

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



**ORIGINAL**

Docket No. 9374

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In the Matter of

Louisiana Real Estate Appraisers Board,  
Respondent

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**RESPONDENT LREAB’S MOTION TO STAY PART 3 ADMINISTRATIVE  
PROCEEDINGS AND MEMORANDUM IN SUPPORT THEREOF**

Pursuant to Rule 3.22 of the Commission Rules of Practice, Respondent Louisiana Real Estate Appraisers Board (“LREAB” or the “Board”), through undersigned counsel, respectfully requests a temporary stay of these proceedings in light of two recent State actions that fundamentally change the legal and factual issues pertinent to this proceeding.

The Governor of Louisiana issued Executive Order 17-16, entitled *Supervision of the Louisiana Real Estate Appraisers Board Regulation of Appraisal Management Companies*, on July 11, 2017. (Exhibit A). This Executive Order requires LREAB and state agencies to undertake and complete, within ninety (90) days, actions that reinforce State active supervision over LREAB rulemaking and enforcement pertaining to the “customary and reasonable” (“C&R”) fee requirements of the Dodd-Frank Act and Louisiana law. On July 17, 2017, LREAB issued a Resolution to implement the Executive Order and to address past and pending investigations and allegations of violations of the prior C&R rule. (Exhibit B)

These State acts substantially change the factual and legal basis of this proceeding, by confirming state action immunity with respect to any current and prospective actions of the

Board, and addressing the retroactive and prospective relief sought in the Complaint. Respondent therefore requests a 120-day stay to give the State time to implement the Governor's and Board's directives, and allow the parties time to consider the impact of these new requirements on this proceeding. The stay will conserve resources, avoid unnecessary burdens on the parties and third parties, and promote the public interest in enforcement of Louisiana law. LREAB sees no prejudice to either party from the requested stay, and good cause to grant the request.

On July 11, 2017, Respondent sent a copy of the Executive Order to Complaint Counsel. The parties conferred on July 12 concerning the effect of the Executive Order. LREAB submitted that the stay would allow the State and Board to take actions that would address all relief sought in the Complaint. Even if, at the end of the stay, some element of the requested relief remains unresolved, a stay will help narrow the claims, defenses, and discovery to those limited issues, and avoid wasteful effort and expense. Two days later, Complaint Counsel indicated their intent to oppose this stay request, calling it "premature" to assess whether the Executive Order and Resolution resolve all allegations in the Complaint. Board counsel invited a further meet and confer following issuance of the July 17 Resolution. Complaint Counsel reiterated its position and declined. (Correspondence attached as Exhibit C)

For the reasons stated below, LREAB requests that the stay be granted.

1. On May 31, 2017, the FTC alleged in an administrative complaint that LREAB's promulgation and implementation of Rule 31101 (requiring payment of C&R fees for residential appraisals) "restrained price competition for real estate appraisal services provided to appraisal management companies ('AMCs') in Louisiana." Complaint at ¶ 1. The Complaint asserts the LREAB's rulemaking and enforcement authority has "not been supervised by independent state officials." *Id.* at ¶ 53. The Complaint seeks to require the LREAB to "rescind and to cease and

desist from enforcing Rule 31101, any order based on an alleged violation of Rule 31101, and any agreement with an AMC or other person involving an alleged violation of Rule 31101.” *Id.* at 10.

2. The Dodd-Frank Act requires lenders and their agents (the AMCs) to pay customary and reasonable fees for residential mortgage appraisals.<sup>1</sup> Dodd-Frank further mandates each state agency that regulates appraisers to also register AMCs, and supervise registered AMCs to meet minimum requirements—including that AMCs pay C&R fees for residential appraisals.<sup>2</sup> In response, the Louisiana Legislature amended<sup>3</sup> its laws to require AMCs to “compensate appraisers at a rate that is customary and reasonable for appraisals being performed in the market area of the property being appraised, consistent with the requirements under federal law.”<sup>4</sup> The Louisiana Legislature empowered LREAB—a state Board whose members are appointed by the Governor of Louisiana—to promulgate a C&R rule. On November 20, 2013, after substantial input from the spectrum of stakeholders, LREAB promulgated Rule 31101, through which LREAB regulates and enforces the federal and state C&R fee requirements.

3. Non-sovereign state board actions that constitute an “official action directed by the state” are immune from federal antitrust laws. *Parker v. Brown*, a 317 U.S. 341, 351 (1943). *Parker* immunity requires a clear and affirmative state policy to displace competition, and active supervision by the State. *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S.

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<sup>1</sup> 15 U.S.C. § 1639e(i)(1).

<sup>2</sup> 12 U.S.C. § 3353(a), (b).

<sup>3</sup> See Act 429 of the 2012 Regular Session of the Louisiana Legislature.

<sup>4</sup> La. R.S. 37:3415.15(A). As amended in 2016, the act now states, “an appraisal management company shall compensate appraisers at a rate that is customary and reasonable for appraisals being performed in the market area of the property being appraised, consistent with the requirements of 15 U.S.C. 1639(e) and the final federal rules as provided for in the applicable provisions of 12 CFR Parts 34, 225, 226, 323, 1026, and 1222.”

97, 105-06 (1980). “Active supervision” requires that the state supervisor reviews the substance of any board decision, has the power to “veto or modify particular decisions,” and the supervisor “may not itself be an active market participant.” *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1116-17 (2015).

4. LREAB asserts its official actions directed by the Louisiana Legislature establish the affirmative defense of state action immunity under *Parker*. Answer to the Complaint, Affirmative Defense 9 at 12 (June 19, 2017). Complaint Counsel appears to concur state active supervision provides a complete defense to the allegations of the Complaint:

JUDGE CHAPPELL: So you're telling me that if respondent was actively supervised by the State of Louisiana, we wouldn't be here?

MR. PUGH: That's correct.

Transcript of Initial Scheduling Conference, July 6, 2017, at 17:7-10. The Complaint anticipatorily disputed LREAB's ability to assert state action immunity from federal antitrust law. Complaint ¶ 7.

5. On July 11, 2017, Governor John Bel Edwards signed Executive Order 17-16, which reinforces the State's active supervision over LREAB's regulatory and enforcement activities by directing:

- a. Prior to finalization of any settlement or filing of an administrative complaint by LREAB against an AMC regarding compliance with a customary and reasonable (“C&R”) rule under La. R.S. 37:3415.15(A), the proposed LREAB action shall be submitted for review to the Division of Administrative Law for approval,

rejection, or modification.<sup>5</sup> The purpose of the review is to ensure that such proposed action serves Louisiana’s policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such appraisals are customary and reasonable. (Exhibit A, Section 1)

- b. Within 90 days of entry of the Executive Order, the LREAB must enter into a contract with the Division of Administrative Law establishing procedures for this review. *Id.*
- c. The LREAB must submit to the Commissioner of Administration or the Commissioner’s designee for approval, rejection, or modification any proposed regulation relating to AMC compliance with the customary and reasonable fee requirement. (Exhibit A, Section 2) Procedures under Louisiana law to promulgate such a regulation require publication of a replacement rule in the Louisiana Register, public notice, and opportunity for public comment, which LREAB estimates will require a minimum of 90-120 days.

These requirements strengthen the Board’s affirmative defense of state action immunity by expanding current state supervision over LREAB’s regulation and enforcement of C&R residential appraisal fees. The Executive Order further articulates State policy to displace competition, and reinforces “political accountability” for Board regulation and enforcement of C&R pricing. *See N.C. Dental*, 135 S. Ct. at 1116-17.

6. On July 17, 2017, LREAB adopted and publicly issued a Resolution to implement Executive Order Sections 1 and 2 governing prospective promulgation and enforcement of a

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<sup>5</sup> The Division of Administrative Law is a centralized state administrative hearings panel that provides adjudication by Administrative Law Judges of disputes between state agencies and the citizens they regulate. *See* La. R.S. 49:991 *et seq.*

C&R rule. (Exhibit B ¶¶ 1-2). Promulgating the regulation will require publication of a replacement rule in the Louisiana Register, public notice, and opportunity for public comment, which LREAB estimates will require 90-120 days.

7. Further, the Resolution instructs the Executive Director to:
  - a. Close all pending investigations upon the Board's finding that the fees charged were customary and reasonable, and to initiate further investigations only after a replacement for current Rule 31101 is adopted (Exhibit B ¶ 3); and,
  - b. Seek settlement or other resolution of all decrees, settlements, and compliance plans under current Rule 31101 that have not expired by their terms (Exhibit B ¶ 4).

The Resolution thus addresses current and retroactive enforcement of Rule 31101, in addition to prospective rulemaking and enforcement.

8. Under the Rules of Practice, the Commission will stay Part 3 administrative proceedings upon a showing of "good cause." Order Granting Respondent Unopposed Motion for Temporary Stay, *In the Matter of Phoebe Putney Health Sys., Inc. et al.*, Dkt. No. 9348, Oct. 30, 2014 (granting stay to determine if Georgia's Certificate of Need laws would effectively preclude the Commission's preferred remedy); *see also* Order Granting Respondent's Unopposed Motion to Stay Discovery, *In the Matter of South Carolina State Board of Dentistry*, Dkt. No. 9311, Oct. 23, 2003 (granting stay of discovery pending resolution of defendant's motion to dismiss under the state action doctrine).

9. These State actions provide good cause for the Commission to issue a 120-day stay in this Part 3 administrative proceeding, for the following reasons. First, issuance of the

Executive Order alone fundamentally alters the factual and legal underpinnings of this proceeding. State and LREAB rulemaking and enforcement under the Executive Order and Resolution will further reshape the landscape. The requested stay will allow the State to make these changes, then give Complaint Counsel and the Commission sufficient opportunity to consider their position under these new circumstances, and to confer with Respondent counsel regarding appropriate next steps. LREAB submits that, by addressing past enforcement and reinforcing active supervision of future actions, the Executive Order and Resolution will moot the Complaint. *See Afshar v. Dep't of State*, 702 F.2d 1125, 1128 (D.C. Cir. 1983) (finding plaintiff's sought relief was moot due to the issuance of a new executive order). If at the end of the stay the parties are unable to agree, the changed posture of the case could warrant dispositive motions; or, at minimum, will require procedural motions to significantly narrow the scope of the case and, concomitantly, to narrow party and third party discovery.

Second, the LREAB July 17 Resolution addresses the remaining elements of the Contemplated Relief in the Complaint. Resolution Paragraph 3 closes any current investigations upon a finding that C&R fees were paid, and ensures no further investigations will occur under the current Rule 31101. (Exhibit B ¶ 3) Paragraph 4 directs the Executive Director to seek to resolve any past unexpired decrees, settlements, and compliance plans under Rule 31101. (Exhibit B ¶ 4) Any contention that a stay is “premature” pending complete execution of these orders misses the key justifications for the stay: it allows the State time to execute, unimpeded by litigation, the actions that will resolve the relief sought in the Complaint; and avoids wasting party and third party resources in the interim.

Third, Part 3 administrative proceedings may be stayed to “prevent an avoidable and certain waste of resources” where the stay “will not prejudice either side.” Order Certifying

Unopposed Motion for Stay, *In Matter of Phoebe Putney Health Sys., Inc. et al.*, Dkt. No. 9348 at 3, July 7, 2011 (granting a stay under Commission Rule 3.22(a)). In this case, the Respondent, Complaint Counsel, and various third-parties will soon be expending significant resources to engage in costly discovery from the parties and third parties, retain experts, and prepare for trial. Complaint Counsel identified on their Preliminary Witness List for trial more than 60 individuals, including nine (9) current Board employees, 21 current and former Board members, and 32 third parties, plus additional categories of persons, who will be subject to discovery by one or both parties. These efforts will be wasted if focused on the facts and governmental structures in place at the time of the filing of the Complaint, rather than those in place as a result of the Executive Order. As noted above, the Executive Order requires certain actions to be taken within ninety (90) days. A 120-day stay in this matter should enable the LREAB and the State government to complete all required actions, and thus properly re-focus the claims, defenses, and relief requested before resuming this proceeding. No party will be prejudiced by the requested short delay, since there is no risk of any additional antitrust violation under the Executive Order and Resolution. The stay therefore will avoid unnecessary expenditure of time, money, and resources by all parties, as well as inconvenience to third parties.

Finally, a stay will promote the public interests set out in the Executive Order by allowing Louisiana to continue to maintain the integrity of its residential appraisal market, as envisioned by the Dodd-Frank Act. Key LREAB and State personnel are necessary both to implementation of the Executive Order and the State's defense of this proceeding.<sup>6</sup> Absent a

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<sup>6</sup> This includes, in addition to the impositions on the Board itself and the State, response to more than 20 subpoenas *duces tecum* served by Complaint Counsel on individual members of the LREAB between 2011 and the present, seeking documents concerning their individual professional activities as well as official activities.



stay, official State functions would be impeded or delayed to the detriment of the public interest in a sound residential real estate appraisal market.

10. Granting the requested stay would be consistent with Commission orders in past matters. Recently, after the West Virginia Legislature amended its law to vest the West Virginia Health Care Authority with power to approve cooperative agreements, including the agreement between two merging hospitals, thus immunizing the parties' merger from federal antitrust scrutiny, the FTC paused the Part 3 litigation against the merger and ultimately, withdrew its complaint. *See* Order Returning Matter to Adjudication and Dismissing Complaint, *In the Matter of Cabell Huntington Hospital/St. Mary's Med. Ctr.*, Dkt No. 9366, July 6, 2016; *see also* Deborah Feinstein, Dir. Bur. of Competition, Fed Trade Comm'n, Am. Bar Assoc. Antitrust in Healthcare Conference (May 12, 2016) (discussing West Virginia's decision and stating that "ultimately states are sovereign entities" and if they want to "exempt [entities] from the antitrust laws with active supervision, then that [is] the end of the discussion.").

11. A stay therefore would facilitate the just and efficient resolution of this proceeding, conserve Commission resources, serve the public interest, and cause no prejudice to the Commission or the parties.

### **CONCLUSION**

Respondent LREAB respectfully requests that the Commission temporarily stay these proceedings for 120 days.

Dated: July 18, 2017

Respectfully submitted,

/s/ W. Stephen Cannon

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*Counsel for Respondent, the  
Louisiana Real Estate  
Appraisers Board*

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

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**In the Matter of**

**Louisiana Real Estate Appraisers Board,  
Respondent**

**Docket No. 9374**

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**[PROPOSED] ORDER ON RESPONDENT'S  
MOTION TO STAY PART 3 ADMINISTRATIVE PROCEEDINGS**

Good cause having been shown,

**IT IS HEREBY ORDERED THAT** Respondent's Motion to Stay Part 3 Administrative Proceedings is **GRANTED**; and

- 1) Commencement of the evidentiary hearing in this matter is moved from January 30, 2018 to May 30, 2018; and
- 2) All other proceedings in this matter are stayed for 120-days from the date of this order.

By the Commission.

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Donald S. Clark  
Secretary

ISSUED:

# EXHIBIT A



EXECUTIVE DEPARTMENT  
EXECUTIVE ORDER NUMBER 17-16

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***SUPERVISION OF THE LOUISIANA REAL ESTATE APPRAISERS BOARD  
REGULATION OF APPRAISAL MANAGEMENT COMPANIES***

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- WHEREAS,** the Louisiana Real Estate Appraisers Board (“the LREAB”) protects Louisiana consumers and mortgage lenders by licensing residential appraisers and regulating the integrity of the residential appraisal process;
- WHEREAS,** the federal Dodd-Frank Wall Street Reform and Consumer Protection Act established requirements for appraisal independence, including requirements that lenders and their agents pay “customary and reasonable” fees for residential mortgage appraisals, and mandating that the same state agency that regulates appraisers must require that appraisals ordered by appraisal management companies (“AMCs”) be conducted pursuant to the appraisal independence standards established in Truth In Lending Act section 129E;
- WHEREAS,** the legislature has recognized this federal requirement in enacting La. R.S. 37:3415.15(A) of the Louisiana Appraisal Management Company Licensing and Regulation Act, requiring that: “an appraisal management company shall compensate appraisers at a rate that is customary and reasonable for appraisals being performed in the market area of the property being appraised, consistent with the requirements of 15 U.S.C. 1639E [TILA section 129E] and the final federal rules as provided for in the applicable provisions of 12 CFR Parts 34, 225, 226, 323, 1026, and 1222”;
- WHEREAS,** on November 20, 2013, consistent with the authority described by La. R.S. 37:3415.21 and the procedure for rule adoption described by La. R.S. 49:953 of the Administrative Procedure Act, the LREAB published in the *Louisiana Register* final rules implementing La. R.S. 37:3415.15(A), Louisiana Administrative Code Title 46, section 31101; and
- WHEREAS,** questions concerning the scope of the U.S. Supreme Court decision in *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015), raise the possibility of federal antitrust law challenges to state board actions affecting prices, which may prevent the LREAB from faithfully executing mandates under the Dodd-Frank Act and Louisiana law under La. R.S. 37:3415.15.

**NOW THEREFORE, I, JOHN BEL EDWARDS,** Governor of the State of Louisiana, by virtue of the authority vested by the Constitution and laws of the State of Louisiana, do hereby order and direct as follows:

**SECTION 1:** Prior to finalization of a settlement with or the filing of an administrative complaint against an AMC regarding compliance with the customary and reasonable fee requirements of La. R.S. 37:3415.15(A), such proposed action and the record thereof shall be submitted to the Division of Administrative Law (DAL) for approval, rejection, or modification within 30 days of the submission. Such review is to ensure fundamental fairness and that the proposed action serves Louisiana’s policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such an appraisal are customary and reasonable. The LREAB shall enter into a contract with the DAL within ninety (90) days of this order to establish the procedure for this review.

**SECTION 2:** The LREAB is directed to submit to the Commissioner of Administration (or the Commissioner's designee) for approval, rejection, or modification within 30 days of the submission any proposed regulation related to AMC compliance with the customary and reasonable fee requirement of La. R.S. 37:3415.15(A), along with its rulemaking record, to ensure that such proposed regulation serves Louisiana's public policy of protecting the integrity of the residential mortgage appraisals by requiring that the fees paid by AMCs for an appraisal are to be customary and reasonable. The Commissioner (or his designee) may extend the 30-day review period upon a determination that such extension is needed.

**SECTION 3:** This Order is effective upon signature and shall continue in effect unless amended, terminated, or rescinded by the Governor.



**IN WITNESS WHEREOF**, I have set my hand officially and caused to be affixed the Great Seal of Louisiana at the Capitol, in the City of Baton Rouge, on this 11<sup>th</sup> day of July, 2017.

GOVERNOR OF LOUISIANA

**ATTEST BY  
THE GOVERNOR**

SECRETARY OF STATE

# **EXHIBIT B**



**State of Louisiana**  
**LOUISIANA REAL ESTATE APPRAISERS BOARD**

**JOHN BEL EDWARDS**  
GOVERNOR

**LOUISIANA REAL ESTATE APPRAISERS BOARD**

**P. O. Box 14785**

**Baton Rouge, LA 70898-4785**

**July 17, 2017**

**RESOLUTION**

WHEREAS, under provisions of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act and the Louisiana Appraisal Management Company Licensing and Regulation Act, as amended by Act 429 of the 2012 Regular Session, the Louisiana Real Estate Appraisers Board (the "Board") is obligated to ensure that Appraisal Management Companies (AMC) pay appraisers a customary and reasonable fee for residential mortgage appraisals, La. R.S. 37:3415.15(A);

WHEREAS, pursuant to La. R.S. 37:3415.15, 37:3415.21 and the Louisiana Administrative Procedures Act, the Board promulgated Louisiana Administrative Code Title 46, section 31101 ("Rule 31101") setting out rules for AMC compliance with the customary and reasonable fee standard;

WHEREAS, the Board has investigated complaints of AMC violations of Rule 31101, and has entered into settlement agreements and/or compliance plans, where appropriate;

WHEREAS, on July 11, 2017, Governor John Bel Edwards signed Executive Order Number 17-16, entitled "Supervision of the Louisiana Real Estate Appraisers Board Regulation of Appraisal Management Companies," which reinforces the State's active supervision over the regulatory and enforcement activities of the LREAB, by directing:

- a. Prior to finalization of any settlement or filing of an administrative complaint by LREAB against an AMC regarding compliance with a customary and reasonable rule under La. R.S. 37:3415.15(A), the proposed LREAB action shall be submitted for review to the Division of Administrative Law for approval, rejection, or modification. The purpose of the review is to ensure that such proposed action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such an appraisal are customary and reasonable.



b. Within 90 days of entry of the Executive Order, the LREAB must enter into a contract with the Division of Administrative Law establishing procedures for this review.

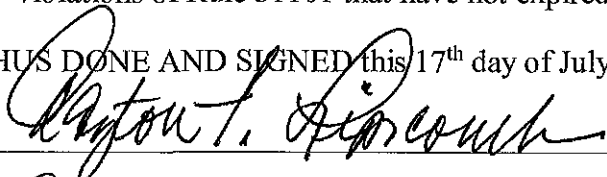
c. The LREAB must submit to the Commissioner of Administration or the Commissioner's designee for approval, rejection, or modification any proposed regulation relating to AMC compliance with the customary and reasonable fee requirement.

AND WHEREAS, the Board intends its ongoing rules and enforcement activities concerning AMC compliance with the obligation to pay appraisers customary and reasonable fees for residential mortgage appraisals to proceed pursuant to the reinforced active supervision established by Executive Order JBE 17-16:

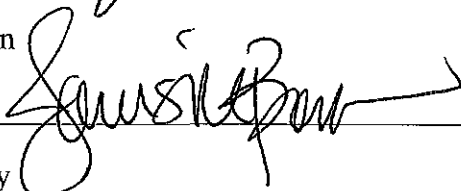
THEREFORE, it is resolved:

1. The Executive Director shall, on or before July 31, 2017 present to the Board a proposed rulemaking that proposes a rule regarding customary and reasonable appraisal fees for review by the Board for submission to the Commissioner of Administration pursuant to Executive Order Section 2, resulting in the repeal and replacement of current Rule 31101;
2. The Executive Director shall negotiate, within 90 days, the contract with the Division of Administrative Law as specified in Executive Order Section 1, for approval by the Board;
3. The Board having determined in all pending investigations of alleged violations of Rule 31101 that the subject payments were customary and reasonable, the Executive Director is directed to close all such pending investigations and to only initiate future investigations once a replacement rule is adopted; and
4. The Executive Director is authorized to seek settlement or other resolution of all decrees, settlements, and compliance plans arising from alleged or adjudicated violations of Rule 31101 that have not expired by their terms.

THUS DONE AND SIGNED this 17<sup>th</sup> day of July 2017.

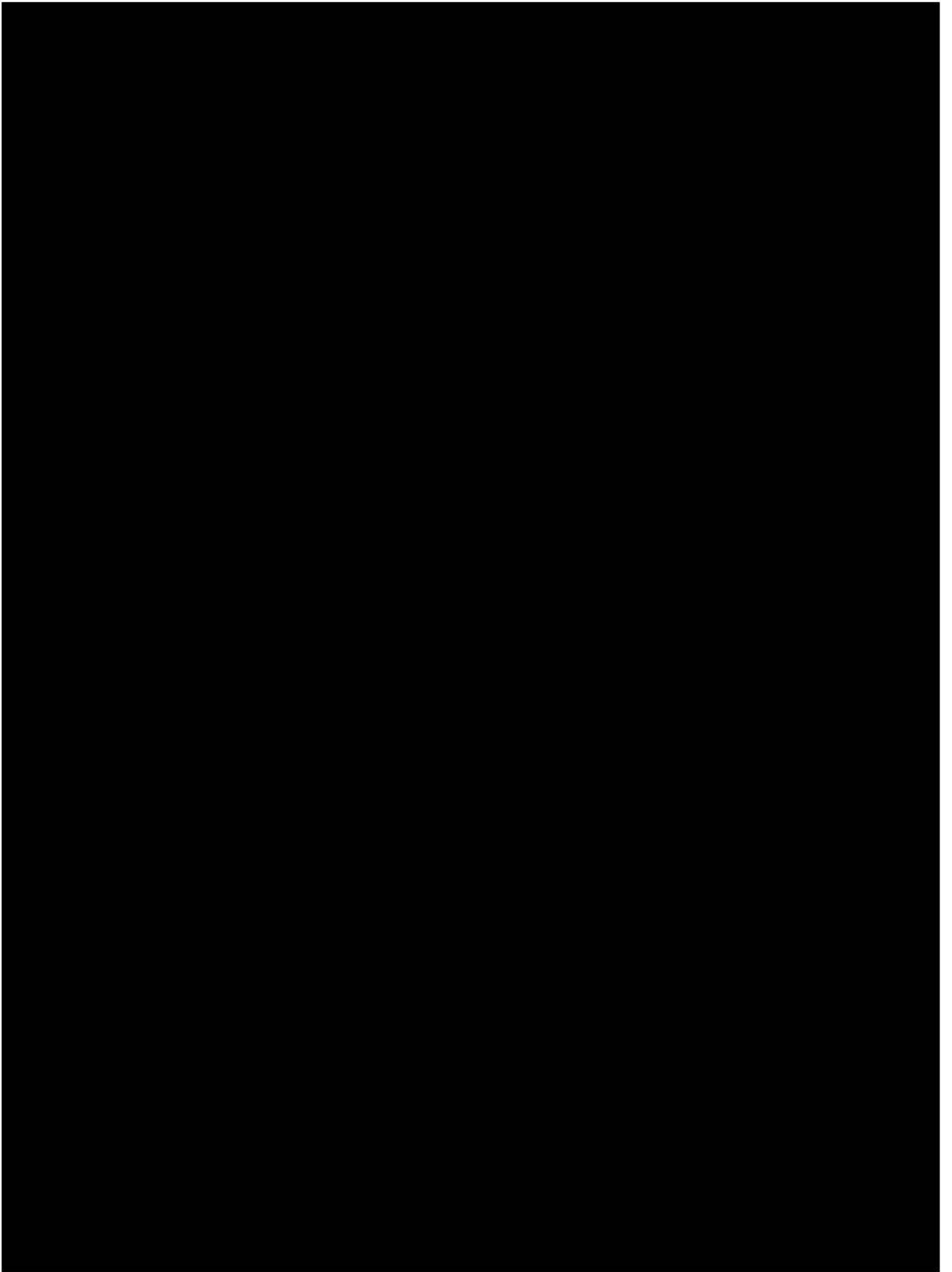
  
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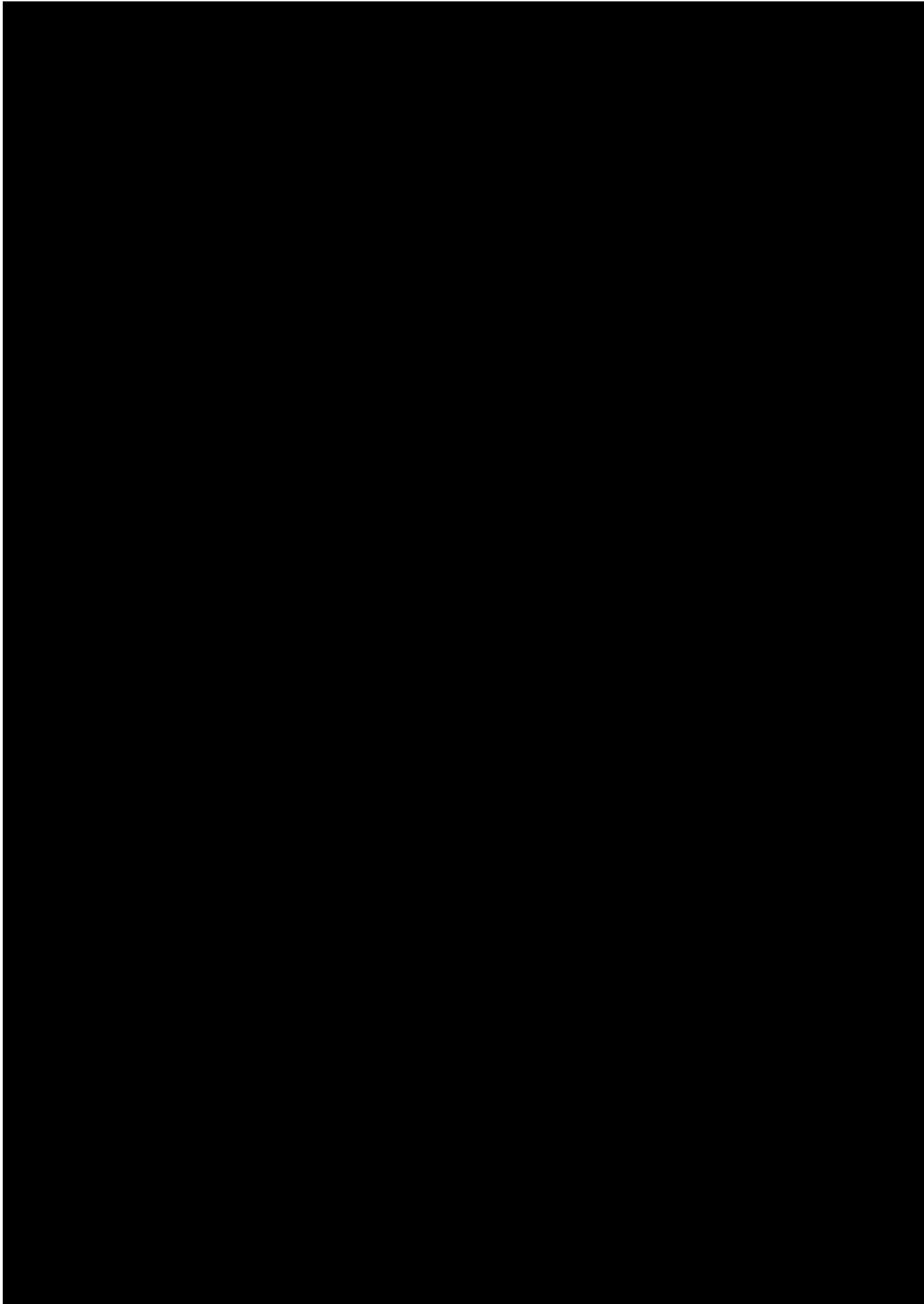
Chairman

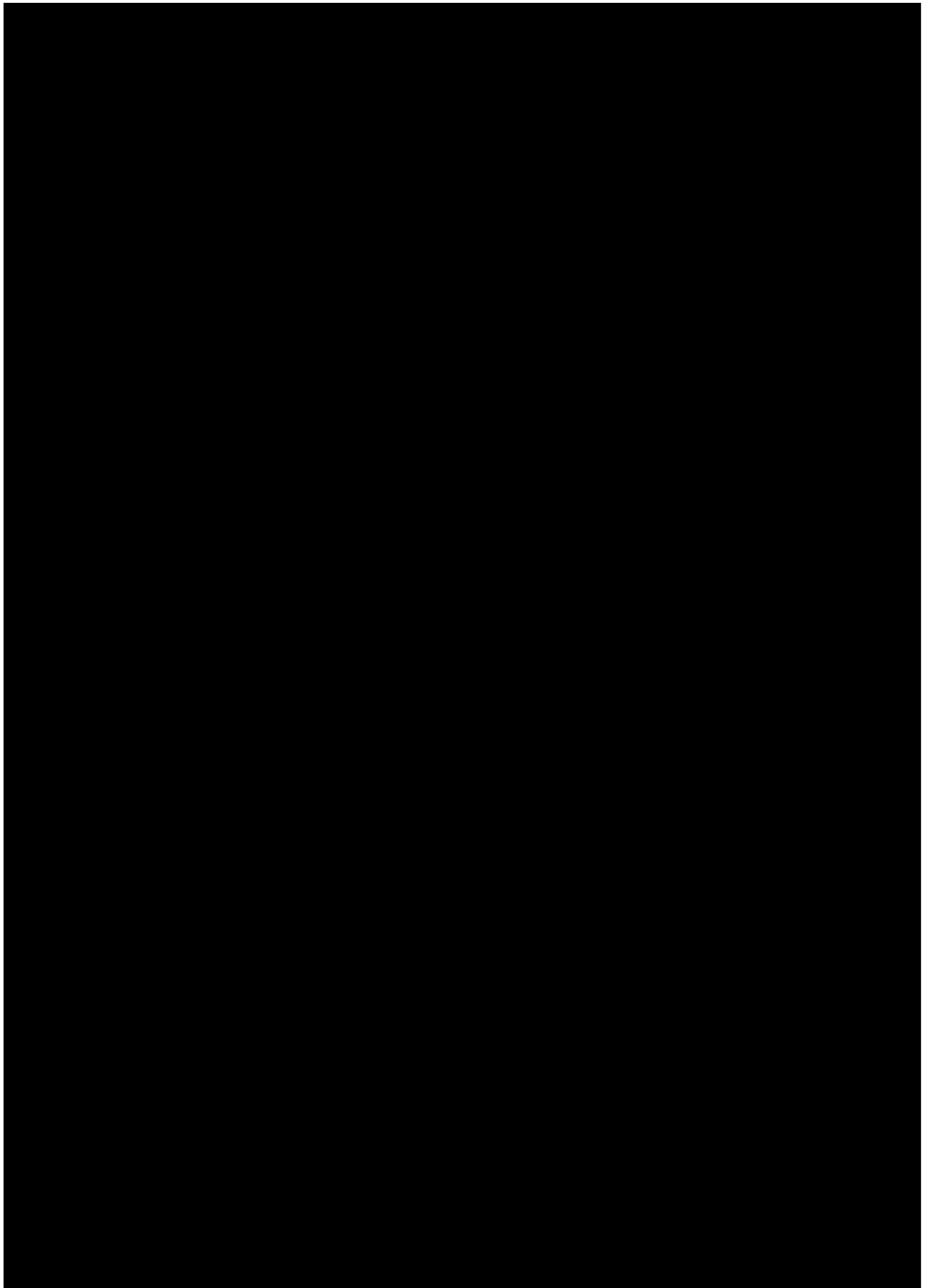
  
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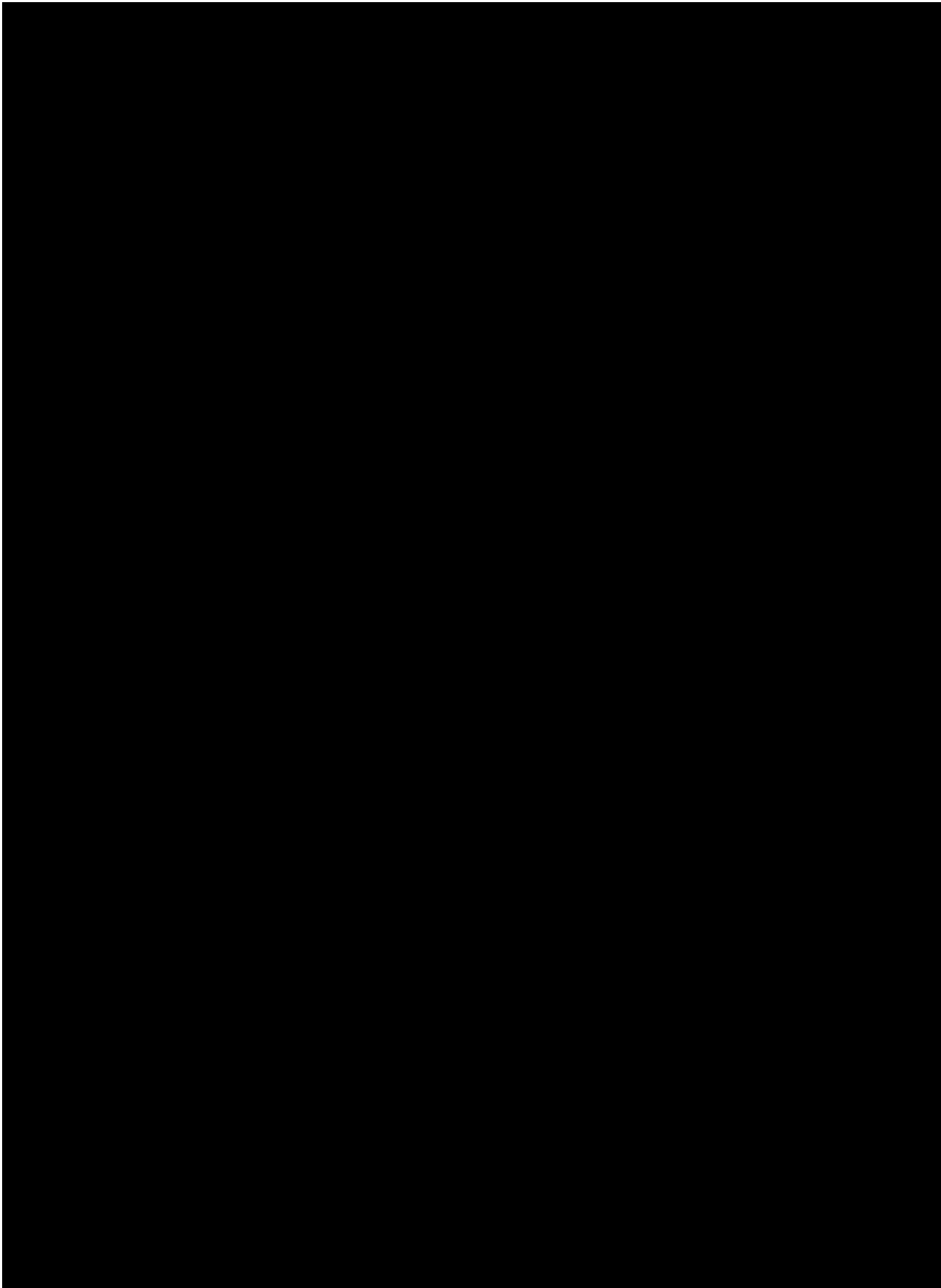
Secretary

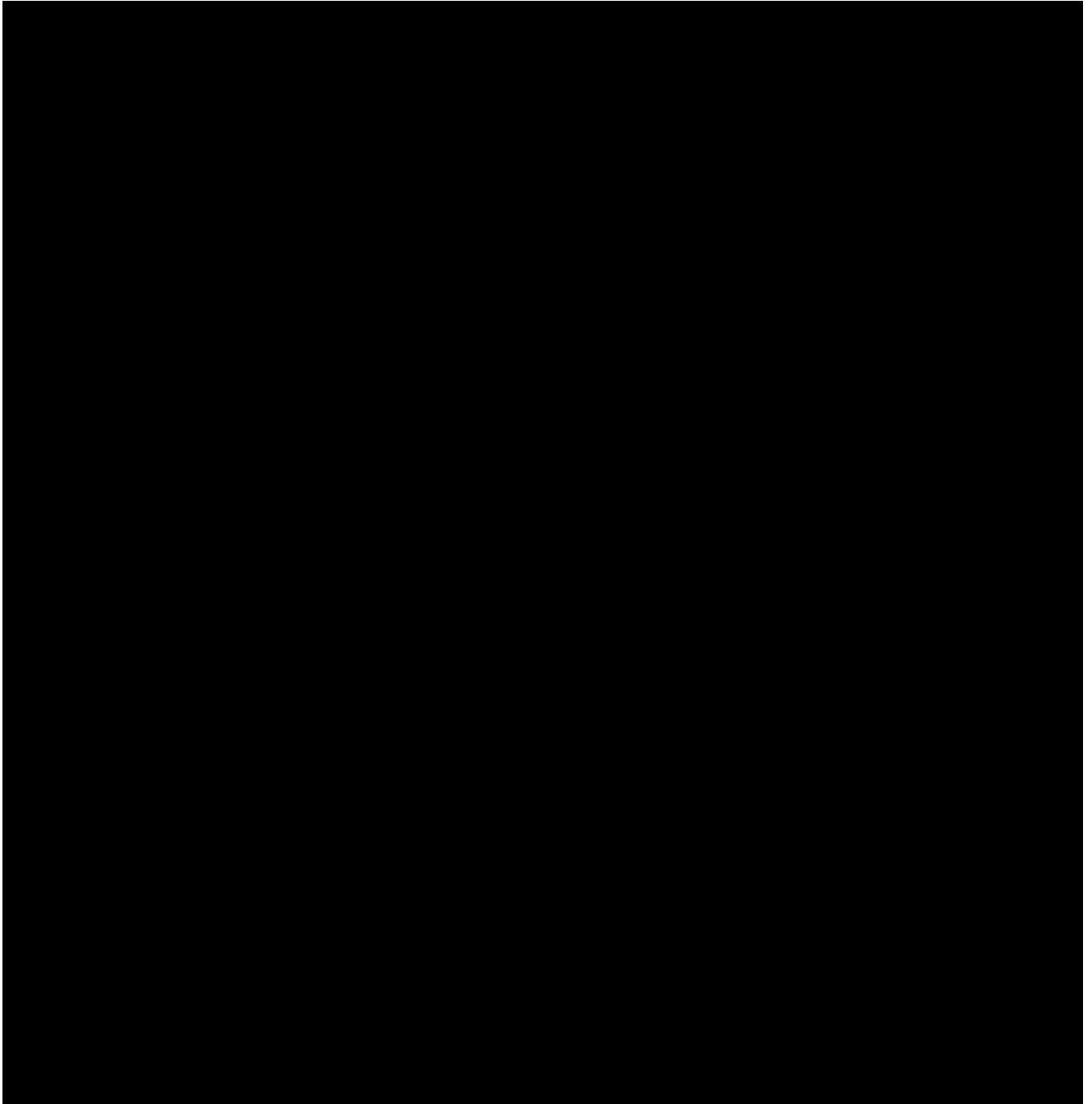
# EXHIBIT C











PUBLIC

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

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In the Matter of )  
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Louisiana Real Estate Appraisers Board, )  
)

Respondent. )  
\_\_\_\_\_ )

DOCKET NO. 9374

**PROTECTIVE ORDER GOVERNING CONFIDENTIAL MATERIAL**

Commission Rule 3.31(d) states: "In order to protect the parties and third parties against improper use and disclosure of confidential information, the Administrative Law Judge shall issue a protective order as set forth in the appendix to this section." 16 C.F.R. § 3.31(d). Pursuant to Commission Rule 3.31(d), the protective order set forth in the appendix to that section is attached verbatim as Attachment A and is hereby issued.

ORDERED:

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

Date: May 31, 2017



## ATTACHMENT A

For the purpose of protecting the interests of the parties and third parties in the above-captioned matter against improper use and disclosure of confidential information submitted or produced in connection with this matter:

**IT IS HEREBY ORDERED THAT** this Protective Order Governing Confidential Material (“Protective Order”) shall govern the handling of all Discovery Material, as hereafter defined.

1. As used in this Order, “confidential material” shall refer to any document or portion thereof that contains privileged, competitively sensitive information, or sensitive personal information. “Sensitive personal information” shall refer to, but shall not be limited to, an individual’s Social Security number, taxpayer identification number, financial account number, credit card or debit card number, driver’s license number, state-issued identification number, passport number, date of birth (other than year), and any sensitive health information identifiable by individual, such as an individual’s medical records. “Document” shall refer to any discoverable writing, recording, transcript of oral testimony, or electronically stored information in the possession of a party or a third party. “Commission” shall refer to the Federal Trade Commission (“FTC”), or any of its employees, agents, attorneys, and all other persons acting on its behalf, excluding persons retained as consultants or experts for purposes of this proceeding.
2. Any document or portion thereof submitted by a respondent or a third party during a Federal Trade Commission investigation or during the course of this proceeding that is entitled to confidentiality under the Federal Trade Commission Act, or any regulation, interpretation, or precedent concerning documents in the possession of the Commission, as well as any information taken from any portion of such document, shall be treated as confidential material for purposes of this Order. The identity of a third party submitting such confidential material shall also be treated as confidential material for the purposes of this Order where the submitter has requested such confidential treatment.
3. The parties and any third parties, in complying with informal discovery requests, disclosure requirements, or discovery demands in this proceeding may designate any responsive document or portion thereof as confidential material, including documents obtained by them from third parties pursuant to discovery or as otherwise obtained.
4. The parties, in conducting discovery from third parties, shall provide to each third party a copy of this Order so as to inform each such third party of his, her, or its rights herein.
5. A designation of confidentiality shall constitute a representation in good faith and after careful determination that the material is not reasonably believed to be already in the public domain and that counsel believes the material so designated constitutes confidential material as defined in Paragraph 1 of this Order.

6. Material may be designated as confidential by placing on or affixing to the document containing such material (in such manner as will not interfere with the legibility thereof), or if an entire folder or box of documents is confidential by placing or affixing to that folder or box, the designation “CONFIDENTIAL – FTC Docket No. 9374” or any other appropriate notice that identifies this proceeding, together with an indication of the portion or portions of the document considered to be confidential material. Confidential information contained in electronic documents may also be designated as confidential by placing the designation “CONFIDENTIAL – FTC Docket No. 9374” or any other appropriate notice that identifies this proceeding, on the face of the CD or DVD or other medium on which the document is produced. Masked or otherwise redacted copies of documents may be produced where the portions deleted contain privileged matter, provided that the copy produced shall indicate at the appropriate point that portions have been deleted and the reasons therefor.

7. Confidential material shall be disclosed only to: (a) the Administrative Law Judge presiding over this proceeding, personnel assisting the Administrative Law Judge, the Commission and its employees, and personnel retained by the Commission as experts or consultants for this proceeding; (b) judges and other court personnel of any court having jurisdiction over any appellate proceedings involving this matter; (c) outside counsel of record for any respondent, their associated attorneys and other employees of their law firm(s), provided they are not employees of a respondent; (d) anyone retained to assist outside counsel in the preparation or hearing of this proceeding including consultants, provided they are not affiliated in any way with a respondent and have signed an agreement to abide by the terms of the protective order; and (e) any witness or deponent who may have authored or received the information in question.

8. Disclosure of confidential material to any person described in Paragraph 7 of this Order shall be only for the purposes of the preparation and hearing of this proceeding, or any appeal therefrom, and for no other purpose whatsoever, provided, however, that the Commission may, subject to taking appropriate steps to preserve the confidentiality of such material, use or disclose confidential material as provided by its Rules of Practice; sections 6(f) and 21 of the Federal Trade Commission Act; or any other legal obligation imposed upon the Commission.

9. In the event that any confidential material is contained in any pleading, motion, exhibit or other paper filed or to be filed with the Secretary of the Commission, the Secretary shall be so informed by the Party filing such papers, and such papers shall be filed *in camera*. To the extent that such material was originally submitted by a third party, the party including the materials in its papers shall immediately notify the submitter of such inclusion. Confidential material contained in the papers shall continue to have *in camera* treatment until further order of the Administrative Law Judge, provided, however, that such papers may be furnished to persons or entities who may receive confidential material pursuant to Paragraphs 7 or 8. Upon or after filing any paper containing confidential material, the filing party shall file on the public record a duplicate copy of the paper that does not reveal confidential material. Further, if the protection for any such material expires, a party may file on the public record a duplicate copy which also contains the formerly protected material.

10. If counsel plans to introduce into evidence at the hearing any document or transcript containing confidential material produced by another party or by a third party, they shall provide advance notice to the other party or third party for purposes of allowing that party to seek an order that the document or transcript be granted *in camera* treatment. If that party wishes *in camera* treatment for the document or transcript, the party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives such notice. Except where such an order is granted, all documents and transcripts shall be part of the public record. Where *in camera* treatment is granted, a duplicate copy of such document or transcript with the confidential material deleted therefrom may be placed on the public record.

11. If any party receives a discovery request in any investigation or in any other proceeding or matter that may require the disclosure of confidential material submitted by another party or third party, the recipient of the discovery request shall promptly notify the submitter of receipt of such request. Unless a shorter time is mandated by an order of a court, such notification shall be in writing and be received by the submitter at least 10 business days before production, and shall include a copy of this Protective Order and a cover letter that will apprise the submitter of its rights hereunder. Nothing herein shall be construed as requiring the recipient of the discovery request or anyone else covered by this Order to challenge or appeal any order requiring production of confidential material, to subject itself to any penalties for non-compliance with any such order, or to seek any relief from the Administrative Law Judge or the Commission. The recipient shall not oppose the submitter's efforts to challenge the disclosure of confidential material. In addition, nothing herein shall limit the applicability of Rule 4.11(e) of the Commission's Rules of Practice, 16 CFR 4.11(e), to discovery requests in another proceeding that are directed to the Commission.

12. At the time that any consultant or other person retained to assist counsel in the preparation of this action concludes participation in the action, such person shall return to counsel all copies of documents or portions thereof designated confidential that are in the possession of such person, together with all notes, memoranda or other papers containing confidential information. At the conclusion of this proceeding, including the exhaustion of judicial review, the parties shall return documents obtained in this action to their submitters, provided, however, that the Commission's obligation to return documents shall be governed by the provisions of Rule 4.12 of the Rules of Practice, 16 CFR 4.12.

13. The provisions of this Protective Order, insofar as they restrict the communication and use of confidential discovery material, shall, without written permission of the submitter or further order of the Commission, continue to be binding after the conclusion of this proceeding.

Notice of Electronic Service

**I hereby certify that on July 18, 2017, I filed an electronic copy of the foregoing Respondent's Motion to Stay Proceedings, 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 July 18, 2017, I served via E-Service an electronic copy of the foregoing Respondent's Motion to Stay Proceedings, upon:**

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Complaint

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Respondent

**I hereby certify that on July 18, 2017, I served via other means, as provided in 4.4(b) of the foregoing Respondent's Motion to Stay Proceedings, upon:**

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U.S. Federal Trade Commission  
spugh@ftc.gov  
Complaint

James J. Kovacs  
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Respondent

W. Stephen Cannon  
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