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ORIGINAL

A proposed order is attached.

Dated: February 28, 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

Telephone: (202) 326-3139

Email: LKopchik@ftc.gov

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 an Order that Respondent Has Waived Privilege, and having considered the papers in support and in opposition thereto, it is hereby

ORDERED, that Respondent's conduct constituted a waiver of any claim of privilege for the documents produced by Respondent in response to the Civil Investigative Demand in the precomplaint investigation in the above-captioned matter, and it is further

ORDERED, that Complaint Counsel need not return, continue to sequester, or destroy any such documents.

D. Michael Chappell
Chief Administrative Law Judge

Date: _____, 2018

STATEMENT OF CONFERENCE

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OFFICE OF ADMINISTRATIVE LAW JUDGES

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basis of a more circumscribed evidentiary record, Respondent seeks to claw back 425 documents from its initial production.

This request comes far too late.

. Ten months ago, staff gave Respondent's counsel of record copies of these documents; at that time, staff expressly explained to Respondent's counsel its position that, by producing these documents, Respondent had waived any privilege protections. Nevertheless, near the close of fact discovery and on the eve of several depositions of Respondent's personnel,³ Respondent has suddenly decided to assert a now-waived claim of *pest come* ,

A. The Disclosure Was Not Inadvertent and Respondent Did Not Take Reasonable Steps to Prevent Disclosure

Inadvertent disclosure, in “comport[ing] with the dictionary definition of the word,” means simply “an unintended disclosure.” *Amobi*, 262 F.R.D. at 53. The question involves the “simple analysis of considering if the party intended to disclose the document.” *Id.*; *see also Coburn Grp., LLC v. Whitecap Advisors LLC*, 640 F. Supp. 2d 1032, 1038 (N.D. Ill. 2009) (same; noting also that “the parallel structure of subparts [of Federal Rule of Evidence 502] contrasts a waiver that is *intentional* with a disclosure that is *inadvertent*”). Applying this simple analysis, it is clear that Respondent intended to produce these 425 documents, as evidenced by the fact that Board Executive Director Bruce Unangst explained to Complaint Counsel, with reference to the Board’s document productions, that “[w]e want to be as transparent as possible” and that Respondent Board wanted FTC staff to see “everything.”⁷

Respondent also did not take reasonable steps to prevent disclosure of privileged materials. In fact, when Respondent produced the disputed documents, it elected not to withhold any materials on the basis of privilege, and therefore did not produce any privilege loTw -17.54 -2.3 Td [(co)-4

case in which some privileged materials slipped through the cracks. Here, Respondent did not attempt to withhold any potentially privileged materials but rather intended to—and apparently did—produce “everything.”

B. Respondent Did Not Act “Promptly”

In or around May 2017, after Constantine Cannon received these materials and before the complaint issued, Complaint Counsel and Respondent's counsel spoke by telephone about the issue of waiver in Respondent's previous document productions. During this telephone call, Respondent's counsel asked Complaint Counsel's position

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Despite these many opportunities to rectify any possible error in producing the disputed documents, Respondent waited until February 23, 2018—three weeks before the close odo.4496 54 (s(w)2 (a))-

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ERICA
COMMISSION

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE

U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
In re: Matter of

DOCKET NO. 0374

Respondent

Under the provisions of the Federal Rules of Criminal Procedure, the undersigned hereby certifies that the following is a true and correct copy of the original as filed with the court.

By: _____, Clerk of Court
U.S. District Court for the District of Columbia
in this regard.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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EXHIBIT B

PUBLIC

From: Kovacs, James J.
To: [Kopchik, Lisa B.](#); [Kennedy, Christine](#); [Turner, Michael](#); [Clair, Kathleen](#)
Cc: [Cannon, Stephen](#); [Greenstein, Seth](#); [Levine, Richard](#); [Sheedy, Allison](#); [Fore, Wyatt](#)
Subject: LREAB Clawback
Date: Friday, February 23, 2018 4:18:07 PM
Attachments: [LREAB Clawback List.xlsx](#)

Lisa,

Attached is an excel spreadsheet listing 425 privileged documents and communications that were inadvertently produced by the Louisiana Real Estate Appraisers Board to Complaint Counsel in response to the Federal Trade Commission's Civil Investigative Demands in the Part II Investigation. Respondent Louisiana Real Estate Appraisers Board requests that Complaint Counsel return all of the original documents and communications to Constantine Cannon and destroy all copies that Complaint Counsel may have in its possession. We respectfully request that the return and deletion of all 425 documents and communications be done by February 28, 2018. Thank you.

Best,
Jimmy

James J. Kovacs
CONSTANTINE | CANNON
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<http://constantinecannon.com>

FTC-LAB-00003790	Attorney-Client
FTC-LAB-00003805	Attorney-Client
FTC-LAB-00003883	Attorney-Client
FTC-LAB-00004053	Attorney-Client
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EXHIBIT C

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Kopchik, Lisa B. [<mailto:LKOPCHIK@ftc.gov>]

Monday, January 29, 2018 12:36 PM

Greenstein, Seth <sgreenstein@constantinecannon.com>; Cannon, Stephen
<scannon@constantinecannon.com>; Broz, Kristen <kbroz@constantinecannon.com>; Kovacs,
James J. <jkovacs@constantinecannon.com>

Depositions

I requested dates for Tad Bolton, Henk, and Robert Maynor depositions. I would still like to schedule them on dates convenient for you.

In the meantime, we are going to serve you with SATs for those depositions. We will be happy to rearrange dates when you get back to us.

Lisa

Lisa B. Kopchik / Federal Trade Commission

CERTIFICATE OF SERVICE

I hereby certify that on March 6, 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
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wfore@constantinecannon.com

Counsel for Respondent Louisiana Real Estate Appraisers Board

Dated: March 6, 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 6, 2018

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