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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE OMMISSION

COMMISSIONERS: **Joseph J. Simons, Chairman**
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In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

DOCKET NO. 9374

COMPLAINT COUNSEL'S REPLY IN SUPPORT OF SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DECISION DISMISSING RESPONDENT'S FOURTH AFFIRMATIVE DEFENSE

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INTRODUCTION

The Louisiana Real Estate Appraisers Board ("LREAB"), a state agency controlled by real estate appraisers, is charged with violating Section 5 of the FTC Act by regulating the fees that appraisal management companies ("AMCs") must pay for appraiser services. LREAB acknowledges that Rule 31101 results in the "displacement of competition."[1] This is the type of collusive conduct that the Supreme Court described and condemned in *Midcal*, warning that: "The national policy in favor of competition cannot be thwarted by casting . . . a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum,* 445 U.S. 97, 106 (1980). For its antitrust defense to alleged price fixing, LREAB asserts that it is complying with a different federal statute – the Dodd-Frank Wall Street Reform and Consumer Protection Act – and that Dodd-Frank compliance is sufficient to exempt LREAB from liability under Section 5. (As discussed below, LREAB employs a loose definition of "Dodd-Frank compliance.") This defense, in all its variations, fails.

There are two regulation-related defenses that an antitrust defendant may potentially assert in this case. First, a defendant could argue that Dodd-Frank requires that market participants fix appraiser fees. This argument sounds in implied antitrust immunity. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 243a2 (2018 Cum. Supp.) ("Hovenkamp") (conduct that is specifically compelled by a federal agency acting within its jurisdiction is deemed immune from antitrust liability). LREAB expressly disclaims this defense. Respondent's Supplemental Brief in Opposition Regarding Good Faith Regulatory Compliance,

[1] Respondent's Motion to Dismiss Complaint, *In re La. Real Estate Appraisers Bd.*, Docket No. 9374, at 15 (Nov. 27, 2017).

In re La. Real Estate Appraisers Bd., Docket No. 9374, at 18 (June 25, 2018) ("Resp. Br.") ("This case does not involve an implied immunity . . .").

Second, a defendant could argue that although Dodd-Frank does not actually require that market participants fix appraiser fees, the defendant has made a good faith, objectively reasonable, and excusable error in its attempt to comply with a requirement of Dodd-Frank. This argument sounds in the "good faith regulatory compliance defense."[2] As discussed below, the record does not support the elements of this defense. Most prominently, LREAB fails to identify any provision of Dodd-Frank that, within reason, requires unsupervised price regulation by market participants, in lieu of regulation of AMCs by the State of Louisiana.

Dodd-Frank encourages States – but not private competitors – to oversee in limited ways the operation of the real estate appraisal industry.[3] Dodd-Frank *does not* require, authorize, or contemplate the regulation of appraiser fees by market participants.[4] In fact, most States that participate in the Dodd-Frank program for the registration and supervision of AMCs do not resort to unsupervised price regulation by private (non-state) actors.[5] It follows that LREAB's conduct is objectively unreasonable.

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[2] This defense excuses certain technical errors committed by a defendant when implementing an imprecise regulatory standard; mistakes of law are not excused. *Phonetele, Inc. v. American Tel. & Tel. Co.*, 664 F.2d 716, 738 (9th Cir. 1981) ("*Phonetele I*"). In the telecommunications/regulatory compliance cases, defendant AT&T reasonably determined that the Communications Act's "public interest" standard, 47 U.S.C. § 201A) (1976), required AT&T to adopt the tariff terms at issue. *S. Pac. Commc'ns Co. v. American Tel. & Tel. Co.*, 740 F.2d 980, 1009–10 (D.C. Cir. 1984) ("*Southern Pacific*"); *Phonetele I,* 664 F.2d at 738.

[3] *See* Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense, *In re La. Real Estate Appraisers Bd.*, Docket No. 9374, at 2–6 (Feb. 6, 2018).

[4] *See id.*

[5] Several states participate in the Dodd-Frank AMC Program by placing regulatory authority for AMCs in the hands of state employees. ARIZ. REV. STAT. § 32-3662; CAL. BUS. & PROF. CODE § 4-3-11320.5; IOWA CODE § 543E.4; MICH. COMP. LAWS § 339.2663; MINN. STAT. § 82C.03; NEV. REV. STAT. § 645C.720; S.D. CODIFIED LAWS § 36-21D-1; WASH. REV. CODE § 18.310.060; WIS. STAT. § 458.33 (effective July 1, 2018)).

Several states delegate regulatory authority to boards with a minority of market participants. COLO. REV. STAT. § 12-61-703; FLA. STAT. § 475.613; KAN. STAT. ANN. § 58-4104; KY. REV. STAT. ANN. § 324A.015; MD. BUS. OCC. & PROF. CODE § 16-202; N.H. REV. STAT. ANN. § 310-B:4; TEX. OCC. CODE § 1103.052; VT. STAT. ANN. tit. 26, § 3313; W. VA. CODE R. § 30-38-6; WYO. STAT. ANN. § 33-39-104.

In its most recent brief, LREAB appears to advance a third defense, a theory that finds no support in the case law. According to this theory, Dodd-Frank (viewed in isolation) affords States discretion as to the regulation of AMCs: a State may elect to regulate appraiser fees directly (through state action), *or* a State may delegate unsupervised authority over appraiser fees to a panel of market participants. LREAB's Rule 31101 represents the latter method (price fixing by market participants). According to LREAB, its conduct "complies" with (*i.e.*, is consistent with but not required by) Dodd-Frank, and on this basis should be treated as exempt from antitrust liability. *See* Resp. Br. at 16, 23. Under LREAB's theory of regulatory compliance, LREAB is obliged to comply with only one federal statute at a time. This argument misconstrues the required elements of the regulatory compliance defense and ignores basic tenets of statutory interpretation.

The regulatory compliance defense applies only where antitrust law and a federal regulatory statute, if both applicable, would impose upon a defendant conflicting standards of conduct. Absent a statutory conflict, the equitable concern targeted by this defense (akin to entrapment) does not arise.[6] As Dodd-Frank and antitrust do not conflict, LREAB can and therefore must comply with both statutes;[7] the good faith compliance defense is inapplicable. *See Pom Wonderful LLC v. Coca-Cola Co*., 134 S. Ct. 2228, 2238 (2014) ("When two statutes

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Several states have created procedures for active state supervision of regulatory boards controlled by market participants. Oklahoma Executive Order 2015-33; Alabama Executive Order Number 7 (2015).

Several states require an AMC to certify that the AMC has a system in place to ensure the payment of customary and reasonable appraiser fees. IDAHO CODE ANN. § 54-4124(8); KAN. STAT. ANN. § 58-4704(a)(12); MISS. CODE ANN. § 73-34-103(2)(j); NEB. REV. STAT. 76-3203(2)(j) (effective until July 19, 2018)).

[6] Where a firm is subject to conflicting antitrust and regulatory standards, it may potentially be ensnared in the following trap. The firm is required to comply with the mandate of the federal regulatory agency, and required to disregard any conflicting antitrust obligation. And yet, a reasonable error in complying with the regulatory mandate may expose the firm to antitrust liability (on top of whatever sanctions are available for non-compliance with the federal regulation).

[7] LREAB acknowledges that Dodd-Frank does not conflict with the antitrust laws. Resp. Br. at 18.

complement each other, it would show disregard for the congressional design to hold that Congress intended one federal statute to preclude the operation of the other."); *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963) ("[T]he proper approach to this case . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted.").

LREAB's supplemental brief discussing the regulatory compliance defense contains multiple errors. Complaint Counsel submits this memorandum in order to correct the most important deficiencies. We show here that the regulatory compliance defense, properly understood, is categorically inapplicable to the antitrust claim asserted in this lawsuit. LREAB's Fourth Affirmative Defense should therefore be dismissed.

DISCUSSION

1. The good faith regulatory compliance defense has been successfully invoked only in the context of the telecommunications industry circa 1980.

LREAB claims that the regulatory compliance defense has been "successfully invoked in diverse contexts." Resp. Br. at 14 (citing *Nat'l Gerimedical Hosp. & Gerontology Ctr. v. Blue Cross of Kansas City*, 452 U.S. 378, 393 n.19 (1981); *Silver*, 373 U.S. at 366; *Mautz & Oren, Inc. v. Teamsters, Chauffeurs, and Helpers Union, Loc. No. 279*, 882 F.2d 1117, 1124 & n.14 (7th Cir. 1989)). This is incorrect. *Mautz & Oren* is not an antitrust case. In the two antitrust cases cited by LREAB, the defendant asserted an affirmative defense predicated on its

compliance with a non-antitrust statute. And in each case that affirmative defense was rejected by the Supreme Court. *Nat'l Gerimedical*, 452 U.S. at 393; *Silver*, 373 U.S. at 361.

According to LREAB, the Supreme Court "reaffirmed" the regulatory compliance defense in *Credit Suisse Securities (USA) v. Billing*, 551 U.S. 264, 271 (2007). This too is incorrect. The *Billing* opinion does not affirm, does not reference, and does not acknowledge a regulatory compliance defense (separate from implied immunity).[8]

Complaint Counsel is aware of only two cases in which an antitrust action was defeated by application of the regulatory compliance defense: *Phonetele, Inc. v. American Tel. & Tel. Co.*, 889 F.2d 224 (9th Cir. 1989) ("*Phonetele II*") and *Southern Pacific*, 740 F.2d. at 980. Each case addressed a Section 2 claim that AT&T unlawfully impeded the plaintiff from interconnecting its equipment to the AT&T telephone network.

2. A defendant's reasonable good faith effort to comply with a federal regulatory scheme is not sufficient to establish the regulatory compliance defense.

LREAB contends: "The availability of the regulatory compliance defense is . . . predicated *only* on a party's reasonable good faith efforts to comply with a defined federal regulatory scheme." Resp. Br. at 23 (emphasis added). LREAB uses the term "comply" to denote conduct that is "consistent with" or "implements the policies of" a regulatory statute. Resp. Br. at 2, 14. This is not at all what is contemplated by the regulatory compliance defense. *See Phonetele I*, 664 F.2d at 738 (defendant must show reasons "that its actions were necessitated by concrete factual imperatives").

Supreme Court precedent plainly negates the contention that conduct consistent with or implementing a federal regulatory program is automatically exempt from antitrust liability. For

[8] The *Billing* opinion cites *Phonetele I* for the proposition that the test for finding implied immunity varies depending upon the regulatory statute invoked by the antitrust defendant. 551 U.S. at 271.

example, in *Nat'l Gerimedical*, 452 U.S. at 388–93, the Court held that an insurance company's refusal to deal with a new hospital, in order to further the goals of the National Health Planning and Resources Development Act, was not exempt from antitrust liability. *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374–75 (1973), held that a monopolist electric utility's refusal to sell power at wholesale to municipal systems, even if consistent with the Federal Power Act, violated the antitrust laws. *United States v. Philadelphia National Bank*, 374 U.S. 321, 352 (1963), held that a bank merger approved by the Comptroller of the Currency, pursuant to the Bank Merger Act, violated the antitrust laws. *Silver*, 373 U.S. at 361, held that a collective refusal to deal by members of a securities exchange, consistent with the Securities Exchange Act, violated the antitrust laws. *See also California v. Federal Power Commission*, 369 U.S. 482 (1962) (merger approved by federal regulatory agency is subject to antitrust scrutiny); *United States v. Radio Corp. of America*, 358 U.S. 334 (1959) (same).

These Supreme Court cases teach that actual and/or good faith compliance with a federal regulatory statute, without more, is insufficient to establish an antitrust defense. Other required elements of the regulatory compliance defense are discussed below.

3. The good faith regulatory compliance defense requires a statutory conflict. LREAB has failed to make this showing.

LREAB claims that the regulatory compliance defense "does not require that the regulatory scheme conflict with the antitrust laws." Resp. Br. at 14. This is incorrect. Where, as here, antitrust law and the relevant regulatory statute are complementary, the court should give effect to both. *See Pom Wonderful*, 134 S. Ct. at 2238; *Morton*, 417 U.S. at 551; *Silver*, 373 U.S. at 357. LREAB has not identified any case in which a court affirmed the regulatory compliance defense in the absence of a statutory conflict.

In the AT&T interconnection/regulatory compliance cases, there was a conflict between the Sherman Act standard (imposing on the defendant a qualified duty to deal) and the Communications Act standard (imposing a duty to deny interconnection in the public interest). *Southern Pacific*, 740 F.2d at 1009-10; *Phonetele I*, 664 F.2d at 737–38; *S. Pac. Commc'ns Co. v. American Tel. & Tel. Co.*, 556 F. Supp. 825, 975–76 (D.D.C. 1982). In these cases, if we were to assume instead that AT&T had no conflicting Communications Act obligation, then the courts' "entrapment" concern melts away. *See supra* note 6. In this hypothetical, there is no unfairness in imposing upon AT&T the ordinary obligation to comply with all applicable laws. Furthermore, absent a statutory conflict, it would have been impossible for AT&T to show (as required by these courts) a reasonable belief that the challenged conduct (the denial of interconnection) was "necessitated" or "required" by the regulatory regime. *Southern Pacific*, 740 F.2d at 1010 (quoting *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1138 (7th Cir. 1983)); *Phonetele I*, 664 F.2d at 737–38.

In the present case, there is no statutory conflict between antitrust law and Dodd-Frank. The State of Louisiana is not required to participate in the Dodd-Frank program for the registration and regulation of AMCs. A State may opt out. *See* Complaint Counsel's Motion for Partial Summary Decision Dismissing Respondent's Fourth Affirmative Defense, *In re La. Real Estate Appraisers Bd.*, Docket No. 9374, at 5 & n.5 (Feb. 6, 2018). And the State of Louisiana can readily and fully implement Dodd-Frank without brushing up against federal antitrust law by regulating AMCs through state action, as opposed to delegating unsupervised discretion over appraiser fees to private market participants in the manner alleged in the Commission's Complaint.

4. The regulatory compliance defense may be invoked only by a regulated entity, that is, by an entity obliged to comply with a regulatory regime or face sanctions. LREAB has failed to make this showing.

LREAB acknowledges that good faith regulatory compliance is a defense "for actions by a regulated entity." Resp. Br. at 14. LREAB is a regulator, overseeing the appraisal industry in Louisiana. How then does LREAB convert itself into a regulated entity? According to LREAB, Dodd-Frank directs that, in Louisiana, LREAB (as currently constituted) shall be responsible for regulating AMCs. LREAB cites to a provision of Dodd-Frank that directs AMCs in participating states to register with and be subject to the supervision of a "State appraiser certifying and licensing agency." 12 U.S.C. §3353(a)(1).

This argument is simply wrong. "State appraiser certifying and licensing agency" is a defined term (12 U.S.C. §3350(1)):

> The term "State appraiser certifying and licensing agency" means a State agency established in compliance with this chapter.

With this definition, Dodd-Frank delegates broad discretion to States to designate a regulatory authority for AMCs. As far as Dodd-Frank is concerned (and setting aside antitrust compliance), Louisiana is free to confer regulatory authority over AMCs to LREAB, to any other extant State agency, or to a wholly new State agency. Further, Louisiana is free to re-constitute LREAB such that it is not controlled by appraisers, or to establish a mechanism for active supervision of LREAB by an independent state actor.[9]

[9] We recognize that it is not entirely LREAB's fault that Louisiana has failed to establish and implement a regime for active supervision. However, this is not a sound basis for extending an antitrust exemption to LREAB. *See In re Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 404, 434 (Comm'n Op., June 21, 2005):

> We acknowledge that the [Respondent's] liability [for price fixing] in this matter is due in part to the [state's] sustained failure to provide proper supervision to Respondent's rate-making activities. This fact, however, does not warrant a different result. Private interests can assess whether a state is in compliance with the requirements of the state action doctrine, and can urge the state to adopt the necessary practices. If

In sum, the contention that Dodd-Frank *requires* LREAB to regulate AMCs and/or to regulate appraiser fees is baseless. In addition, as discussed in Complaint Counsel's previous briefs, as a matter of Constitutional law, Congress is prohibited from imposing any duty to regulate upon a state agency. *See, e.g.*, *Murphy v. NCAA*, No. 16-476, slip op. (U.S. May 14, 2018). It follows that LREAB is not a regulated entity for purposes of the regulatory compliance defense.[10]

5. The regulatory compliance defense requires the defendant to show that it had an objectively reasonable basis to conclude that the challenged conduct was both necessary to comply with the regulatory statute and narrowly tailored to satisfy the relevant regulatory requirement. LREAB has failed to make this showing.

In adopting and enforcing Rule 31101, LREAB acted in an objectively unreasonable manner. LREAB cannot identify any provision of Dodd-Frank that, within reason, requires unsupervised regulation of appraiser fees by a panel of market participants, in lieu of regulation of AMCs by the State.

LREAB asserts that "[a] 'less competitive alternative' has no relevance to the regulatory compliance defense." Resp. Br. at 26. This is incorrect. *Phonetele I* instructed that, in order to avoid liability, AT&T must show "that the tariff as filed was the most reasonable, narrowly focused mechanism then available" to prevent harm to the telephone network. 664 F.2d at 738. One less anticompetitive alternative present here – and ignored by Louisiana and LREAB – is appraiser fee regulation through state action. LREAB has not shown that eschewing this alternative was objectively reasonable and necessary.

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a state, for whatever reason, declines to follow the requirements of the state action doctrine, then private interests can alter their behavior to comply with the antitrust laws.

[10] The licensed appraisers serving as members of LREAB, in their individual businesses, are regulated under state law. This has no bearing on the regulatory compliance defense.

6. The rule of per se antitrust liability may be applied to restraints entered into by regulated firms.

LREAB argues, without citation to relevant authority, that the per se rule is inapplicable to regulated firms. Resp. Br. at 21. This is incorrect. "[T]he presence of regulation, by itself, does not dictate the antitrust standard; antitrust actions involving regulated industries have been repeatedly tried under a per se standard." *United States v. Baltimore & O. R. R.*, 538 F. Supp. 200, 210 (D.D.C. 1982) (citing cases).

7. Except insofar as it relates to the analysis of competitive conditions, a defendant's claim that it complied with government regulation is not relevant to a rule of reason analysis.

According to LREAB, a defendant's claim that a challenged restraint advances a non-competition-related regulatory objective is a cognizable defense under the rule of reason. Resp. Br. at 19-22. This is incorrect. A rule of reason inquiry is a consideration of the effect of challenged conduct upon the competitive process. Anticompetitive practices can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers v. Pacific Stationary and Printing*, 472 U.S. 284, 294 (1985). "A cognizable justification is ordinarily one that stems from measures that increase output or improve product quality, service, or innovation." *In re N.C. State Bd. of Dental Exam'rs*, Docket No. 9343, 152 F.T.C. 640, 674 (Final Comm'n Op. and Order, Dec. 2, 2011).

LREAB cites no case holding that non-economic objectives are relevant to a rule of reason assessment of a challenged restraint.

8. Neither Dodd-Frank nor the Appraisal Subcommittee requires LREAB to regulate the fees paid by AMCs for appraiser services.

LREAB's narrative regarding the role and responsibilities of the Appraisal Subcommittee misconstrues the public record. Resp. Br. at 7, 10–11. Earlier this year, the Appraisal Subcommittee adopted Revised Policy Statements setting forth, *inter alia*, criteria that will be used by the agency to evaluate whether States participating in the federal AMC Program are properly supervising the activities of AMCs. *See* Federal Financial Institutions Examination Council, Appraisal Subcommittee; Adoption of Revised ASC Policy Statements, 83 Fed. Reg. 9144 (March 5, 2018) (codified at 12 C.F.R. Ch. XI). The requirements identified in the Revised Policy Statements run to States, and do not run to LREAB. *Id.* (Proving yet again that LREAB is not a regulated entity.) The Revised Policy Statements instruct:

(a) "States are not required to establish an AMC registration and supervision program." *Id.* at 9156.

(b) Participating States are required to impose various requirements upon AMCs. For example, participating States shall require AMCs to engage only licensed appraisers for federally-related transactions. *Id.* Participating States shall require AMCs to direct the appraiser to perform the assignment in accordance with accepted industry standards. *Id.*

(c) On the subject of appraiser fees, participating States are required to impose requirements upon AMCs to:

> Establish and comply with processes and controls reasonably designed to ensure that the AMC conducts its appraisal management services in accordance with the requirements of Section 129E(a) through (i) of the Truth in Lending Act, 15 U.S.C. 1639e (a) through (i), and regulations thereunder. *Id*.

TILA Section 1639e is entitled "Appraisal independence requirements," and is intended to ensure that real estate appraisals are conducted free of inappropriate influences. *See* 12 U.S.C. §

3353(a)(4). Section 1639e prohibits practices such as coercion, collusion, intimidation, extortion, and bribery. Also, lenders and their agents are required "to compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised." 15 U.S.C. §1639e(i)(1). In the federal scheme, "the marketplace should be the primary determiner of the value of appraisal services, and hence the customary and reasonable rate of compensation." Federal Reserve System; Interim Final Rule, 75 Fed. Reg. 66,554 (Oct. 28, 2010) (codified at 12 C.F.R. Pt. 226).

Assembling these pieces: The Appraisal Subcommittee will assess whether Louisiana requires AMCs to "establish and comply" with internal "processes and controls" that are "reasonably designed" to ensure "appraisal independence."[11] The Appraisal Subcommittee does not require LREAB to promulgate and enforce Rule 31101. And Dodd-Frank does not require LREAB to promulgate and enforce Rule 31101.

CONCLUSION

The Commission should rule that Respondent's good faith regulatory compliance defense fails, and should enter an Order dismissing Respondent's Fourth Affirmative Defense.

Dated: July 2, 2018

Respectfully submitted,

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[11] As noted earlier, several states comply by requiring an AMC to certify that the AMC has a system in place to ensure the payment of customary and reasonable appraiser fees. IDAHO CODE ANN. § 54-4124(8); KAN. STAT. ANN. § 58-4704(a)(12); MISS. CODE ANN. § 73-34-103(2)(j); NEB. REV. STAT. 76-3203(2)(j) (effective until July 19, 2018)).

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2018, I filed the foregoing document electronically using the FTC's E-Filing System, and sent notification of such filing to:

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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: July 2, 2018

By: /s/ Christine M. Kennedy
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