

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



\_\_\_\_\_) )  
In the Matter of ) )  
 ) )  
Louisiana Real Estate Appraisers Board, ) )  
 ) )  
Respondent. ) )  
\_\_\_\_\_)

DOCKET NO. 9374

**ORDER DENYING MOTION FOR AN ORDER DECLARING  
THAT RESPONDENT HAS WAIVED PRIVILEGE**

**I.**

On February 28, 2018, Federal Trade Commission (“FTC” or “Commission”) Complaint Counsel filed an Expedited Motion for an Order that Respondent Has Waived Privilege (“Motion”). Pursuant to the March 1, 2018 Order requiring an expedited response, Respondent Louisiana Real Estate Appraisers Board (“Respondent” or “the Board”) filed an opposition on March 6, 2018 (“Opposition”). On March 6, 2018, Complaint Counsel filed an Unopposed Motion for Leave to Reply, together with its proposed reply (“Reply”). The motion for leave to file the Reply is GRANTED.

For the reasons set forth below, the Motion is DENIED.

**II.**

In summary, Complaint Counsel states that Respondent’s production of documents to Commission staff in May 2016, in response to a Civil Investigative Demand (“CID”) issued during the Part II investigation of this matter, included 425 documents that Respondent has only recently asserted are protected by the attorney-client privilege. Respondent asserts that the documents constitute privileged communications with Board counsel, that it took reasonable steps to prevent disclosure, and that it did not knowingly and intentionally waive any privilege, including the attorney-client privilege. Respondent has asked Complaint Counsel to return the 425 documents. Complaint Counsel seeks an order declaring that Respondent has waived its privilege to the 425 documents.

<sup>1</sup> Although the parties designated much of the information in their pleadings as “confidential material,” none of the information contained in this Order constitutes “confidential material” as defined by the Protective Order issued in this case on May 31, 2017 and FTC Rule 3.31A.

The following is a chronology of relevant events, as demonstrated by the Motion, Opposition, and Reply, and declarations submitted in support.

Mr. Bruce Unangst is the Executive Director of the Louisiana Real Estate Commission and serves as Executive Director of the Louisiana Real Estate Appraisers Board. Mr. Unangst is 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. The Board's outside counsel is Ms. Arlene Edwards.

In April 2016, Commission staff served a CID on the Board as part of its precomplaint investigation.

When the Board received the CID, Mr. Unangst instructed his administrative assistants to gather relevant documents and directed them not to include any documents that reflected communications with, or advice received, from Ms. Edwards. Mr. Unangst did not retain Ms. Edwards to assist in responding to the CID.

In May 2016, the Commission received a thumb drive of documents from the Board in response to the CID. The production did not include a privilege log or indication that any documents had been withheld based on privilege.

In August 2016, Ms. Lisa Kopchik, an attorney for Complaint Counsel, asked Mr. Unangst if the Board was represented by counsel for the investigation and was told that the Board was not.

In September 2016, FTC staff conducted investigational hearings ("IHs") of two Board members. Ms. Edwards represented the two Board members at the IHs.

After the IHs of the two Board members, Mr. Unangst informed Ms. Kopchik that the Board was represented by Ms. Edwards.

In November 2016, FTC staff conducted an IH of Mr. Unangst, during which 2 of the 425 documents that are at issue in this Motion were used as exhibits (FTC-LAB-00003805 and FTC-LAB-00025864). Each of these two documents shows that Ms. Edwards was either an author or recipient of the document. Ms. Edwards was not present at the IH of Mr. Unangst.

In April 2017, attorneys from the law firm Constantine Cannon LLP advised FTC staff that the firm had been retained by the Board in connection with the investigation.

In April 2017, Ms. Kopchik produced to Constantine Cannon an electronic database of the documents that the Board had produced in response to the CID and copies of all of the documents marked for identification at the IHs. Ms. Kopchick informed Constantine

Cannon that they could purchase transcripts of the IHs from the court reporting firm that produced those transcripts.

Constantine Cannon purchased copies of the transcripts of the IHs and received copies of the exhibits to the IHs on April 4, 2017.

On May 30, 2017, the Commission issued a Part III Administrative Complaint against the Board.

In November 2017, Complaint Counsel used FTC-LAB-00003805 as an exhibit in support of its motion for partial summary decision, filed with the Commission.

In February 2018, while preparing for depositions, attorneys with the Constantine Cannon law firm discovered for the first time that the Board's precomplaint production included documents that appeared to be privileged communications with outside counsel. At this time, Constantine Cannon performed a more thorough search of the documents produced by the Board in response to the CID to determine the existence of additional potentially privileged documents.

On February 23, 2018, an attorney from Constantine Cannon sent an email to Complaint Counsel requesting that Complaint Counsel return to Constantine Cannon 425 of the documents from the precomplaint production and destroy all copies that Complaint Counsel may have in its possession, on the grounds that the documents were privileged and had been inadvertently produced in response to FTC staff's CID.

On February 26, 2018, Complaint Counsel and Respondent's counsel conducted a "meet and confer" by telephone, in a good faith effort to resolve by agreement the issues raised by this Motion and were unable to reach an agreement.

### III.

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the attorney-client privilege is to facilitate full and frank disclosure between attorneys and clients. *Id.* Because of the sacrosanct nature of the attorney-client privilege, the privilege is "worthy of maximum legal protection." *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992).

The Commission's Rules establish a three part test for determining in what circumstances production of privileged documents constitutes a waiver. Rule 3.31(g)(1)(i) states that the disclosure of privileged or protected information or communications during a Commission precomplaint investigation *shall not operate as a waiver* if:

- (A) The disclosure is inadvertent;
- (B) The holder of the privilege or protection took reasonable steps to prevent disclosure;

and

(C) The holder promptly took reasonable steps to rectify the error, including notifying any party that received the information or communication of the claim and the basis for it.

16 C.F.R. § 3.31(g)(1)(i) (emphasis added).

**A. Whether the disclosure was inadvertent and the holder took reasonable steps to prevent disclosure**

“‘Inadvertent’ has been defined as ‘not focusing the mind on a matter . . . ; unintentional,’ and as ‘[a]n accidental oversight; a result of carelessness.’” *JAWHBS, LLC v. Arevalo*, 224 F. Supp. 3d 1296, 1300 (S.D. Fla. 2016). In *In re Brand Name Prescription Drugs Antitrust Litigation*, 1995 U.S. Dist. LEXIS 17110, at \*7 (N.D. Ill. 1995), the court observed that to be “inadvertent,” a disclosure must be accidental, and not merely the result of a conscious but erroneous judgment.

Respondent states that the Board is supported by legislatively-prescribed license fees and has a limited staff and budget and no in-house counsel. Respondent further states that, given the Board’s budgetary constraints, Mr. Unangst did not retain Ms. Edwards or other counsel to assist the Board in responding to the CID and that while the Board intended to make a complete production, it did not intend to produce privileged documents.

Complaint Counsel asserts that Mr. Unangst said, with reference to the documents he produced during the investigation, that he wanted to be “as transparent as possible,” and for the FTC staff to see “everything.” Mr. Unangst explains that any statements he made with respect to “transparency” meant only that he thought he and the Board had not done anything wrong and he intended to respond fully to the Commission’s questions.

Mr. Unangst states that when the Board received the CID, he directed his administrative assistants and information technology assistant to gather relevant documents and not to include any documents that reflected communications with or advice received from Ms. Edwards, and that he believed his instructions were followed. Complaint Counsel argues that when the Board produced the disputed documents, it elected not to withhold any materials on the basis of privilege and did not produce a privilege log, and that this failure constitutes a failure to take reasonable steps to prevent disclosure of privileged material.

It is not necessary to resolve what Mr. Unangst meant by any statements he made with respect to transparency to determine that Mr. Unangst, who is not an attorney, was trying to be cooperative during the precomplaint investigation and did not intend to disclose documents protected by attorney-client privilege. Therefore, the disclosure was inadvertent.

It is appropriate to view the disclosure in context, in order to determine whether the steps the Board took to prevent disclosure were reasonable. The disclosure was made by a non-lawyer, contrary to his instruction to staff not to include communications involving

Ms. Edwards, and was made before any complaint had been filed. In this context, the holder of the privilege took reasonable steps to prevent disclosure.

### **B. Whether the holder promptly took reasonable steps to rectify the error**

Complaint Counsel argues that Respondent's steps to rectify the error of inadvertently disclosing privileged documents were not prompt because of the time period that passed between the time of the disclosure and the steps taken to rectify the error. Complaint Counsel notes that the Board was represented by Ms. Edwards since at least September 19, 2016 and that Complaint Counsel used two of the disputed documents in November 2016 at the IH of Mr. Unangst. However, Ms. Edwards was not involved in the April 2016 document production and did not attend Mr. Unangst's IH.

Respondent states that it retained Constantine Cannon in March 2017 and that in April 2017, Constantine Cannon received a disk with the 6,500 documents that the Board had produced in response to the CID. The parties' accounts as to what, if anything, Complaint Counsel told Constantine Cannon about whether the Board had waived privilege for its document production during the precomplaint investigation contradict each other and need not be resolved in order to decide the Motion.

Complaint Counsel states that in November 2017, Complaint Counsel cited one of the disputed documents (beginning with Bates number FTC-LAB-00003805) as an exhibit in support of its motion for partial summary decision and that this put Respondent on notice of the need to assert privilege claims. According to Respondent, this document, authored in part by Ms. Edwards, is the final version of a 2013 report that was submitted as part of the legislative oversight process. Thus, it is not immediately apparent that this document is a privileged document or that it put counsel on notice that the Board had produced privileged documents.<sup>2</sup>

Respondent states that Constantine Cannon did not discover that the precomplaint production included documents that were subject to the attorney-client privilege until Respondent began preparing for depositions last month. Upon making this discovery, Constantine Cannon performed a more thorough search for potentially privileged documents and promptly thereafter sent an email to Complaint Counsel with a list of potentially privileged documents and a clawback request.

Although the documents were produced to the FTC nearly two years ago, the issue is whether Respondent acted promptly to retrieve the documents after discovering the inadvertent disclosure. *See, e.g., In re Southeast Banking Corp. Secs. & Loan Loss Reserves Litig.*, 212 B.R. 386, 393 (S.D. Fla. 1996) (finding prompt action to rectify where, "after it learned of the inadvertent disclosure, [the producing party] immediately and persistently took steps to recover the documents"); *Absolute Activist Value Master Fund Ltd. v. Devine*, 262 F. Supp. 3d 1312,

---

<sup>2</sup> Respondent states that it will not claim privilege for "the two documents used in Complaint Counsel's Motion for Partial Summary Decision." Complaint Counsel states it used one document, FTC-LAB-00003805, in its Motion for Partial Summary Decision and used two documents, FTC-LAB-00003805 and FTC-LAB-00025864, in its IH of Mr. Unangst. Regardless, Respondent will be held to this statement and may not claim privilege for either of these documents.

1326 (M.D. Fla. 2017) (“While Defendant likely could have taken additional steps to discover the inadvertent disclosure sooner, the Court is unwilling to find that the steps she took to rectify the inadvertent disclosure — once discovered — were unreasonable. Once Defendant’s counsel discovered the inadvertent disclosure, they acted quickly, diligently, and [thus] took reasonable steps to rectify the error.”).

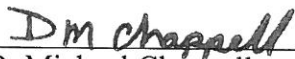
In this case, Constantine Cannon sent an email to Complaint Counsel requesting the return of the potentially privileged documents shortly after they discovered the inadvertent production of privileged documents. Therefore, Respondent promptly took reasonable steps to rectify the error.

IV.

For the above stated reasons, to the extent that the 425 documents are protected by the attorney-client privilege, the inadvertent disclosure during the precomplaint investigation does not operate as a waiver of the privilege. Accordingly, the Motion is DENIED.

It is further ORDERED that Respondent shall provide Complaint Counsel with a privilege log, in compliance with provisions of Rule 3.38A, within three business days. To the extent that, after good faith negotiations, a dispute remains between the parties as to the applicability of privilege, Complaint Counsel may seek a determination by the Administrative Law Judge. Until such time as the privilege claims are resolved, Complaint Counsel shall sequester any disputed documents and shall not use or disclose the information. 16 C.F.R. § 3.31(g)(1)(ii).

ORDERED:

  
\_\_\_\_\_  
D. Michael Chappell  
Chief Administrative Law Judge

Date: March 9, 2018