

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



_____)
In the Matter of)
)
Louisiana Real Estate Appraisers Board,)
)
Respondent.)
_____)

DOCKET NO. 9374

**ORDER GRANTING IN PART
MOTION TO STAY PART 3 PROCEEDINGS**

I.

On July 18, 2017, Respondent Louisiana Real Estate Appraisers Board (“Respondent” or “LREAB”) filed a Motion to Stay Part 3 Administrative Proceedings, pursuant to Rule 3.22 of the Federal Trade Commission (“FTC”) Rules of Practice (“Motion”).¹ In compliance with the Order dated July 20, 2017, FTC Complaint Counsel filed an expedited response on July 24, 2017 (“Response”).²

For the reasons set forth below, the Motion is GRANTED IN PART.

¹ Pursuant to Rule 3.22(c), “[a]ll written motions shall state the particular order, ruling, or action desired and the grounds therefor.” 16 C.F.R. § 3.22(c). Respondent’s motion requested a 120-day stay of the administrative action. The Motion was referred for resolution to the Office of Administrative Law Judges by the Office of the Secretary because the request for a 120-day stay does not necessarily delay the date of the evidentiary hearing. Thus, this motion is properly before the Administrative Law Judge. Although Respondent’s proposed order asks that the commencement of the evidentiary hearing in this matter be moved from January 30, 2018 to May 30, 2018, such request was not presented in the Motion and is not proper to address. 16 C.F.R. § 3.21(c) (“The Commission may, upon a showing of good cause, order a later date for the evidentiary hearing than the one specified in the complaint.”). Because a 120-day stay does not necessarily delay the evidentiary hearing date, Complaint Counsel’s request, contained in a footnote, that Respondent’s motion be certified to the Commission is denied.

² On July 25, 2017, Respondent submitted a letter to the Office of Administrative Law Judges, seeking to have its letter included in the “Confidential docket.” Respondent is hereby advised that the FTC’s Rules of Practice do not establish a “Confidential docket” and is instructed to review the FTC’s Rules relating to submissions containing *in camera* or confidential information. 16 C.F.R. §§ 3.45, 4.2.

II.

A.

The Complaint, issued on May 30, 2017, alleges that LREAB's promulgation and implementation of Rule 31101 regarding the payment of customary and reasonable fees ("C&R") for residential appraisals has "unreasonably restrained price competition for real estate appraisal services provided to appraisal management companies ('AMCs') in Louisiana." Complaint ¶¶ 1, 30-32. The Complaint further alleges that the LREAB's actions "have not been supervised by independent state officials." *Id.* ¶ 53. The Complaint seeks an order requiring the LREAB to "rescind and to cease and desist from enforcing Rule 31101, or any order based on an alleged violation of Rule 31101, and any agreement with an AMC or other person involving an alleged violation of Rule 31101." *Id.* at 10.

Non-sovereign state board actions that constitute "official action directed by a state" are immune from federal antitrust laws. *Parker v. Brown*, 317 U.S. 341, 351 (1943). *Parker* immunity requires a clear and affirmative state policy to displace competition, and active supervision by the state. *Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.* 445 U.S. 97, 105-06 (1980). In its Answer, Respondent asserts that its official actions, directed by the Louisiana Legislature, establish the affirmative defense of state action immunity under *Parker*.

B.

Through its Motion, Respondent states:

- The Governor of Louisiana, on July 11, 2017, issued Executive Order 17-16, entitled *Supervision of the Louisiana Real Estate Appraisers Board Regulation of Appraisal Management Companies*, attached to the Motion as Exhibit A ("July 11 Executive Order").
- The July 11 Executive Order requires LREAB and state agencies to undertake and complete, within ninety (90) days, actions that reinforce State active supervision over LREAB rulemaking and enforcement pertaining to the "customary and reasonable" fee requirements of the Dodd-Frank Act and Louisiana law.
- On July 17, 2017, LREAB issued a Resolution to implement the July 11 Executive Order and to address past and pending investigations and allegations of violations of the prior C&R rule, attached to the Motion as Exhibit B ("July 17 Resolution").

Respondent argues that these State acts substantially change the factual and legal basis of this proceeding, by confirming state action immunity with respect to any current and prospective actions of the Board, and addressing the retroactive and prospective relief sought in the

Complaint.³ Therefore, Respondent seeks a 120-day stay to give the State time to implement the Governor's and the Board's directives, and allow the parties time to consider the impact of these new requirements on this proceeding, while allowing the parties and third parties to avoid unnecessary burdens of litigation, thereby serving the public interest.

C.

Complaint Counsel asserts that the recent developments relied upon by Respondent "have not eliminated the need for Commission intervention" because neither the July 11 Executive Order nor the steps contemplated by Respondent will yield an effective supervision regime. Specifically, Complaint Counsel asserts that the July 11 Executive Order does not require active supervision when Respondent promulgates or enforces a rule regulating appraiser fees; that review by an administrative law judge does not satisfy the active supervision requirement; and that there are other "gaps" in the asserted supervisory regime.

Complaint Counsel further asserts that even if Respondent were to fully implement the July 11 Executive Order and the July 17 Resolution, this proceeding would not be moot. In addition, Complaint Counsel asserts, the July 11 Executive Order and the July 17 Resolution fail to address Respondent's past conduct.

III.

Pursuant to Commission Rule 3.21(c)(2), the Administrative Law Judge may, upon a showing of good cause, grant a motion to extend any deadline or time specified in the scheduling order other than the date of the evidentiary hearing. 16 C.F.R. § 3.21(c)(2). In addition, Part 3 administrative proceedings may be stayed upon a showing of good cause. *In re Phoebe Putney Health Sys., Inc.*, 2014 FTC LEXIS 281 (Oct. 30, 2014). In *Phoebe Putney*, the Commission granted respondent's request for a stay based on recent changes in state law that created uncertainty as to the feasibility of the challenged transaction, and on its finding that neither party would be prejudiced by a stay. In addition, the Commission noted, complaint counsel did not oppose the motion to stay. *Id.* at *4.

Like *Phoebe*, this case presents recent developments in the state law challenged in the Complaint that fundamentally change the factual and legal basis of this proceeding. Furthermore, any discovery pertaining to the LREAB's regulatory and enforcement activities under the previous C&R rule may become less relevant in light of the July 11 Executive Order and July 17 Resolution. Thus, even if, at the end of the stay, some element of the requested relief remains unresolved, a stay will help narrow the claims, defenses, and discovery to those limited issues, and avoid wasteful effort and expense. Accordingly, a stay is warranted.

³ The July 17 Resolution notes the intent of the Board to repeal Rule 31101 and submit a new rule to the state: "The Executive Director shall, on or before July 31, 2017 present to the Board a proposed rulemaking that proposes a rule regarding customary and reasonable appraisal fees for review by the Board for submission to the Commissioner of Administration pursuant to Executive Order Section 2, resulting in the repeal and replacement of current Rule 31101." July 17 Resolution at 2, para. 1.

Unlike *Phoebe*, Complaint Counsel in this case has opposed the motion. However, Complaint Counsel cannot point to any undue prejudice it would suffer if a limited stay were granted. While recognizing the strong interest in completing Part 3 proceedings expeditiously,⁴ based on the above stated reasons, there is good cause to issue a temporary stay in this case.

Under Rule 3.21(c)(2), “[i]n determining whether to grant [a] motion, the Administrative Law Judge shall consider any extensions already granted, the length of the proceedings to date, the complexity of the issues, and the need to conclude the evidentiary hearing and render an initial decision in a timely manner.” 16 C.F.R. § 3.21(c)(2). No other extensions have been granted. A stay of 120 days will make preparing for a January 30, 2018 hearing date impractical, though not impossible, in the event that this case is not otherwise resolved. For this reason, Respondent’s Motion is GRANTED IN PART and, instead, a stay of 90 days is hereby ORDERED.

The parties are further ORDERED to provide to the Office of Administrative Law Judges a Joint Proposed Scheduling Order no later than 10 days before the expiration of the stay.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: July 28, 2017

⁴ See Rule 3.41(b) (“Hearings shall proceed with all reasonable expedition.”) 16 C.F.R. § 3.41(b).

Notice of Electronic Service

I hereby certify that on July 28, 2017, I filed an electronic copy of the foregoing Order Granting in Part Motion to Stay Part 3 Proceedings, with:

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I hereby certify that on July 28, 2017, I served via E-Service an electronic copy of the foregoing Order Granting in Part Motion to Stay Part 3 Proceedings, upon:

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