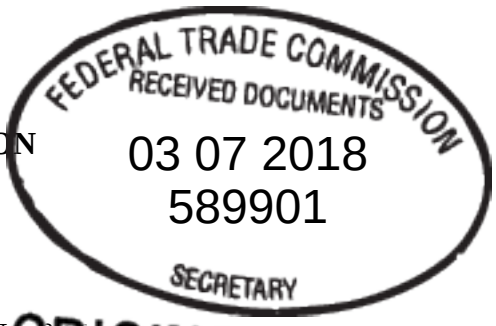
PUBLIC



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

ORIGINAL

COMPLAINT COUNSEL'S MOTION FOR LEAVE TO FILE REPLY IN SUPPORT OF COMPLAINT COUNSEL'S MOTION FOR AN ORDER THAT RESPONDENT HAS WAIVED PRIVILEGE

Pursuant to Rule 3.22(c) of the Commission Rules of Practice, 16 C.F.R. § 3.22, Complaint Counsel respectfully move the Court for leave to file the attached reply in support of Complaint Counsel's Motion for an Order that Respondent Has Waived Privilege.

Respondent's Opposition to the Motion, filed on March 6, 2018, alleges that Complaint Counsel made misrepresentations to Respondent's Counsel. Complaint Counsel request that the Court grant leave to file the attached reply so that Complaint Counsel can answer these serious allegations.

Respondent's counsel has advised Complaint Counsel that Respondent has no objection to Complaint Counsel filing a Reply.

Dated: March 7, 2018

Respectfully submitted,

/s/ Lisa B. Kopchik
Lisa B. Kopchik
Kathleen M. Clair
Christine M. Kennedy
Michael J. Turner
Counsel Supporting the Complaint

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580
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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

[PROPOSED] ORDER

Upon Complaint Counsel's Motion for leave to file its Reply in Support of Complaint Counsel's Motion for an Order that Respondent Has Waived Privilege, and Respondent having no objection thereto, it is hereby

ORDERED, that Complaint Counsel is granted leave to file its Reply.

_____
D. Michael Chappell
Chief Administrative Law Judge

Date: _____, 2018

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

In the Matter of Louisiana Real Estate Appraisers Board, Respondent	Docket No. 9374

COMPLAINT COUNSEL'S REPLY BRIEF ON EXPEDITED MOTION FOR AN ORDER THAT RESPONDENT HAS WAIVED PRIVILEGE

In its response to our motion regarding its waiver of privilege, Respondent Louisiana Real Estate Appraisers Board has suggested that Complaint Counsel made misrepresentations that contributed to Respondent's failure to act promptly to rectify the production of privileged documents. Complaint Counsel disputes these allegations.[1]

Complaint Counsel does not wish to turn this motion into a finger-pointing exercise that will be of little assistance to the Court. We can advise the Court of the following:

1. Respondent's primary claim is that no attorney was involved in its initial document production; Respondent preferred not to incur legal fees. This is not an acceptable excuse. Respondent plainly failed to exercise reasonable care in protecting from disclosure any privileged documents. Complaint Counsel played no role.
2. Setting aside the role of Respondent's initial counsel, and the reasons why she failed to act diligently to assert any privilege, even Respondent's replacement/current counsel (Constantine Cannon) have failed to act promptly. {[redacted]

[1] At the time of the Investigational Hearings, Complaint Counsel stated to Respondent's Counsel that it is our practice not to provide a transcript of a witness' Investigational Hearing testimony until and unless the Commission issues a complaint. In all other respects, Complaint Counsel dispute the allegations of misrepresentations. Further, Respondent's affidavits are hearsay, and there has been no opportunity for cross-examination. The Court should disregard these affidavits.

[redacted] **}** It took Respondent eleven months to take any steps to rectify the alleged inadvertent production of privileged documents. This is too long.

3. The form Subpoena Ad Testificandum, attached as Exhibit A, that was served on all investigational hearing witnesses provides a link to the administrative rules that are applicable to investigational hearings. Rule 2.9(b)(2) gives counsel for the witness notice that she may raise objections:

> Any objection during a deposition or investigational hearing shall be stated concisely on the hearing record in a nonargumentative and nonsuggestive manner. Neither the witness nor counsel shall otherwise object or refuse to answer any question. Following an objection, the examination shall proceed and the testimony shall be taken, except for testimony requiring the witness to divulge information protected by the claim of protected status. Counsel may instruct a witness not to answer only when necessary to preserve a claim of protected status.

4. Respondent claims that Complaint Counsel denied witnesses an opportunity to review and correct the transcript of their investigational hearings. **{**[redacted] **}**

5. Respondent was on notice – at the very latest –three months ago, that it produced privileged documents, when Complaint Counsel cited disputed documents in our Motion for Partial Summary Judgment, dated November 30, 2018. While we believe that Respondent had notice well before then, even Respondent's three month delay in

raising the privilege constitutes a failure to take "reasonable steps to rectify the error" in producing the document.

We will provide any other materials to the Court that it may deem useful for its consideration of our motion.

Dated: March 7, 2018

Respectfully submitted,

/s/ Lisa B. Kopchik
Lisa B. Kopchik
Kathleen M. Clair
Christine M. Kennedy
Michael J. Turner

Counsel Supporting the Complaint

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
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EXHIBIT A

PUBLIC

SUBPOENA AD TESTIFICANDUM

1. TO	2. FROM UNITED STATES OF AMERICA FEDERAL TRADE COMMISSION
	2a. MATTER NUMBER

This subpoena requires you to appear and testify at the request of the Federal Trade Commission at a hearing [or deposition] in the proceeding described below (Item 6).

3. LOCATION OF HEARING	4. YOUR APPEARANCE WILL BE BEFORE
	5. DATE AND TIME OF HEARING OR DEPOSITION

6. SUBJECT OF INVESTIGATION

7. RECORDS CUSTODIAN/DEPUTY RECORDS CUSTODIAN	8. COMMISSION COUNSEL

DATE ISSUED	COMMISSIONER'S SIGNATURE

INSTRUCTIONS AND NOTICES

The delivery of this subpoena to you by any method prescribed by the Commission's Rules of Practice is legal service and may subject you to a penalty imposed by law for failure to comply. This subpoena does not require approval by OMB under the Paperwork Reduction Act of 1980.

PETITION TO LIMIT OR QUASH

The Commission's Rules of Practice require that any petition to limit or quash this subpoena be filed within 20 days after service, or, if the return date is less than 20 days after service, prior to the return date. The original and twelve copies of the petition must be filed with the Secretary of the Federal Trade Commission, and one copy should be sent to the Commission Counsel named in Item 8.

YOUR RIGHTS TO REGULATORY ENFORCEMENT FAIRNESS

The FTC has a longstanding commitment to a fair regulatory enforcement environment. If you are a small business (under Small Business Administration standards), you have a right to contact the Small Business Administration's National Ombudsman at 1-888-REGFAIR (1-888-734-3247) or www.sba.gov/ombudsman regarding the fairness of the compliance and enforcement activities of the agency. You should understand, however, that the National Ombudsman cannot change, stop, or delay a federal agency enforcement action.

The FTC strictly forbids retaliatory acts by its employees, and you will not be penalized for expressing a concern about these activities.

TRAVEL EXPENSES

Use the enclosed travel voucher to claim compensation to which you are entitled as a witness for the Commission. The completed travel voucher and this subpoena should be presented to Commission Counsel for payment. If you are permanently or temporarily living somewhere other than the address on this subpoena and it would require excessive travel for you to appear, you must get prior approval from Commission Counsel

A copy of the Commission's Rules of Practice is available online at http://bit.ly/FTCsRulesofPractice. Paper copies are available upon request.

RETURN OF SERVICE

I hereby certify that a duplicate original of the within subpoena was duly served: *(check the method used)*

◯ *in person.*

◯ *by registered mail.*

◯ *by leaving copy at principal office or place of business, to wit:*

_____

_____

_____

_____

on the person named herein on:

_____

(Month, day, and year)

_____

(Name of person making service)

_____

(Official title)

EXHIBIT B

CONFIDENTIAL
REDACTED IN ENTIRETY

EXHIBIT C

CONFIDENTIAL
REDACTED IN ENTIRETY

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2018, 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
600 Pennsylvania Ave., NW, Rm. H-113
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:

W. Stephen Cannon
Seth Greenstein
Richard Levine
James Kovacs
Allison Sheedy
Justin Fore
Constantine Cannon LLP
1001 Pennsylvania Avenue, NW
Suite 1300N
Washington, DC 20004
scannon@constantinecannon.com
sgreenstein@constantinecannon.com
rlevine@constantinecannon.com
jkovacs@constantinecannon.com
asheedy@constantinecannon.com
wfore@constantinecannon.com

Counsel for Respondent Louisiana Real Estate Appraisers Board

Dated: March 7, 2018

By: /s/ Lisa B. Kopchik
Lisa B. Kopchik, Attorney

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Dated: March 7, 2018

By: /s/ Lisa B. Kopchik
Lisa B. Kopchik, Attorney