

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Joseph J. Simons, Chairman
Noah Joshua Phillips
Rohit Chopra
Rebecca Kelly Slaughter
Christine S. Wilson



In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

Docket No. 9374

**RESPONDENT LOUISIANA REAL ESTATE APPRAISERS BOARD'S
MOTION FOR CONTINUANCE OF STAY**

Pursuant to Federal Trade Commission Rules of Practice, 16 C.F.R. § 3.22, Respondent Louisiana Real Estate Appraisers Board (“LREAB” or “Board”) respectfully moves the Commission to continue its stay of the Part 3 proceedings in this matter pending a decision by the Fifth Circuit Court of Appeals as to rehearing en banc. The Board submits this Motion as well as its Motion for Expedited Review. Complaint Counsel have informed undersigned counsel that they intend to oppose this Motion. For the reasons set forth below, the Board’s Motion should be granted.

Introduction

The Board respectfully submits this Motion to continue the Commission’s July 19, 2018 stay of the Part 3 administrative proceedings to spare both parties the burden of preparing for a trial pending appellate review. In accordance with the Federal Rules of Appellate Procedure, LREAB will submit a petition for rehearing en banc of the Fifth Circuit’s February 28, 2019

decision. Although LREAB is afforded 45 days to file its petition with the Fifth Circuit, the Board intends to file well before the deadline. Fed. R. App. P. 40. Under its Internal Operating Procedures, the Fifth Circuit will determine whether to consider rehearing the case en banc expeditiously. *See* Fifth Circuit Rule 35 I.O.P. (“Within 10 days of the filing of the petition, any active judge of the court or any member of the panel rendering the decision, who desires that the case be reheard en banc...”). If the Fifth Circuit grants LREAB’s petition for en banc review, the Commission is expected to again be divested of jurisdiction given Fifth Circuit Rules and the prior Order by the Fifth Circuit staying the case upon request by LREAB. *See* Fifth Circuit Rule 41.3; 16 C.F.R. § 3.41(f)(1)(i); Order Granting Stay, *Louisiana Real Estate Appraisers Board v. FTC*, No. 18-60291 (5th Cir., July 17, 2019) (hereinafter “*LREAB v. FTC*”).

Accordingly, the Board respectfully requests that the Commission continue its stay of administrative proceedings pending a decision from the Fifth Circuit on LREAB’s petition for rehearing en banc. The continuance of the Commission’s current stay will cause no undue prejudice to either party, will protect Louisiana’s sovereign and dignitary interests, and will spare the Commission and the parties the wasteful expense of renewing preparations for trial when the Commission may shortly be divested of jurisdiction during an appellate process addressing issues that may moot any future Part 3 proceedings.

Background and Procedural History

The Commission issued an administrative complaint on May 30, 2017, asserting that the Board “has violated Section 5” of the FTC Act. Compl. 1.¹ The Board’s Answer asserted its Third and Ninth Affirmative Defenses relating to state action immunity under *Parker v. Brown*,

¹ This motion adopts the April 10th Order’s abbreviations for the matter’s litigation documents. *See* Order, slip op. at 4 n.10.

317 U.S. 341 (1943). Answer at 12 ¶¶ 3, 9. On November 27, 2017, the Board moved to dismiss the Complaint on the basis that the “actions of the Board are State actions that are immune from federal antitrust scrutiny,” that the Governor’s Executive Order and the Board’s new rule created “active supervision” that “has eliminated any ongoing or proposed effects of its prior regulation,” and thus that “none of the contemplated relief sought in the Complaint can be granted” pursuant State action immunity and mootness. MTD 1-2. Complaint Counsel opposed this motion to dismiss, and filed a motion for partial summary decision with respect to the Board’s Third and Ninth affirmative defenses. *See* MPSD; CCOpp. On April 10, 2018, the Commission issued an Opinion and Order denying the Board’s Motion to Dismiss and granting Complaint Counsel’s Motion for Partial Summary Judgment.² Nine days later, the Board filed a Petition for Review with the Fifth Circuit seeking judicial review of the Commission’s Order. *Pet. for Review, LREAB v. FTC* (5th Cir., Apr. 19, 2018). In light of its appeal, on April 20, 2018, the Board filed a Motion to Stay accompanied with a Motion for Expedited Review with the Commission. On April 27, 2018, the Commission denied the Board’s Motion for Expedited Review and then, subsequently, denied the Motion for Stay on June 6, 2018. Less than a week later, the Board moved the Fifth Circuit to stay the Commission’s Part 3 proceedings pending appeal. *Mot. to Stay, LREAB v. FTC* (June 11, 2018). The Fifth Circuit granted that motion, *Order, LREAB v. FTC* (July 17, 2017), and two days later, on July 19, the Commission ordered a stay of all Part 3 proceedings “until further order of the Court of Appeals for the Fifth Circuit and the Commission.” Less than two weeks ago, the Fifth Circuit dismissed the appeal on jurisdictional grounds and issued the mandate. *Op & J., LREAB v. FTC* (Feb. 28, 2019).

² All references hereinafter to the Part 3 administrative proceeding can be found at <https://www.ftc.gov/enforcement/cases-proceedings/161-0068/louisiana-real-estate-appraisers-board>.

However, in accordance with the Commission's July 19, 2018 Order, the stay of the Part 3 proceedings remains in place.

Argument

I. Relevant Standards

The Commission may, for good cause, stay the proceeding of an administrative adjudication during the pendency of a collateral federal court action. 16 C.F.R. § 3.41(f)(1)(i); *see also* 16 C.F.R. § 3.22(a). While the Commission has a strong interest in “conducting [Part 3] proceedings expeditiously,” 16 C.F.R. § 3.1, the “applicability of the state action doctrine is a key issue” whose resolution by the Fifth Circuit “will avoid a waste of resources and will not prejudice either side.” *In re Phoebe Putney Health System*, Dkt. No. D-9348, 152 F.T.C. 1035, 1035 (July 15, 2011) (staying proceeding pending Eleventh Circuit review); *see also In re South Carolina State Bd. of Dentistry*, Dkt. No. 9311, 2004 WL 1942070 (Aug. 17, 2004) (granting unopposed motion to stay discovery and further proceedings).

II. There is Good Cause to Continue the Existing Stay

The Commission has good cause to continue the stay of the Part 3 proceedings. Under the local rules of the Fifth Circuit, the Fifth Circuit's grant of a rehearing en banc typically will “vacate[] the panel's opinion and judgment and stay[] the mandate.” Fifth Circuit Rule 41.3. Either procedurally, or by motion of LREAB, the Commission is expected again to be divested of jurisdiction over this proceeding should the Fifth Circuit grant LREAB's petition for en banc review. 16 C.F.R. § 3.41(f)(1)(i); *see also LREAB v. FTC* (July 17, 2017). Moreover, given that the Part 3 proceeding is currently stayed, a continuance of the stay until the Fifth Circuit determines whether to grant a rehearing en banc will not cause either party undue prejudice.

There is also good cause to continue the stay to ensure that the Board, an agency of a sovereign state, is afforded an opportunity to protect important state interests that will be “effectively lost if a case erroneously is permitted to go to trial.” *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 536 (1985)). Those interests include protecting officials from the risk of trial and distraction of State employees in their service of Louisiana citizens. An elimination of the existing stay during an ongoing appeal that seeks to safeguard these dignitary interests is unnecessary and would harm both LREAB and the State.

No harm to the public interest will result by a continuation of the stay. As LREAB represented to the Fifth Circuit, “[t]here can be no antitrust risk from the stay, since LREAB has halted all enforcement of Rule 31101 until this issue [on appeal] is resolved.” Reply Mot. to Stay, *LREAB v. FTC*, at 13-14 (June 28, 2018). LREAB renews that representation here.

Lastly, a continuance of the existing stay until the Fifth Circuit appellate cycle is complete will limit the waste of resources. In light of the likely short turnaround, there is no judicial economy in the Commission lifting the stay prior to that pronouncement. Lifting the stay prior to the Fifth Circuit’s decision will cause a cascade of events including a new administrative hearing date and a fourth scheduling order.³ Each of these dates may be effectively nullified by the Fifth Circuit’s decision. As a result, a continuance of the stay will not harm the public’s interest in “conducting [adjudicative] proceedings expeditiously,” 16 C.F.R. § 3.1, nor “prejudice either side,” *Phoebe Putney Health System*, 152 F.T.C. 1035, 1035 (July 15, 2011) (staying proceedings pending judicial review).

³ To date, there have been three scheduling orders issued in this case. The last scheduling order was issued on May 1, 2018.

Conclusion

For the foregoing reasons, the Board respectfully requests that the Commission continue its stay of administrative proceedings pending review by the Fifth Circuit.

Dated: March 13, 2019

/s/ W. Stephen Cannon

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[PROPOSED] ORDER ON RESPONDENT’S MOTION FOR CONTINUANCE OF STAY

On March 13, 2019 Respondent filed a Motion for Continuance of Stay. Good cause having been shown, the motion is hereby **GRANTED**:

IT IS ORDERED that the stay shall be continued pending a final resolution of *Louisiana Real Estate Appraisers Board v. FTC*, Case No. 18-60291. Within ten days of a final decision affirming the Commission’s Order, counsel for the parties shall jointly propose a revised scheduling order.

By the Commission.

Donald S. Clark
Secretary

ISSUED:

Notice of Electronic Service

I hereby certify that on March 13, 2019, I filed an electronic copy of the foregoing Respondent's Motion for Continuance of Stay, with:

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I hereby certify that on March 13, 2019, I served via E-Service an electronic copy of the foregoing Respondent's Motion for Continuance of Stay, upon:

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