 3.31(d) ("The Administrative Law Judge may also deny discovery or make any other order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding.").

Here, as outlined below, the information sought by the Board is not relevant to the claims or defenses at issue. In addition, the information calls for confidential and proprietary information, and the protective order in place is not sufficient to protect Clear Capital's interests. Accordingly, Clear Capital therefore respectfully requests that the Deposition Subpoena be quashed, or alternatively, limited in several respects.

A. Topic 6: Fees Paid to Clear Capital By Lenders Are Not Relevant to the Complaint or Any Defense

Deposition Topic 6 requests testimony regarding the following: "Fees paid to you by lenders for appraisals of covered transactions in Louisiana."

These fees are not relevant to the Complaint or to any Board defense. The Complaint alleges that the Board has suppressed competition among appraisers and has displaced market forces. Compl. ¶ 29. The Complaint is centered on the Board's activities in "effectively requiring AMCs to match or exceed appraisal rates listed in a published survey." *Id.* ¶ 4. Moreover, the Complaint defines the "relevant market for purposes of analyzing the Board's conduct" as "real estate appraisal services sold to AMCs in Louisiana." Compl. ¶ 49.

The relevant inquiry, therefore, involves the fees paid by AMCs for appraisals in Louisiana; not what AMCs were paid by lenders for arranging the appraisals. The Deposition Subpoena should therefore be limited to eliminate Topic 6.

B. Topic 7: Advocacy Efforts By Clear Capital in Louisiana Are Not Relevant to the Complaint or Any Defense.

Deposition Topic 7 requests testimony regarding the following: "Advocacy efforts by you or any association regarding the adoption of laws and regulations in Louisiana regarding payment of customary and reasonable fees."

First, this deposition topic is overly broad because it calls for testimony regarding advocacy efforts by "any association." "Association" is not a defined term in the Deposition Subpoena. Clear Capital therefore objects to this deposition topic as vague and confusing.

More fundamentally, though, Clear Capital's advocacy efforts in Louisiana are not relevant to the Complaint or to any defense in this matter. The Complaint is centered on the Board's actions in restraining competition by not allowing the market to determine appraisal fees. Compl. ¶ 3. Clear Capital's position regarding payment of customary and reasonable fees in Louisiana prior to the Board's adoption of Rule 31101 (or Louisiana's AMC Law) has no bearing on whether the Board's Rule 31101 restrained competition.

Board counsel has represented that Clear Capital's advocacy efforts are relevant to its defenses of state action immunity and good faith compliance. However, the question with respect to the state action defense is "whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws." *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1111 (2015) (brackets in original) (quoting *Patrick* v. *Burget*, 486 U. S. 94, 100 (1988)). A two-part test is employed, and anticompetitive conduct constitutes protected state action where the following factors apply: "first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *Id.* at 1112 (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631, 112 S. Ct. 2169, 2175 (1992)).

Thus, advocacy efforts by AMCs, of which Clear Capital is one, with respect to the interpretation of customary and reasonable fees are not a factor in determining whether the Board's anticompetitive conduct can be deemed state action. The Board makes only four arguments in its Opposition to Complaint Counsel's Motion for Partial Summary Decision with respect to the Board's affirmative defense of state action: 1) mootness; 2) the Board was actively supervised by Louisiana; 3) the Board was not controlled by active market participants; and 4) there are disputed issues of material fact. The Board makes no mention of AMC advocacy efforts in its opposition.

In fact, the Board actively asserts that advocacy efforts by AMCs, made specifically to the Board itself prior to its promulgation of what it calls "Prior Rule 31101" are "irrelevant and immaterial" to its state action defense. Board Opposition at 19. In its response to Complaint Counsel's Statement of Material Facts, the Board admits that "five entities, four AMCs and a coalition of AMCs, that are required to pay customary and reasonable fees as mandated by federal and state law" submitted written comments to the Board on proposed Rule 31101, but it actively asserts that those comments are "**irrelevant and immaterial to the State of Louisiana's active supervision over promulgation and enforcement of the Prior Rule 31101.**" Board Opposition at 19 (Response to Statement of Material Fact no. 46) (emphasis added). The Board further admits that the contents of the written comments (noting that Dodd Frank allowed any method to determine compliance, but that the Louisiana rule would require AMCs to use one of two methods to calculate appraisal fees) are "irrelevant and immaterial to the State of Louisiana's active supervision and enforcement" of Rule 31101, and that "the approval of Prior Rule 31101 reflects the judgment of the legislative oversight committees and the governor that the Rule was consistent with federal law, as required by the AMC Act." Board

Opposition at 21. Indeed, the Board repeats several times that the written comments submitted to it by AMCs are not relevant or material to Louisiana's active supervision over promulgation and enforcement of Prior Rule 31101. *See* Opposition at 19-27. Thus, by the Board's own admission, Clear Capital's advocacy efforts with respect to the adoption of laws and regulations in Louisiana regarding the payment of customary and reasonable fees are therefore irrelevant to the Board's state action defense.

In addition, Clear Capital's advocacy efforts with respect to payment of customary and reasonable fees have nothing to do with whether the Board "has acted in good faith to comply with a federal regulatory mandates." Answer at 12 (Affirmative Defense 4). Whether the Board acted in good faith is a reflection of the Board's motive at the time it promulgated Rule 31101. This is dependent upon what the Board's intentions were, and the information the Board had at that time. What is relevant to its defense is the *Board's* understanding of what the *federal regulations* required regarding payment of customary and reasonable fees – not what AMCs advocated for in Louisiana. Clear Capital's advocacy efforts are therefore irrelevant to the Complaint and the Board's defenses, and the Deposition Subpoena should be limited to exclude Deposition Topic 7.

C. The Protective Order Does Not Sufficiently Protect Clear Capital's Interests in Its Confidential and Competitively Sensitive Information.

The Protective Order, which was entered into this matter on May 31, 2017, does not protect Clear Capital's interests in competitively sensitive information. The Protective Order protects "confidential material," which is defined as "any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information." Protective Order, Attachment A ¶ 1. The Protective Order further defines "document" as "any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the

possession of a party or a third party." *Id.* Significantly, the definition of "document" does *not* include the deposition testimony itself. Thus, while the deposition transcript resulting from the deposition may be designated confidential, and is therefore "attorney eyes only" (Protective Order ¶ 7), the testimony itself is *not* so protected. This is especially important where, as here, Clear Capital's competitively sensitive information is at risk of exposure in an action that Clear Capital is not even a party to. Clear Capital therefore requests that the Deposition Subpoena be quashed so that its competitively sensitive information is appropriately protected. Alternatively, Clear Capital requests that the proposed deposition be delayed until a protective order that sufficiently protects its interests is entered.

III. Conclusion

The Board's Deposition Subpoena calls for irrelevant information from Clear Capital, which is not even a party to this action. Moreover, the Protective Order in place does not sufficiently protect Clear Capital's proprietary and competitively sensitive information. Clear Capital therefore respectfully requests the Board Subpoena be quashed, or in the alternative, limited as described above. In the alternative, Clear Capital requests that the proposed deposition be delayed until a protective order that is sufficient to protect its interests is entered.[1]

[1] According to the docket, the Board has filed a motion to stay these proceedings, including discovery in this case, pending the Commission's decision on the Board's Motion to Dismiss the Complaint and Complaint Counsel's Motion for Partial Summary Decision. Clear Capital therefore requests alternatively that the Board's Deposition of a Clear Capital representative be postponed until after a ruling on the Motion to Stay has been entered.

Dated: February 26, 2018

/s/ David M. Souders

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CERTIFICATE OF CONFERENCE

I hereby certify that I, counsel for petitioner Clear Capital, conferred with counsel for the Board on Monday, February 5, 2018, in a good-faith effort to resolve the issues raised in this petition, and have been unable to reach agreement on the issues set forth herein.

/s/ Joseph M. Katz
Joseph M. Katz

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

In the Matter of	:	
	:	FTC FILE No. 161 0068
Louisiana Real Estate Appraisers Board,	:	Docket No. 9374
Respondent	:	
	:	
	:	

[PROPOSED] ORDER GRANTING CLEARCAPITAL.COM, INC.'S PETITION TO QUASH OR LIMIT RESPONDENT'S SUBPOENA AD TESTIFICANDUM

Upon consideration of Clearcapital.com, Inc.'s Petition to Quash or Limit Respondent's Subpoena Ad Testificandum, it is hereby

ORDERED, that the subpoena *ad testifiandum* is QUASHED.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Notice of Electronic Service

I hereby certify that on February 26, 2018, I filed an electronic copy of the foregoing CLEAR CAPITAL'S PETITION TO QUASH OR LIMIT RESPONDENT'S SUBPOENA AD TESTIFICANDUM, with:

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I hereby certify that on February 26, 2018, I served via E-Service an electronic copy of the foregoing CLEAR CAPITAL'S PETITION TO QUASH OR LIMIT RESPONDENT'S SUBPOENA AD TESTIFICANDUM, upon:

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I hereby certify that on February 26, 2018, I served via other means, as provided in 4.4(b) of the foregoing CLEAR CAPITAL'S PETITION TO QUASH OR LIMIT RESPONDENT'S SUBPOENA AD TESTIFICANDUM, upon:

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