PUBLIC

ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

DOCKET NO. 9374

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE COMPLAINT

Geoffrey M. Green
Assistant Director

Lisa B. Kopchik
Christine M. Kennedy
Michael J. Turner
Attorneys

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Facsimile: (202) 326-3496
Telephone: (202) 326-3139
Email: LKopchik@ftc.gov

Counsel Supporting the Complaint

Dated: December 8, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statues

Other Authorities

I. INTRODUCTION

This case challenges conduct of the Louisiana Real Estate Appraisers Board ("Respondent") that unreasonably restrains price competition for real estate appraisal services provided to appraisal management companies ("AMCs"). Respondent is a state agency controlled by a panel of licensed real estate appraisers. Beginning in 2013, Respondent has regulated the fees that AMCs pay to real estate appraisers for appraisal services, a form of price fixing. In an earlier filing, Complaint Counsel showed that Respondent's actions from 2013 through 2016 were not adequately supervised by an independent, disinterested state actor, and that the conduct at issue in this case does not constitute state action. Complaint Counsel's Motion for Partial Summary Judgment (Nov. 27, 2017).

Respondent contends that over the past several months there have been modifications to the legal framework applicable to Respondent's activities; that going forward, antitrust violations cannot recur; and hence, that the case should be dismissed as moot. This chain of argument is defective from beginning to end. The recent modifications to Louisiana's active supervision regime are unproven, incomplete, and facially deficient. The procedure for review of Respondent's regulations by the Commissioner of Administration is largely unknown. The procedure for review of Respondent's enforcement activities by an administrative law judge is defective on its face. Certain of Respondent's enforcement activities are not even eligible for review by an administrative law judge ("ALJ"). In sum, there is no basis for concluding that there currently exists a facially satisfactory active supervision regime applicable to Respondent's future price-setting activity.

But more critically, even if (contrary to fact) a facially satisfactory active supervision

regime were now in place, this would not entitle Respondent to a dismissal. For any number of reasons, a supervision regime that looks fine on paper may fail in execution. *See, e.g.*, *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992). Recognizing this reality, the Commission has concluded that post-complaint amendments to a state supervision regime "cannot immunize" any unlawful conduct the respondent "engaged in before the amendment[s] went into effect" and that such amendments do not moot the underlying litigation. *See In re New England Motor Rate Bureau* ("*NEMRB*"), 112 F.T.C. 200, 264 (1989), *modified on other grounds sub nom. New England Motor Rate Bureau v. F.T.C.*, 908 F.2d 1064 (1st Cir. 1990).[1]

The Commission has been down this road before. Suppose (contrary to fact) that a satisfactory supervision regime were now in place in Louisiana. Following a finding of antitrust liability for past conduct, the proper recourse here, as in previous cases, is a Commission order that enjoins unreasonable private restraints on competition—qualified by an order proviso that expressly allows Respondent to engage in future conduct that falls within the contours of the state action doctrine (referred to hereafter as a "State Action Proviso"). *See, e.g.*, *In re Ticor Title Ins. Co.*, 112 F.T.C. 344, 466 (Final Comm'n Order 1989) ("Provided that nothing in this order shall prohibit respondents from collectively setting or adhering to prices for title search and examination services in any state where such collective activity is engaged in pursuant to clearly articulated and affirmatively expressed state policy and where such collective activity is actively supervised by a state regulatory body."), *rev'd sub nom. Ticor Title Ins. Co. v. F.T.C.*, 922 F.2d 1122 (3d Cir. 1991), *rev'd* 504 U.S. 621 (1992). The remedial order described here would

[1] The Commission concluded that NEMRB violated Section 5 by filing collective motor carrier rates in both Massachusetts and New Hampshire. NEMRB appealed, challenging only the Commission's finding as to the absence of sufficient state supervision in Massachusetts, and the First Circuit reversed the Commission's decision.

supplement but not interfere with the state's supervision of concerted action by market participants.

"[A]s long as a court has the ability to fashion some form of meaningful relief, a case is not moot." *F.T.C. v. Actavis, Inc.*, No. 1:09-CV-955, 2017 U.S. Dist. LEXIS 84438, at *16 (N.D. Ga. June 2, 2017). Applying this standard, the present case is not moot. Respondent is entitled to no more than an opportunity at trial to show, on the basis of an evidentiary record, that the Commission's remedial order should include a State Action Proviso. The Commission should therefore deny Respondent's motion to dismiss.

II. STATEMENT OF FACTS

Appraisal Management Companies ("AMCs") are independent companies engaged by lenders to retain real estate appraisers, and to obtain from these appraisers an assessment of the value of real property. This means that AMCs are often the direct customers of appraisers. Complaint ¶¶ 8, 15.[2]

Respondent Louisiana Real Estate Appraisers Board is an agency of the state of Louisiana charged with licensing and regulating AMCs and real estate appraisers. Complaint ¶¶ 8, 9. Respondent is empowered to discipline an AMC that violates any applicable Louisiana statute or regulation, including by revoking the AMC's license and imposing fines or civil penalties. Complaint ¶ 9.

Respondent is governed by a multi-member board, with each member appointed by the Governor and confirmed by the Senate. La. R.S. 37:3394. At all relevant times, a majority of

[2] On a motion to dismiss, the Commission assumes that all facts alleged in the Complaint and true and correct. *In re S.C. State Board of Dentistry*, 138 F.T.C. 229, 232–33 (Comm'n Order 2004) (citations omitted).

Respondent's board members have been licensed real estate appraisers actively engaged in the provision of appraisal services in Louisiana. Complaint ¶¶ 10–11. Appraisers have an obvious financial interest in securing from AMCs supra-competitive appraisal fees.

In the wake of the financial crisis of 2007–2008, policy makers perceived that inflated appraisals had contributed to a housing "bubble," *i.e.*, an unsustainable run-up in housing prices. One concern was that some appraisers experienced undue pressure from, or had ties to, lenders or other parties with financial interests in mortgage transactions. Complaint ¶ 16. In response to these concerns, Congress included in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ("Dodd-Frank") provisions intended to ensure that appraisers would operate independently, shielded from inappropriate influence exerted by lenders and other interested parties. Complaint ¶ 17. To promote appraisal independence, Dodd-Frank requires lenders and their agents to compensate appraisers "at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised." Complaint ¶ 19. Federal banking agencies charged with enforcing Dodd-Frank have advised that whether an appraisal fee is judged customary and reasonable shall depend upon an assessment of all relevant facts and circumstances, but that the marketplace should be the primary determiner of whether the compensation paid to appraisers by AMCs is customary and reasonable. Complaint ¶¶ 22, 24.

In 2012, the Louisiana legislature enacted legislation that, similar to Dodd-Frank, requires AMCs to compensate appraisers at a rate that is "reasonable and customary." Complaint ¶ 28. In 2013, Respondent promulgated Rule 31101, specifying how AMCs shall comply with Louisiana's customary and reasonable fee requirement. Specifically, Rule 31101 directs that an

AMC shall pay appraiser fees as determined by one of three prescribed methods: (i) based on a survey of fees recently paid by lenders in the relevant geographic area; (ii) based on a fee schedule established by Respondent; or (iii) based on fees recently paid in the relevant geographic area, adjusting this base rate using six specified factors. Complaint ¶ 31. By requiring that AMCs employ one of these three methods, Respondent prevents AMCs and appraisers from determining appraisal fees through *bona fid*e negotiation and through the operation of a free market. Complaint ¶ 3.

Respondent commissioned the Southeastern Louisiana University Business Research Center ("SLU") to survey fees paid by lenders. SLU conducted four annual surveys, in 2013, 2014, 2015, and 2017, and produced four reports. According to Respondent, the SLU reports identify the median fees paid by lenders for five types of appraisals in each of nine geographic regions in Louisiana. Complaint ¶¶ 4, 35; Resp. Mot. Dismiss, Exhibit 10 at 6–7.

Through its enforcement activities, Respondent has effectively required AMCs to pay appraisal fees that equal or exceed the median fees identified in the SLU reports. Complaint ¶ 5. AMCs that do not follow the rates set forth in the SLU reports risk investigation and discipline by Respondent. Complaint ¶ 36. For example, in two enforcement actions brought under Rule 31101, Respondent ordered AMCs to pay fees at least as high as the medians reported in the SLU survey. Complaint ¶¶ 37, 39–40. In at least two other instances, Respondent discontinued investigations after AMCs agreed to pay median fees set forth in the SLU report. Complaint ¶ 42.

Respondent's actions have unreasonably restrained competition and harmed consumers. Complaint ¶ 44. Respondent's anticompetitive actions are continuing, and will continue or recur unless the Commission enters appropriate and effective injunctive relief. Complaint ¶ 55.

Louisiana law does *not* clearly articulate an intention to displace competition in the setting of appraisal fees. Complaint ¶ 52. Throughout the pre-complaint period, Respondent's actions have *not* been supervised by independent state officials, that is, by persons who are not participants in the Louisiana appraisal industry. Complaint ¶ 53.

Subsequent to the issuance of the Complaint, there have been efforts in Louisiana to adopt and implement procedures for supervision of Respondent's anticompetitive activities. Initially, on July 11, 2017, the Governor issued an Executive Order that (1) directs the Louisiana Commissioner of Administration ("COA") to approve, modify, or reject any customary and reasonable fee regulation promulgated by Respondent; and (2) directs Respondent to contract with the Louisiana Division of Administrative Law ("DAL") to review enforcement actions against AMCs for alleged violations of the customary and reasonable fee rule. Resp. Mot. Dismiss, Exhibit 1.

On July 31, 2017, Respondent's board voted to repeal Rule 31101—and to adopt Replacement Rule 31101 having precisely the same text as the original rule. Resp. Mot. Dismiss, Exhibit 2. Respondent forwarded proposed Replacement Rule 31101 to the COA for review. Resp. Mot. Dismiss, Exhibit 10 at 1. By letter dated August 14, 2017, the COA approved Respondent's request to promulgate the Replacement Rule. Resp. Mot. Dismiss, Exhibit 3. There is no record evidence that the COA conducted a substantive evaluation of Replacement Rule 31101 prior to granting its approval.

On August 20, 2017, proposed Replacement Rule 31101 was published for comment in the Louisiana Register. Resp. Mot. Dismiss, Exhibit 4 at 2. Respondent held a public hearing to receive additional comments. Resp. Mot. Dismiss, Exhibit 10 at 1–2.

Respondent forwarded the proposed rule, together with the public comments, to the COA a second time. By letter dated November 9, 2017, the COA's General Counsel stated that the COA's approval of the proposed rule occurred on August 16, 2017 (prior to the receipt of public comments), and that the COA no longer had the authority "to disapprove proposed rules." Resp. Mot. Dismiss, Exhibit 11.

The Louisiana Administrative Procedures Act ("APA") establishes a procedure whereby the legislature may (at its option) review the exercise of rule-making authority by a state agency. La. R.S. 49:953 *et seq*. In brief, the state agency files with each house of the legislature a report on the proposed rule, which is then referred to the appropriate House and Senate oversight subcommittees. La. R.S. 49:968(B–D). The subcommittees may hold hearings regarding the adoption of the proposed rule, and at such hearings the subcommittees may, among other things, "[d]etermine whether the rule change . . . is in conformity with the intent and scope of the [relevant] enabling legislation," and determine whether to approve or disapprove the proposed rule. La. R.S. 49:968(D)(1). If either the House or the Senate oversight subcommittee, acting by majority vote, finds that a proposed rule is unacceptable, such determination is then reviewed by the Governor. La. R.S. 49:968(F–G). If the subcommittees elect not to hold hearings, then the proposed rule may become effective.

Respondent sent a report regarding its adoption of Replacement Rule 31101 to the Louisiana legislature, as required by the APA. The report was referred to the relevant legislative oversight subcommittees. The oversight committees elected not to hold hearings regarding the adoption of Replacement Rule 31101. Resp. Mot. Dismiss, Exhibits 12 and 13. There is no record evidence that the legislative oversight committees conducted a substantive evaluation of

Replacement Rule 31101. There is no record evidence that the legislative oversight committees voted to approve Replacement Rule 31101. There is no record evidence that Replacement Rule 31101 was reviewed by the Governor.

In or around July 2017, Respondent and DAL signed a Memorandum of Understanding ("MOU"). Resp. Mot. Dismiss Exhibit 8. Under the terms of the MOU, DAL will review any administrative complaint proposed by Respondent that alleges a violation of Replacement Rule 31101. DAL will also review any resolution of a previously-reviewed administrative complaint. DAL's scope of review is limited, as described more fully *infra*.

The Louisiana AMC Act provides that a Louisiana court may review questions of law arising in an adjudicatory proceeding conducted by Respondent. The scope of review is limited, as described more fully *infra*. La. R.S. 37:3415.20(B).

Replacement Rule 31101 became effective on November 20, 2017. Resp. Mot Dismiss, Exhibit 14.

III. LEGAL STANDARD

A. Legal Standard for Mootness

On a motion to dismiss, it is a respondent's burden to demonstrate that a lawsuit is moot, and this burden "is a heavy one." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953). A lawsuit is properly dismissed as moot only where "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Chafin v. Chafin*, 586 U.S. 165, 172 (2013) (citation omitted). As long as a court has the ability to fashion some form of meaningful relief, a case is not moot. *See Church of Scientology of California v. United States*, 506 U.S. 9, 12–13 (1992). "A defendant cannot . . . automatically moot a case simply by ending its unlawful

conduct once sued." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citations omitted).

Absent extraordinary circumstances, where the respondent plans—unless enjoined—to continue engaging in the conduct challenged in the complaint, the case is not moot. *See Rubbermaid, Inc. v. F.T.C.*, 575 F.2d 1169, 1172–73 (6th Cir. 1978).[3]

B. Overview of the State Action Defense

In *Parker v. Brown*, the Supreme Court held that the Sherman Act's prohibition of restraints of trade should not be read to bar states from imposing market restraints "as an act of government." 317 U.S. 341, 350, 352 (1943). The Court explained that "nothing in the language of the Sherman Act or in its history" suggests that Congress intended to restrict the sovereign states from regulating their economies. *Id.* at 350. Thus, states may, within certain limits, adopt and implement policies that would otherwise violate the Sherman Act. Application of the state action defense is "disfavored," however, and the doctrine must be applied narrowly. *Ticor*, 504 U.S. at 636. That is because "[t]he preservation of the free market and of a system of free enterprise" is a "national policy of . . . a pervasive and fundamental character." *Id.* at 632; *accord North Carolina State Bd. of Dental Exam'rs v. F.T.C.* ("*N.C. Dental*"), 135 S. Ct. 1101, 1110 (2015); *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013).

"[W]hile the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where a State delegates control over a market to a non-sovereign actor"—including a regulatory board whose members are engaged in the occupation it regulates. *N.C. Dental*, 135 S. Ct. at 1110. As the Supreme Court

[3] *Cf. S.C. State Bd. of Dentistry*, 138 F.T.C. at 264 ("Because Paragraph 38 of the Complaint suggests that the Board will again engage in actions similar to those challenged, we find that the Complaint sets forth grounds for injunctive relief to address such actions. We thus decline to dismiss the Complaint on such grounds at this stage of these proceedings.").

has recognized, "there is a real danger" that competitors serving as board members will act to further their "own interests, rather than the governmental interests of the State." *Id.* at 1112 (quoting *Patrick v. Burget*, 486 U.S. 94, 100 (1988)).

In order to guard against this danger, where a state regulatory agency is controlled by active market participants, the state action defense requires a showing that the allegedly anticompetitive actions were (1) undertaken in furtherance of a clearly articulated and affirmatively expressed state policy; and (2) actively supervised by the state itself. *Id.* at 1110; *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).[4]

C. Legal Standard for Active Supervision

N.C. Dental identifies four "constant requirements" for a state's active supervision of conduct alleged to violate the antitrust laws:

1. the supervisor must review the substance of the decision, not merely the procedures used to produce it;

2. the supervisor must have the power to veto or modify the particular decision to ensure that it accords with state policy;

3. the supervisor must undertake an actual review and decision, potential supervision is not sufficient; and

4. the supervisor must not be an active market participant. *N.C. Dental*, 135 S. Ct. at 1106, 1114.

"The Supreme Court has made clear that the standard for active state supervision is a rigorous one. It is not enough that the state approves private pricing agreements with little review." *In re Kentucky Household Goods Carriers Ass'n* ("*Kentucky Movers*"), 139 F.T.C. 404,

[4] For purposes of this motion, Complaint Counsel focuses on issues relating to active supervision. However, Complaint Counsel does not concede that the clear articulation requirement is satisfied. *Cf. Patrick*, 486 U.S. at 100 ("We need not consider the clear articulation prong of the [state action defense] because the active requirement is not satisfied." (internal quotation marks and citation omitted)).

415 (Comm'n Op. 2005). As the Court held in *Midcal*, "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." Instead, State officials must engage in a "pointed re-examination" of the private conduct, *Midcal*, 445 U.S. at 106, such that "the details of the rates or prices have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634. *See also Kentucky Movers*, 139 F.T.C. at 415 ("The purpose of the active supervision requirement is not to impose normative standards on state regulatory practices, but rather to ensure that a state, in displacing federal law, takes appropriate steps to ensure that its own standards are met.").

State action is an affirmative defense, and the burden of proof falls on the Respondent. *See Kentucky Movers*, 139 F.T.C. at 436–37. When assessing whether a state has actively supervised challenged conduct, the Commission focuses upon three key elements of the supervision regime. *See, e.g.*, *In re North Carolina Bd. Dental Exam'rs* (*"N.C. Dental"*), 151 F.T.C. 607, 629 (Comm'n Order Granting Partial Summ. J. Feb. 3, 2011). *First*, the Commission considers whether the state supervisor is capable of developing, and has developed, an adequate factual record from which to assess the validity of the conduct. *Id.* The record should include facts sufficient for the reviewing authority to assess the nature and impact of the challenged conduct, and then to determine whether the State's substantive regulatory requirements have been achieved. *See Kentucky Movers*, 139 F.T.C. at 416–17; *In re Indiana Household Movers and Warehousemen, Inc.* ("*Indiana Movers*"), 135 F.T.C. 535, 555–57 (Consent Order, Analysis to Aid Public Comment, 2005). "Additionally, in assembling an adequate factual record, the procedural value of notice and opportunity to comment is well established. These procedural

elements . . . are powerful engines for ensuring that relevant facts—especially those facts that might tend to contradict the proponent's contentions—are brought to the state decision maker's attention." *Indiana Movers*, 135 F.T.C. at 557; *see also TEC Cogeneration, Inc. v. Fla. Power & Light Co.*, 76 F.3d 1560 (11th Cir.), *modified*, 86 F.3d 1028 (11th Cir. 1996) (involving "eleven-month contested administrative proceeding" and "extensive and contested agency proceedings"); *Lease Lights v. Pub. Serv. Co*., 849 F.2d 1330, 1334 (10th Cir. 1988) ("[T]he Commission conducted three days of public hearings involving extensive testimony and over 100 exhibits"); *Green v. Peoples Energy Corp.*, No. 02 C 4117, 2003 U.S. Dist. LEXIS 4958, at *19 (N.D. Ill. Mar. 28, 2003) (rate approved only "after holding lengthy hearings which could span several months")*; Destec Energy v. S. Cal. Gas Co*., 5 F. Supp. 2d 433, 457 (S.D. Tex. 1997) (contested hearings, circulation of proposed resolutions for public notice and comment before being adopted, and a "fact-finding process" that "required public proceedings in which ratepayers and the public were represented"), *aff'd*, 172 F.3d 866 (5th Cir. 1999); *Kentucky Movers*, 139 F.T.C. at 417 (activities that support a determination of active supervision of collective ratemaking include collecting business data, economic studies, public hearings, and independent investigation).

The *second* element the Commission considers is evidence showing that the state supervisor has made "a specific assessment—both qualitative and quantitative—of whether the private action comports with the substantive standards established by the legislature." *N.C. Dental*, 151 F.T.C. at 629 (citations omitted). "There should be evidence of the steps the State took in analyzing the rates filed and the criterion it used in evaluating those rates. There should also be evidence showing whether the State independently verified the accuracy of financial data

submitted and whether it relied on accurate and representative samples of data." *Indiana Movers*, 135 F.T.C. at 559; *see also Yeager's Fuel v. Pa. Power & Light Co.*, 22 F.3d 1260, 1271 (3rd Cir. 1994) (agency "actually considered complaints about the [electricity rate] and decided that it served energy conservation and load management purposes"); *Cnty. of Stanislaus v. Pac. Gas & Elec. Co.*, No. CV-F-93-5866, 1994 U.S. Dist. LEXIS 21032, at *78 (E.D. Cal. Aug. 25, 1994) (agency conducted a "searching and thorough" annual review of the reasonableness of utility's rates that included the "application of criteria to consider competitive concerns"); *Kentucky Movers*, 139 F.T.C. at 422 (activities that support a determination of active supervision of collective ratemaking include a review of profit levels, and developing and applying relevant standards or measures); FTC Office of Policy Planning, REPORT OF THE STATE ACTION TASK FORCE at 22 (Sept. 2003) ("The state's supervision must reach the *substantive merits* of the challenged conduct, and the state's involvement must be meaningful." (emphasis in original)).

Third, the Commission will consider whether the state supervisor has issued a written decision explaining whether and why the private action conforms with state policy. *See N.C. Dental*, 151 F.T.C. at 629; *Kentucky Movers*, 139 F.T.C. at 420; *Indiana Movers*, 135 F.T.C. at 555. "Though not essential, the existence of a written decision is normally the clearest indication that [the state supervisor] (1) genuinely has assessed the legislature's stated standards and (2) has directly taken responsibility for that determination. Through a written decision . . . [the state supervisor] would provide analysis and reasoning, and supporting evidence, that the private conduct furthers the legislature's objectives." *Indiana Movers*, 135 F.T.C. at 557–58. *See also DFW Metro Line Servs. v. Sw. Bell Tel.*, 988 F.2d 601, 606 (5th Cir. 1993) ("[P]ublished decisions reflect that the PUC has conducted other broad-based ratemaking proceedings");

Green, 2003 U.S. Dist. LEXIS 4958, at *23–24 ("Upon conclusion of the hearings, the ICC issued lengthy orders approving the tariffs. . .").

Regardless of the review procedure contemplated by state law, an unexercised state authority to review private conduct is insufficient to constitute active supervision. For example, in *F.T.C. v. Ticor Title Ins. Co.*, competing insurance companies filed joint rates for title search and title examination with state regulators. 504 U.S. 621, 629 (1992). In Wisconsin and Montana, state law created "a theoretical mechanism for substantive review." *Id.* However, in practice, "the rate filings were subject to minimal scrutiny by state regulators." *Id.* The insurance companies argued that "as a matter of law in those States inaction signified substantive approval." *Id*. at 638. The Court rejected this contention, explaining: "Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-setting or rate-setting scheme." *Id*. As the nominal supervisor in fact took no meaningful action, the state's formal approval did not exempt the competitors' joint rate-setting from antitrust liability. *Id.* at 638–39. Also, the existence of the facially satisfactory supervision regime did not dissuade the Commission from entering a meaningful remedy. *Ticor*, 112 F.T.C. at 465-66. The Commission entered an order that, *inter alia*, enjoined the insurance companies from agreeing on prices. *Id.* The *Ticor* order contains a State Action Proviso, permitting joint rate setting when the elements of the state action defense are satisfied. *Id.* at 466.

Complaint Counsel does not contend that the *bona fides* of a state action program cannot be determined until after an antitrust court has actually reviewed the supervisor in action. As

described above, the Commission has provided extensive guidance regarding the procedural elements of a facially satisfactory supervision regime. But, where a supervision regime is introduced in the midst of a litigation, in a procedural posture in which the complaint allegations are assumed to be true, the Commission is properly skeptical of the claim that the new and untested procedures are fully sufficient to protect against future antitrust violations.

ARGUMENT

IV. THE COMMISSION CAN ENTER MEANINGFUL INJUNCTIVE RELIEF, AND THE CASE IS NOT MOOT, EVEN IF THE LOUISIANA SUPERVISION REGIME IS NOW FACIALLY ADEQUATE

Complaint Counsel expects that, after a full trial on the merits, the Commission will conclude that Respondent violated Section 5 by unreasonably restraining price competition among real estate appraisers. The Commission can and should then enter a meaningful remedy, designed to benefit consumers by preventing the recurrence of Respondent's unlawful behavior. The core order provisions should require Respondent to cease and desist from (i) adopting or enforcing any regulation, rule, or policy relating to compensation levels for real estate appraisers, and (ii) otherwise raising, maintaining, or stabilizing fees in connection with the sale of real estate appraisal services. *See* Notice of Contemplated Relief, Complaint at 10–11. If, and only if, the trial record shows that, post-complaint, Louisiana has in place a robust state action regime, then the Commission's order may include a proviso that expressly permits conduct that satisfies the elements of the state action doctrine. Several prior Commission orders contain a State Action Proviso, including *Ticor*, 112 F.T.C. at 466; *In re New England Motor Rate Bureau, Inc.*, No. 9170, 113 F.T.C. 1013 (Modifying Order, Nov. 6, 1990); *In re Alaska Healthcare Network, Inc.*, 131 F.T.C. 893, 905 (Consent Order Apr. 25, 2001); and *In re Texas Surgeons, P.A.*, No. 3944,

2000 WL 669997, at *11 (Consent Order May 18, 2000).

According to Respondent, all of Respondent's "future . . . conduct constitutes state action." Resp. Mot. Dismiss at 25. Respondent points to the Governor's Executive Order No. 17-16 ("Executive Order") and a recent contract with the Division of Administrative Law ("DAL"), under which the DAL is supposed to "exercise informed review of all Board enforcement actions against AMCs." Resp. Mot. Dismiss at 21. With these documents in hand, we are told, "it is not possible" for Respondent to violate the antitrust laws because all future enforcement of Replacement Rule 31101 will be "immune from federal antitrust enforcement under the state action doctrine." Resp. Mot. Dismiss at 23, 27.

Respondent's argument evidences a fundamental misunderstanding of the state action doctrine, coupled with a disregard of Commission practice in similar cases involving post-complaint modifications to a state's supervision procedures. For purposes of the present discussion, we will assume (contrary to fact[5]) that there exists in Louisiana today a facially satisfactory procedure for active supervision of Respondent's regulatory activities. Even if facially satisfactory, the mere existence of this new supervision regime does not render future antitrust violations impossible (and does not obviate the need for a remedial order).

A. Post-Complaint Changes in the Supervision Regime Do Not Preclude a Recurrence of Respondent's Anticompetitive Conduct and Do Not Moot this Lawsuit

Respondent can cite no antitrust case in which a post-complaint change in the state supervision regime led a court to dismiss the lawsuit, or to withhold injunctive relief. The reason, in part, is that a supervision regime that appears sufficient on paper may fail in execution. *See*

[5] Deficiencies in the Louisiana supervision regime are discussed in Part V, *infra*.

Ticor, 504 U.S. at 637 (discussed above) ("The mere potential for state supervision is not an adequate substitute for a decision by the State."). If private conduct is not submitted to state supervisors for review, or if the state supervisors do not execute appropriately, then the active supervision requirement is not satisfied, and the underlying conduct is not "the state's own." *N.C. Dental*, 135 S. Ct. at 1111.

Thus, Commission practice is not to dismiss a case on the basis of a post-complaint change in the state's supervision procedures. An antitrust remedy remains a reasonable and appropriate means of guarding against future violations. For example, in *NEMRB*, the Commission's complaint alleged that NEMRB (a rate bureau) and its members (competing motor carriers) violated Section 5 by collectively formulating and filing with various state regulatory agencies common rates for the intra-state transportation of property. *NEMRB*, 112 F.T.C. at 264. The ALJ concluded that the conduct was *lawful* in Rhode Island, where the regulatory agency sufficiently supervised the collectively established rates; and that the conduct was *unlawful* in Massachusetts and New Hampshire where, pre-complaint, collective rate setting was not sufficiently supervised. *NEMRB*, 112 F.T.C. at 264–65. Subsequent to the issuance of the ALJ's initial decision but prior to the Commission's review, New Hampshire enacted a statute empowering the New Hampshire Department of Transportation "to suspend or reject rates for being unjust or unreasonable." *Id.* at 268. Notwithstanding this modification to the state action regime, the Commission affirmed the finding of liability as to New Hampshire, explaining: "[T]his statutory change cannot immunize conduct that NEMRB engaged in before the amendment went into effect." *Id.* at 275. The Commission then proceeded to issue an order broadly prohibiting collective rate setting in all states (including Rhode Island with its robust

active supervision), with the following proviso: NEMRB was permitted to engage in collective rate setting—in states other than New Hampshire and Massachusetts—if the requirements of the state action defense (clear articulation and active supervision) were satisfied. *Id.* at 287–88. As to New Hampshire (with its new but unproven supervision statute) and Massachusetts, the order's prohibition on collective rate setting was unqualified. *Id.* at 287.

Two years later, NEMRB filed a petition requesting that the Commission reopen the proceeding and set aside the order in its entirety (akin to contending that the order was now moot). *In re New England Motor Rate Bureau, Inc.* ("*NEMRB II*"), 114 F.T.C. 536, 536 (Mod. Order Sept. 4, 1991). In the Commission's judgment, the petition sufficiently showed that, as of 1991, New Hampshire had in place a satisfactory active supervision program. *Id.* at 540 ("[S]tate officials in New Hampshire have and exercise the power to review [proposed] rates and to disapprove those that do not meet the statutory requirements that rates be just and reasonable and not discriminatory."). Still, the Commission declined to set aside the remedy. Instead, the Commission modified the order to permit collective rate setting in New Hampshire but only where the requirements of the state action defense are satisfied. *Id.* at 541. The lesson here is clear and simple: the existence of a facially sufficient supervision scheme, adopted after the antitrust violation, does not obviate the need for an injunctive remedy.

Texas Surgeons is similar. 2000 WL 669997, at *11. The Commission's complaint alleged that competing medical practice groups agreed to deal with third-party payers only on collectively determined terms. After this conduct occurred, the State of Texas adopted a state action regime: the new legislation permitted certain collective negotiations between health plans and groups of competing physicians if approved by the Attorney General. *In re Texas Surgeons,*

P.A., No. 3944, (Analysis to Aid Public Comment May 18, 2000) slip op. *available at* https://www.ftc.gov/sites/default/files/documents/cases/2000/04/ftc.gov-texasana.htm. Once again, the Commission determined that "[e]nactment of the statute does not eliminate the need for an order." *Id.* The Commission explained that "[i]t is necessary and appropriate . . . to provide a remedy against future conduct that is not approved and supervised by the State of Texas." *Id.* Thus, the Commission entered an order enjoining respondents from engaging in collective negotiations with payers, qualified by a State Action Proviso. *Texas Surgeons,* 2000 WL 669997, at *11.

In *Kentucky Movers*, the Commission challenged an association of movers that prepared and filed joint tariffs with a state agency, the Kentucky Transportation Cabinet ("KTC"). *Kentucky Movers,* 139 F.T.C. at 406–07. Although Kentucky law required supervision of joint rate setting by movers, the KTC "[had] not taken the steps that the state legislature itself has identified as important." *Id.* at 427. In the absence of a viable state action defense, the Commission concluded that the association's ratemaking activities constituted unlawful horizontal price fixing. *Id.* at 433. Similar to our Respondent, the Kentucky association sought to avoid an order, arguing that, after the ALJ's initial decision, the KTC had taken steps "to augment the level of supervision it exercises" over household goods carrier rates. *Id.* at 437. The Commission rejected this argument, and entered an order requiring the association to cease and desist from collective ratemaking. *Id.* The Commission's opinion notes that the association may petition to modify the order (perhaps to request inclusion of a State Action Proviso) if and when there is sufficient information to show that the KTC's new procedures actually provide active state supervision. *Id.*

B. The Principles and Cases Cited by Respondent are Inapplicable Here

Respondent cites three cases for the proposition that a violation cannot recur where the legislation or regulation challenged in the lawsuit has been repealed and will not be re-enacted. Resp. Mot. Dismiss at 25–26. This proposition is not applicable here, as Respondent has already re-promulgated Prior Rule 31101 as Replacement Rule 31101. In this context, the dispute concerning the legality of Respondent's efforts to regulate appraisal rates is not moot. *See Northeast Florida v. Jacksonville*, 508 U.S. 656, 662 & n.3 (1992) (noting that a matter is not mooted where the challenged regulation is repealed and replaced by one that "differs only in some insignificant respect"); *Mesquire v. Aladdin*, 455 U.S. 283, 289 (1982) (noting that where the defendant can just re-enact the challenged regulation, repeal of that regulation does not moot the matter); *Citizens for Responsible Gov't State PAC v. Davidson*, 236 F.3d 1174, 1182 (10th Cir. 2000) ("Where a new statute 'is sufficiently similar to the repealed [statute] that it is permissible to say that the challenged conduct continues,' the controversy is not mooted by the change, and a federal court continues to have jurisdiction." (citation omitted; alteration in original)).

Next, Respondent implies that, because Respondent is a state agency, the Commission should credit its representation that any illegal conduct has ceased and will not recur. Resp. Mot. Dismiss at 26–28. This contention fails for three reasons. *First*, none of the cases cited by Respondent involves the antitrust laws.[6] *Second*, in the cases cited by Respondent, the

[6] *Brown v. Buhman*, 822 F.3d 1151 (10th Cir. 2016) (constitutionality of a bigamy statute); *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974 (6th Cir. 2012) (constitutionality of advertising restrictions); *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176 (9th Cir. 2010) (improper application of the Cargo Preference Act); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096 (10th Cir. 2010) (improper application of the Endangered Species Act); *Bahnmiller v. Derwinski*, 923 F.2d 1085 (4th Cir. 1991) (improper application of the Veterans Judicial Review Act); *Mosley v. Hairston*, 920 F.2d 409 (6th Cir. 1990) (improper application of the Social Security Act).

government actor in fact altered its practices.[7] Here, in contrast, Respondent has not ceased its efforts to restrain price competition among appraisers. Indeed, Prior Rule 31101 and Replacement Rule 31101 are identical, letter for letter. Respondent itself has represented that its enforcement activity will not change. *Third*, Respondent is a state agency controlled by active market participants. As the Supreme Court has recognized, agencies controlled by active market participants are apt to "confus[e] their own interests with the State's policy goals." *N.C. Dental*, 135 S. Ct. at 1114. This is the very reason for requiring independent supervision, as opposed to trusting to the good faith of the agency. *Id*.

In addition, in the past Respondent has evaded a theoretically available mechanism of supervision. For several years, Respondent has commissioned the Southeastern Louisiana University Business Research Center ("SLU") to conduct a survey of recent appraiser rates in Louisiana. Under the guise of enforcing Prior Rule 31101, Respondent has coerced certain AMCs to pay appraiser fees as specified in a fee schedule derived from the SLU survey. Respondent treated the fee schedule as separate and apart from Prior Rule 31101, and did not submit the fee schedule for legislative review, a review that was available under the Louisiana APA. (As discussed below, whether the legislature would have elected to review the fee schedule is a separate question.)

To recap, the existence of a facially adequate active supervision regime does not

[7] *Brown*, 822 F.3d at 1169 (noting that the state department substantively changed its enforcement policy); *Bench Billboard*, 675 F.3d at 981 (noting that case the city defendant implemented "entirely new statutory scheme"); *Am. Cargo Transp.*, 625 F.3d at 1180 (noting that the government "changed its position" and agreed with the plaintiff); *Rio Grande Silvery Minnow*, 601 F.3d at 1111 (finding that the government agency had issued a substantively new policy and rescinded the old policies); *Bahnmiller*, 923 F.2d at 1089 (holding that the defendant's change in policy was substantive and mooted the plaintiffs' claim); *Mosley*, 920 F.2d at 415 (holding that the claim was moot because the federal statute was amended in a manner that addressed plaintiff's claim and the agency was adopting a new policy to comply with the statute).

guarantee that supervision will actually occur, and so does not obviate the need for injunctive relief. Respondent's contention that, in the future, everything that the Board does will be "immune from federal antitrust enforcement," Resp. Mot. Dismiss at 23, is simply inaccurate. Furthermore, the Commission has consistently declined to dismiss antitrust cases where there is a post-complaint change in the state's procedures for active supervision. The Commission should adhere to this practice by rejecting Respondent's motion to dismiss—even assuming that today a facially adequate supervision program exists in Louisiana. If, after trial, the Commission concludes that there is both an antitrust violation and a facially adequate state action regime, the Commission may (as in *Ticor*) temper the core cease and desist provisions of its remedial order with a State Action Proviso.

V. THE CURRENT SUPERVISION REGIME APPLICABLE TO RESPONDENT'S CONDUCT IS FACIALLY FLAWED

As described above, Respondent's future price-fixing activity is not automatically immune from antitrust liability, even if today Louisiana had in place a facially adequate regime of active supervision. In addition, at present, Louisiana *does not* have in place a facially satisfactory regime of active supervision. As it relates to Respondent's activities, the Louisiana system of review is incomplete, unproven, and/or facially deficient in multiple respects. This is a further reason why, after a finding of antitrust liability, a Commission remedy will be necessary and appropriate. And this is a further reason why this lawsuit is not moot.

Respondent's Brief identifies four state actors that may potentially supervise Respondent's activities: (i) the Commissioner of Administration; (ii) the Louisiana legislature; (iii) the Division of Administrative Law; and (iv) the state courts. *See* Resp. Mot. Dismiss at 18–

22. Below we discuss the principal defects attendant to each of the four procedures. We then describe conduct by Respondent that is potentially anticompetitive, but falls outside of the Louisiana supervision regime.

A. Supervision of Rulemaking by the Commissioner of Administration is Facially Flawed

The Governor's Executive Order directs Respondent to submit any proposed regulation related to customary and reasonable fees, together with its rulemaking record, to the Commissioner of Administration ("COA" or "Commissioner"). The Executive Order provides that the COA may approve, reject, or modify a proposed regulation "to ensure" that it comports with state policy.

The Executive Order is, however, silent with regard to the all-important procedural aspects of the COA's review. *See* Resp. Motion Dismiss, Exhibit 1. The Executive Order does not direct COA to provide public notice, to solicit or accept comments from anyone other than Respondent, or to develop a factual record. The Commissioner is not directed to conduct a substantive analysis or to issue a written opinion. For purposes of assuring active state supervision of Respondent's regulations, the Commissioner of Administration process is not facially sufficient; it is facially devoid of any of the necessary checks and supervisory powers. Accordingly, there is no way to assess the adequacy of supervision that might be exercised by the COA.

In practice, procedural deficiencies are also apparent. By letter dated August 14, 2017, the COA approved publication of Replacement Rule 31101 in a Notice of Intent in the Louisiana Register. *See* Resp. Motion Dismiss, Exhibit 3. The letter fails to describe the procedural aspects of the COA review that preceded this decision. It does not indicate whether COA provided

public notice, solicited or accepted comments from anyone other than the Respondent, or developed a factual record. The letter contains no analysis, reasoning, or supporting evidence.

The COA letter issued on August 14, 2017, before publication of the Notice of Intent in the Louisiana Register, and before collection of public comments. Accordingly, the COA could not have considered or relied upon the comment letters appended to Respondent's Brief. After the public comment period, Respondent secured from the General Counsel of the Division of Administration ("DOA") a follow-up letter affirming that "[t]he public comments were nearly all positive." Resp. Mot. Dismiss, Exhibit 11. But in the same letter, the General Counsel expressly disavows any authority at this time to supervise the adoption of Replacement Rule 31101:

> At the outset, I should note that at this point in the rulemaking process, the legislative oversight committee and the Governor—not the DOA—have the formal authority to disapprove proposed rules. Pursuant to Executive Order No. 17-16, any action on the part of the DOA to approve, reject, or modify the proposed rule was prior to its promulgation. As noted above, the Commissioner approved the adoption of the rule via letter on August 14, 2017.

Resp. Mot. Dismiss, Exhibit 11. Thus, "the substantial written and oral public comment" on which Respondent relies in no way supports a finding of active supervision by the Commissioner of Administration. *See* Resp. Mot. Dismiss at 21.

In ruling on Respondent's motion to dismiss, the Commission need not determine whether Replacement Rule 31101 constitutes antitrust-exempt state action. The issue here is whether the Commission can grant any meaningful relief; whereas Replacement Rule 31101 may be replaced yet again tomorrow. That said, the record shows no meaningful supervision by the Commissioner of Administration. In fact, Respondent has not shown that the COA's review process was in any respect more rigorous than the insufficient, rubber-stamping review afforded

to collective rate-making in *Ticor*, 504 U.S. at 638, and *Kentucky Movers*, 139 F.T.C. at 498.

B. Supervision of Rulemaking By the Louisiana Legislature is Facially Flawed

The Louisiana Administrative Procedure Act provides that the legislature may, at its option, review the exercise of rule-making authority by a state agency. La. R.S. 49:968(B). This is the procedure referenced in the DOA General Counsel's correspondence (quoted above). Respondent's Brief states that "*every rule* promulgated by the Board *must be reviewed* by the Senate and House Commerce Committee legislative oversight subcommittees." Resp. Mot. Dismiss at 19 (emphasis added). The contrary is actually true: legislative review is wholly optional. *See* La. R.S. 49:968(D)(1)(a); La. R.S. 49:968(E)(2).

Pursuant to the Louisiana APA, the state agency files with the legislature a report on its proposed rule, which is then referred to the appropriate House and Senate oversight subcommittees. La. R.S. 49:968(B). The subcommittees *may* elect to hold hearings regarding the adoption of the proposed rule, but they are not required to do so. La. R.S. 49:968(D)(1)(a). At a hearing, a subcommittee may: (i) determine "whether the rule change . . . is in conformity with the intent and scope of the [relevant] enabling legislation," and (ii) determine whether the rule change is acceptable or unacceptable to the subcommittee. La. R.S. 49:968(D)(3). Each such determination "shall require an affirmative vote of a majority of the members of the subcommittee that are present and voting." La. R.S. 49:968(E). If either the House or the Senate subcommittee determines by majority vote that a proposed rule is unacceptable, the determination is then reviewed by the Governor. La. R.S. 49:968(F–G).

If, on the other hand, the subcommittee in each chamber opts not to hold hearings and not to make determinations, the proposed rule nevertheless may be made final and effective. La. R.S.

49:968(E)(2), (H). Accordingly, there is no assurance that, when in the future Respondent exercises its rule-making authority in a manner that harms competition, such conduct will be actively supervised by the Louisiana legislature. Again, an unexercised state authority to supervise does not transform the actions of market participants into exempt state action. *See Ticor*, 504 U.S. at 638; *Kentucky Movers*, 139 F.T.C. at 505. The legislative supervision procedure is therefore facially flawed.

Respondent appends to its brief an email authored by the Executive Director of the Louisiana Real Estate Appraisers Board, Resp. Mot. Dismiss, Exhibit 13, and a letter authored by Louisiana State Senator Martiny, Resp. Mot. Dismiss, Exhibit 12. These documents are not eligible for judicial notice on this motion to dismiss, and should be disregarded.[8] Moreover, these documents do not show active supervision of Replacement Rule 31101 by the Louisiana legislature.

The email authored by Respondent's Executive Director reports that no member of the House oversight subcommittee "voiced any concern" about Replacement Rule 31101, or "saw the need for any public hearing." Resp. Mot. Dismiss, Exhibit 13. Senator Martiny's letter states that a Senate subcommittee "has conducted a review of" Replacement Rule 31101, and that no member requested to convene a hearing. Resp. Mot. Dismiss, Exhibit 12. However, the letter does not describe what the review entailed.

The process recited in these two documents does not constitute approval of Replacement

[8] The Commission may take judicial notice of "state statutes, regulations, court decisions, and other official government records," *S.C. State Bd. of Dentistry*, 138 F.T.C. at 240, as long as they concern facts "that are not subject to reasonable dispute." *United States v. Ritchie*, 342 F.3d 903, 908–09 (9th Cir. 2003) (quoting Fed. R. Evid. 201(b)). The letter and email in Exhibits 12 and 13 are not official government records, and the facts recited therein are a subject of dispute. Therefore, Exhibits 12 and 13 do not meet the requirements of Rule 201 and should not be considered.

Rule 31101 by the Louisiana Legislature. By statute, such approval would require actual hearings and an actual vote by the legislators. The mere possibility of legislative review, as an option not exercised, is not enough to satisfy the active supervision requirement. *See Ticor*, 504 U.S. at 638; *Kentucky Movers*, 139 F.T.C. at 505.

For purposes of this motion, the Commission need not determine whether the adoption of Replacement Rule 31101 constitutes antitrust-exempt state action. That said, the record properly before the Commission shows no active supervision by the legislative branch.

C. Supervision of Respondent's Enforcement Actions by the Division of Administrative Law is Facially Flawed

In or about July 2017, Respondent entered into a Memorandum of Understanding ("MOU") with the Division of Administrative Law ("DAL"), pursuant to a directive in the Governor's Executive Order. Resp. Motion Dismiss, Exhibit 9. This document establishes a procedure for review by an administrative law judge where Respondent takes certain enforcement actions against an AMC. Subject to that review are administrative complaints, and actions that resolve a previously-reviewed administrative complaint, *e.g.*, dismissal, informal or formal settlement, or an order. We here focus on enforcement proceedings. An ALJ will review Respondent's enforcement proceedings pursuant to paragraph 5(c) of the MOU and the state Administrative Procedure Act, La. R.S. 49:964(G), incorporated by reference in the MOU.

Respondent plans to continue its practice of conducting administrative proceedings against AMCs for alleged violations of Rule 31101. If Respondent concludes that an AMC has paid appraisal fees that are "too low," then it may issue sanctions. In particular, Respondent may require the AMC, going forward, to pay appraiser fees no lower than specified in a fee schedule approved by Respondent. The MOU provides that an ALJ will review Respondent's

determination of liability as well as the fee schedule and other elements of the proposed remedy.

In order to invoke the state action defense, the state's supervision must be substantive, and not deferential to the policy judgments of the market participants. *See, e.g.*, *N.C. Dental*, 135 S. Ct. at 1116. For this reason, antitrust courts are highly skeptical of placing responsibility for active supervision in the hands of judges. Traditional forms of judicial review of administrative actions, such as limited inquiries into whether an agency acted within its delegated discretion, followed proper procedures, or had some factual basis for its actions, are insufficient to constitute active supervision. *See Patrick*, 486 U.S. at 105 ("constricted" judicial review of whether decision was supported by reasonable procedures and reasonable evidence "does not convert the action of a private party . . . into the action of the State for purposes of the State action doctrine"); *Pinhas v. Summit Health*, 894 F.2d 1024, 1030 (9th Cir. 1989) (judicial review was not active supervision where "reviewing court may not reject the judgment of the governing board even if it disagrees with the board's judgment" (citation omitted)); *Shahawy v. Harrison*, 875 F.2d 1529, 1535–36 (11th Cir. 1989) (judicial review "for procedural error and insufficient evidence" is not active supervision); *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343, 2015 U.S. Dist. LEXIS 166754, at *26 (E.D. Tex. Dec. 14, 2015) (judicial review "limited to inquiring whether the decision exceeded the statutory authority granted to the agency" is not active supervision).

As a mechanism of active supervision, the MOU procedure is facially flawed in several respects. First, the MOU procedure is not designed to develop an adequate factual record. The ALJ reviews only the evidence assembled by Respondent in the course of its enforcement proceeding. Resp. Mot. Dismiss, Exhibit 9. The review process is closed to consumers, public-

interest groups, AMCs, economic experts, industry experts, *etc*. Second, the ALJ is required to "giv[e] deference to [Respondent's] determination of credibility issues." Respondent's Mot. Dismiss, Exhibit 11 ¶5(c)(iii). Third, the ALJ is not required to issue a written decision "provid[ing] analysis and reasoning and supporting evidence that the [Respondent's] conduct furthers the legislature's objectives." *Indiana Movers*, 135 F.T.C. at 558.

Fourth, and most important, ALJ review of the enforcement proceeding will be limited to addressing discrete legal questions: Has Respondent acted "in excess of its legal authority?" La. R.S. 49:964(G)(5). Are Respondent's conclusions "arbitrary or capricious or characterized by abuse of discretion"? La. R.S. 49:964(G)(5). This type of review is not sufficient for state action purposes. The ALJ will not "review the substance of the anticompetitive decision," *N.C. Dental*, 135 S. Ct. at 116 (citation omitted), and will not determine "whether it accorded with state regulatory policy." *Patrick*, 486 U.S. at 105.[9]

Respondent cannot remedy this defect in the Louisiana active supervision regime simply by editing (or re-characterizing) the MOU. A serious program for supervising collective rate making by appraisers in Louisiana, and ensuring that rates comport with the state's policy objectives, would entrust supervision to an entity akin to a public utilities commission, not to an administrative law judge. Thus, the Commission in *Kentucky Movers* stated:

> The courts that have addressed the active supervision requirement, and the Commission's previous decisions involving collective ratemaking, have identified a number of state supervisory activities that support a determination of active supervision. These factors include where the state: collects business data (including revenues and expenses); conducts

[9] Respondent's Brief represents that the ALJ will assess whether an enforcement proceeding "serves Louisiana's public policy of protecting the integrity of residential mortgage appraisals." Resp. Mot. Dismiss at 20. This mischaracterizes the MOU. See MOU ¶5(c) (stating that review of enforcement proceedings and proposed remedy shall be conducted according to APA standards).

> economic studies; reviews profit levels and develops standards or measures such as operating ratios; disapproves rates that fail to meet the state's standard; conducts hearings; and issues a written decision.

139 F.T.C. at 417. Respondent has not shown, with evidence, that Louisiana's administrative law judges have the experience, know-how, authority, tools and resources that are needed for active supervision of collective rate-making. Hence, the MOU process is facially flawed.

D. Supervision of Respondent's Enforcement Actions by a State Court is Facially Flawed

Following the ALJ process discussed above, an AMC may seek review of Respondent's enforcement proceeding in state court. The Supreme Court has not determined whether judicial review can ever provide the requisite state action supervision. *See Patrick*, 486 U.S. at 104 (declining to decide "the broad question whether judicial review of private conduct can constitute active supervision"). But, even setting this aside, judicial review is plainly insufficient here for two reasons.

First, there is no guarantee that a state court will review Respondent's enforcement actions. *N.C. Dental*[10] and *Ticor*[11] expressly hold that active supervision must actually occur, and not be optionally available or possible. Judicial review that is contingent on a plaintiff filing a lawsuit shifts the burden of initiating supervision away from the court. An AMC may decide not to appeal Respondent's findings, particularly because the cost of a successful appeal may be substantial. Judicial review that is contingent provides no certainty that the state will make a reviewing decision, and therefore is not active supervision.

Second, under Louisiana state law, any future state court review of an enforcement action

[10] *N.C. Dental*, 135 S. Ct. at 1116 (noting that the "mere potential for [such review] is not an adequate substitute for a decision" (citation omitted)).
[11] *Ticor*, 504 U.S. at 638.

by Respondent against an AMC will be limited to assessing whether the Respondent "has regularly pursued its authority and has not acted arbitrarily." La. R.S. 37:3415.20(B)(2) ("If the court finds that the Louisiana Real Estate Appraisers Board has regularly pursued its authority and has not acted arbitrarily, it shall affirm the decision, order, or ruling of the board."). Judicial review is insufficient for state action purpose where the court will not "review the substance of the anticompetitive decision," *N.C. Dental*, 135 S. Ct. at 1116 (citation omitted), and will not determine "whether it accorded with state regulatory policy." *Patrick*, 486 U.S. at 105. There is no assurance that judicial review by Louisiana state courts will supply the necessary supervision.[12]

E. The Louisiana Regime Does Not Provide For Supervision of Important Elements of Respondent's Conduct

Much of Respondent's past anticompetitive conduct would not be eligible for review under Louisiana's current supervision regime. In multiple instances, Respondent has investigated appraiser-complaints that an AMC paid or offered a fee lower than the median fee specified in the SLU fee survey. In several cases, Respondent closed the investigation after the AMC agreed to pay the survey's median fees in the future. Complaint ¶ 42. Respondent's recent Policy Statement indicates that Respondent intends to continue this kind of informal enforcement

[12] Respondent contends that the Louisiana supervision regime is similar to review procedures found sufficient in two district court cases. *See* Resp. Mot. Dismiss at 20–21. In *Ports Authority v. Compania Panamena de Aviacion ("Copa")*, 77 F. Supp. 2d 227 (D.P.R. 1999), the district court affirmed the state action defense where the state supervisor *itself*, through contractual agreement with the defendant, set the defendant's airport facility fees. *Id.* at 234, 236 (noting that the private defendant "has virtually no discretion in the establishment of the fee"). No similar contracting process exists in the present case. In *Prime Healthcare Services-Monroe v. Indiana University Health Bloomington*, No. 1:16-cv-00003, 2016 U.S. Dist. LEXIS 136474 (S.D. Ind. Sept. 30, 2016), the plaintiff hospital alleged that the defendant-owned ambulance service gave preferential treatment to the defendant's hospital system. To the extent that the court in *Prime Healthcare* held that state supervision is sufficient where the state supervisor "*may* review" the defendant's actions and "*may* effectuate disciplinary action" for compliance with state regulations, (*id.* at *23–24 (emphasis supplied)), the case is inconsistent with Supreme Court precedent. *N.C. Dental*, 135 S. Ct. at 1114, 1116 (holding that the supervisor must make an actual decision regarding the action, potential supervision is not enough); accord *Ticor*, 504 U.S. at 638.

activity. Resp. Mot. Dismiss, Exhibit 10 at 2. Because Respondent conducts investigations without first issuing an administrative complaint, any agreement that terminates an investigation will not be subject to Division of Administrative Law review, and cannot be shielded by the state action doctrine. Resp. Mot. Dismiss, Exhibit 9 ¶ 5(b) (stating that only the resolution of a "DAL-approved" enforcement action will be reviewed).

In addition, a regulation promulgated by Respondent pursuant to any statute other than La. R.S. 37:3415(A), or an administrative complaint alleging violation of a rule other than replacement Rule 31101, will not be reviewed by any state supervisor, and thus will not be shielded by the state action doctrine. Resp. Mot. Dismiss, Exhibit 2 ¶ a.

VII. CONCLUSION

This case challenging Respondent's price-fixing activity is not moot. Following a finding of liability, the Commission can and should issue a cease and desist order that prohibits Respondent from repeating its anticompetitive conduct. At present, Louisiana does not have in place a facially satisfactory regime of active supervision. For this reason, a State Action Proviso is not advisable. Under Commission Rule of Practice 2.51, Respondent may later seek modification of the order, such as the inclusion of a State Action Proviso, if Respondent can show that an effective state action regime will supervise its actions. This is the procedure followed by the Commission in *NEMRB*, 112 F.T.C. at 287–88. *See also Indiana Movers*, 135 F.T.C. at 550 (discussing order modification process relating to state action).

For the foregoing reasons, the Commission should deny Respondent's Motion to Dismiss Complaint.

December 8, 2017

Respectfully submitted,

/s/ Geoffrey M. Green
Geoffrey M. Green
Lisa B. Kopchik
Michael Turner
Christine Kennedy
Thomas H. Brock

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-3139
LKopchik@ftc.gov

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on December 8, 2017, 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
Constantine Cannon LLP
1001 Pennsylvania Avenue, NW
Suite 1300N
Washington, DC 20004
scannon@constantinecannon.com

Counsel for Respondent Louisiana Real Estate Appraisers Board.

Dated: December 8, 2017

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.

Date: December 8, 2017

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