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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 REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY DECISION

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INTRODUCTION

The only issue before the Commission on this motion is whether the state action doctrine shields Respondent's adoption and enforcement of Rule 31101 during the period 2013 through 2016.

Complaint Counsel's opening brief showed that the activities challenged in the Complaint were not actively supervised as required in order to invoke the state action defense. Respondent's Opposition ("Opp.") identifies no material factual disputes. Instead, it contests the legal implications of undisputed facts and adds irrelevant information for the Commission's consideration.

Rule 31101 established three methods for establishing certain residential appraisal fees. Arms-length, free market negotiations, free of collusion or abuse, was *not* one of the three permissible methods. Respondent denies that this regulatory program was a form of rate-setting or price fixing, and argues that it was justified for a variety of reasons. Complaint Counsel disagrees. But whether Respondent's program was price-fixing is irrelevant to the present motion for partial summary judgment, which addresses only Respondent's state action affirmative defenses.

Respondent advances four principal arguments in favor of finding state action immunity, each without merit. *First*, Respondent contends that the decision by subcommittees of the Louisiana legislature not to convene hearings on proposed Rule 31101 (2013) constituted active supervision. This is incorrect. The decision to forgo hearings indicates the absence of supervision, because it shows that the subcommittees were deferring to the judgment of Respondent. Case law requires that the state supervisor undertake a meaningful and substantive review rather than defer to a panel of active market participants. As a matter of law, that the nominal supervisor allows a

rule to take effect without a hearing or any other independent examination of its substance does not constitute active supervision.

Second, Respondent contends that after-the-fact state court review of enforcements actions brought by Respondent under the deferential and limited standards specified in the Louisiana APA constituted active supervision. But after-the-fact APA-style judicial review of enforcement actions has been rejected as adequate for active supervision in numerous cases.

Third, Respondent contends that its governing board was not controlled by active market participants, and therefore needs no supervision to invoke the state action doctrine. This argument cannot be squared with Supreme Court precedent including *North Carolina Dental* and *Goldfarb*. Respondent suggests replacing the standard set out in *N.C. Dental* with a new standard, under which the Commission would need to evaluate the current composition of each board member's business portfolio to determine whether active supervision is required. The Commission should reject Respondent's proffered standard because it is contrary to Supreme Court case law and utterly impractical. Respondent's test would require detailed, intrusive, and unmanageable factual inquiries into each Board member's individual financial interests.

Finally, Respondent raises mootness in its opposition and reiterates arguments from its separate motion to dismiss. Respondent's mootness arguments are irrelevant to this motion, because they address only post-complaint conduct, while this motion seeks partial summary judgment concerning only pre-complaint conduct. Nevertheless, this reply briefly responds to that argument.

The Commission should dismiss Respondent's Third and Fifth Affirmative Defenses.

I. LEGAL STANDARD

The same legal standard applies to summary judgment motions made pursuant to Commission Rule 3.24 as to motions for summary judgment made under the Federal Rule of Civil Procedure. *See In re North Carolina State Board of Dental Examiners* ("*N.C. Dental*"), 151 F.T.C. 607, 6610-11 (2011).

In order to defeat Complaint Counsel's motion for partial summary judgment, Respondent needs to point to specific material facts which, if true, might affect the outcome of the suit under governing law. *See Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); *Mass. Mutual Life v. Residential Funding Co.*, 55 F. Supp.3d 235, 239 (D. Mass. 2014) ("[A] fact is 'material' when it might affect the outcome of the suit under the applicable law."). Summary judgment must be entered "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). The nonmoving party must do more than make vague denials or "simply show that there is some metaphysical doubt as to the material facts." *In re North Carolina State Board of Dental Examiners,* 151 F.T.C. 607, 611 (2011) (citation, quotation marks omitted). Generalized assertions do not establish a genuine factual dispute. *See* Opinion of the Commission, *In re Jerk, LLC*, No. 9361, 2015 WL 1518891, at *3 (F.T.C. March 13, 2015) ("[A] party opposing summary judgment cannot rest on generalized assertions, but must set forth 'concrete particulars' showing the need for trial." (quoting *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978))).

In sum, Respondent must show facts, that, if credited, establish a state action defense. It has not done so.

II. RESPONDENT'S PROMULGATION OF RULE 31101 WAS NOT ACTIVELY SUPERVISED

In *N.C. Dental*, the Supreme Court held that state agencies controlled by market participants require meaningful and independent state supervision in order to be exempt from antitrust oversight. Complaint Counsel's motion establishes that only superficial legislative oversight occurred when Respondent adopted Rule 31101. The Louisiana legislature allowed the Rule to take effect without undertaking any significant substantive review. Memorandum in Support of the Motion for Partial Summary Judgment ("Mem. Supp.") at 15. "The standard for active state supervision is a rigorous one," *In re Kentucky Household Goods Carriers Ass'n* ("*Kentucky Movers*"), 139 F.T.C. 404, 415 (2005), and requires that the supervisor "make an actual decision regarding the action, potential supervision is not enough." *N.C. Dental*, 135 S. Ct. at 1116-17. Here, the legislative subcommittees had the authority to review the proposed rule, but they did not exercise it.

Respondent argues that two legislative subcommittees did engage in substantive review of the rule, and made an actual decision regarding its substance. Opp. at 19, Unangst Aff. ¶ 34. According to Respondent, the subcommittees (1) "considered" the record compiled by LREAB in preparing Rule 31101, (2) requested no further information, and (3) voted against holding a hearing, thereby allowing the Rule to take effect. Unangst Aff. ¶¶ 33–34.

As an initial matter, Respondent's boilerplate, hearsay statement that the Subcommittee had "consider[ed]" the materials submitted by LREAB is insufficient to establish a material dispute of fact. Unangst ¶ 34 (a "representative" of the Subcommittee members told Unangst that LREAB submission had been given "consideration"). *See F.T.C. v. Publishing Clearing House, Inc.*, 104 F.3d 1168, 1170–71 (9th Cir.1997) ("Once the FTC has made a prima facie case for summary judgment, the defendant . . . must produce significant probative evidence that demonstrates that

there is a genuine issue of material fact for trial . . . A conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact."). *See also Burchett v. Bromps*, 466 F. App'x 605, 607 (9th Cir. 2012); *cf. McLaughlin v. Liu*, 849 F.2d 1205, 1206 (9th Cir. 1978) (nonmoving party survived summary judgment where he relied on sworn affidavit that included specific factual averments, such as payroll documentation that supported his factual allegations). This assertion does not distinguish between a cursory glance at the text of the proposed rule and a searching analysis of the record, and could not support a finding in Respondent's favor on the issue of active supervision given Respondent's burden to prove its own affirmative defense. *See Kentucky Movers*, 139 F.T.C. at 413 n.4 (Comm'n Op. 2005) ("Because the state action exception is an affirmative defense, the burden of proof is on Respondent to show that this standard has been met.").

Even if Respondent's three factual points are accepted, however, these facts do not establish that the legislature actively supervised the adoption of Rule 31101. A procedural vote on whether to hold a hearing does not establish that the subcommittee undertook a substantive review of the proposed Rule and is not a vote on the merits of Rule 31101 itself. The decision to forgo hearings does not show active state involvement by the subcommittees in determining the content of the Rule 31101. *See, e.g., F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 629 (1992) (rejecting the assertion that "as a matter of law in those States inaction signified substantive approval" where "the potential for state supervision was not realized in fact"). Indeed, it shows the opposite: a decision by the legislators to defer to the judgment of the Louisiana Real Estate Appraisers Board. Forgoing hearings does not establish an independent factual record, does not establish that the subcommittees conscientiously determined that Rule 31101 comports with state policy, and does not signal to citizens of Louisiana that the legislators accept political responsibility for Rule 31101.

Respondent embeds its argument within a broader narrative that is misleading. According to Respondent, the Louisiana APA "requires" the subcommittees to oversee all rules promulgated by Respondent. Opp. at 8. Respondent argues that the subcommittees, in declining to hold hearings, did all that was required of them under state law. *Ergo* (according to Respondent), Rule 31101 must have been supervised by the subcommittees.

Respondent's argument is defective, in part because it starts from a false premise. The Louisiana APA creates an opportunity, but not an obligation, for legislative subcommittees to review Rule 31101: The APA also permits the subcommittees to forgo review, to defer to the judgment of a state agency, and to allow a rule to take effect without legislative oversight. La. R.S. 49:968(A) ("It is the declared purpose of this Section to provide a procedure whereby the legislature *may review* the exercise of rule-making authority . . . which it has delegated to state agencies." (emphasis added)).

As to Rule 31101, the subcommittees elected not to engage in the APA review process (which would include hearings, followed by a vote on whether the rule comports with the enabling statute). This is perfectly consistent with the legislators' duty under state law, but in no way constitutes active supervision under federal antitrust law. Forgoing a hearing is a decision by the subcommittees to abstain rather than approve; a decision to defer to the state agency rather than to undertake an independent review. The Supreme Court has cautioned against overly permissive active supervision doctrines that implicitly assign to a state legislature responsibility for regulatory actions that the legislature did not intend. *See Ticor*, 504 U.S. at 636 ("Neither federalism nor political responsibility is well served by a rule that essential national [competition] policies are displaced by state regulations intended [by the legislature] to achieve more limited ends.").

It is not Complaint Counsel's contention that a formal subcommittee hearing is always a prerequisite for active supervision. But it is exactly backwards that a subcommittee's decision *not* to convene hearings, without more, may be viewed as affirmative evidence of active supervision. Antitrust cases have held that *convening* a hearing is evidence of active supervision. *See TEC Cogeneration, Inc. v. Fla. Power & Light Co.*, 76 F.3d 1560 (11th Cir.), *modified*, 86 F.3d 1028 (11th Cir. 1996) (active supervision 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) (active supervision where "the 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 (Comm'n Op.) (activities that support a determination of active supervision of collective ratemaking include collecting business data, economic studies, public hearings, and independent investigation). If deciding not to convene a hearing is likewise evidence of supervision, then active supervision loses all meaning.

Respondent states that the legislators had good reasons to forgo supervision of Rule 31101, *i.e.*, that the legislators had considered the AMC Act the previous year and wanted Rule 31101 to take effect without delay. These may or may not be the actual reasons why the legislators declined to undertake any of the procedural steps indicative of supervision. But having reasons, even good reasons, to forgo supervision is not the legal equivalent of engaging in actual supervision.

Lastly, Respondent attempts to distinguish *Ticor* and *Kentucky Movers* because those cases involved rate-setting, while Rule 31101, according to Respondent, does not. Respondent describes Rule 31101 as initially permitting AMCs to set their own fees. Only later, if there is a complaint, does the Respondent rule on whether the complained-of fee was lawful (*i.e.*, "customary and reasonable"). If Respondent's procedure is not rate-setting, then it is the antitrust equivalent thereof.[1] In any event, Respondent does not explain why the active supervision required of a state board would be subject to different tests depending on the type of activity challenged, and it is not.

Respondent appears to be arguing that its conduct did not violate the antitrust laws at all. This issue is unrelated to whether its conduct qualifies as state action. *See also* Opp. at 21, n.25 (arguing that Rule 31101 "had no economic impact").

III. THERE IS NO MATERIAL FACTUAL DISPUTE THAT RESPONDENT'S ENFORCEMENT OF RULE 31101 WAS NOT ACTIVELY SUPERVISED

Respondent asserts that enforcement decisions against AMCs for violating Rule 31101 can be supervised by a state court applying Administrative Procedure Act ("APA") standards. If accepted, this argument would eliminate any meaning to the active supervision requirement for state boards because most, if not all, state agency decisions are subject to judicial review. As discussed in the Mem. Supp., APA review is not legally sufficient for three reasons.

First, the state's supervision must be substantive, and not deferential to the policy judgments of the private actors. *See, e.g.*, *N.C. Dental*, 135 S. Ct. at 1116. Louisiana law governing AMCs states that a reviewing state court must affirm Respondent's decision if the "Board has regularly pursued its authority and not acted arbitrarily." La. R.S. 37:3415.20(B)(2). The Louisiana APA also describes the scope of review for state courts. The APA states that the review will be confined to the record, and the court can reverse or modify only if the appellant has been

[1] *See* Complaint, ¶¶ 29–43.

prejudiced by findings or decisions that are contrary to law, arbitrary or capricious, or not supported by a preponderance of evidence contained in the record. La. R.S. 49:964(F–G). The scope of review does not permit reversal or modification if the enforcement action furthers the interests of the market participants rather than the interest of the state. Complaint Counsel's motion cites multiple cases confirming that this sort of limited review cannot constitute active supervision. *See* Mem. Supp. at 20. Respondent's Opposition to the motion ignores these cases and cites no authority for its position.

Second, active supervision must actually occur, and cannot be contingent on other factors. *See N.C. Dental*, 135 S. Ct. at 1116; *Ticor*, 504 U.S. at 638. Review of an enforcement action depends on the AMC to appeal to the state courts. If the AMC decides for any reason not to appeal, there will be no review. Under this system, the burden of ensuring supervision lies with the target of the enforcement rather than with the regulator. Respondent denies that judicial review is contingent because an appeal to the state court is *available* to each target of Respondent's formal enforcement activities. This construction is clearly not consistent with the requirement that supervision actually occur and not exist only as a potential outcome. *See id.*

Third, there is no review at all—even potentially by the state court—of Respondent's informal enforcements activities. Respondent discontinued investigations into possible violations of Rule 31101 when AMCs agreed to pay fees consistent with survey medians. Respondent treats settlements as non-events, and calls them "voluntary" and "rational." Opp. at 22. But settlements enforce Rule 31101, and *can* have anticompetitive effect. It is not necessary at this time for the Commission to determine if informal settlements constitute illegal price-fixing; the Commission need determine only whether the settlements were actively supervised and therefore acts of the state rather than acts of market participants. *See In re N.C. Bd. Dental Exam'rs*, No. 9343, 151

F.T.C. 607, 611–12 (Comm'n Op. and Order on Mot. Summ. J., Jan. 16, 2011) ("For purposes of summary judgment on the state action defense issue, we need not determine whether the Board's activities violate the relevant antitrust laws. Instead we focus only on whether the Board's conduct is exempt from antitrust scrutiny.").

As a matter of law and based on undisputed facts, Respondent's enforcement activities were not actively supervised as the state action doctrine requires. Respondent has failed to specify any disputed fact that, if true, would support a finding of active supervision.

IV. ACTIVE SUPERVISION IS REQUIRED BECAUSE RESPONDENT IS CONTROLLED BY ACTIVE MARKET PARTICIPANTS

A. Under the *N.C. Dental* Standard, Supervision is Required

As explained in Complaint Counsel's motion for summary judgment, a state agency requires supervision when "a controlling number of decisionmakers" have a "private interest" in the "occupation the board regulates." *N.C. Dental*, 135 S. Ct. at 1114.

Applying this standard, Respondent's promulgation and enforcement of Rule 31101 requires supervision. Respondent is empowered to license and regulate real estate appraisers (both general and residential). There is no dispute that, during the relevant time period from 2013 through to 2016, a controlling number of Respondent's board members were active real estate appraisers. This sufficiently establishes that Respondent was controlled by market participants.[2]

B. Excluding Non-Participants in the Residential Appraisal Market

Rule 31101 affects residential appraisals primarily but not exclusively. Respondent has proposed that detailed factual inquiries are required to assess which LREAB members performed residential appraisals during the relevant period. Opp. 29–30. Respondent does not contest that the

[2] See CC Mot. Summary J., Statement of Undisputed Facts ¶¶ 6, 10; Opp. Responses to Complaint Counsel's Statement of Undisputed Facts, ¶¶ 6, 10.

residential appraiser members were active market participants. And with respect to general appraisers, it is clear from Respondent's proffered affidavits that at least some general appraiser LREAB members were also engaged in residential appraisal work throughout the relevant period.

Complaint Counsel made an initial showing that all of the general appraisers on the Board were active market participants because all of them were licensed by LREAB to perform residential appraisals. In an effort to defeat summary decision, Respondent has submitted affidavits from two past and present board members who state that they "estimate" they performed no residential appraisals during the relevant period.[3] But even if we re-classify these two affiants as non-market participants, the record reflects that, at all relevant times, a majority of board members were performing residential appraisals.[4]

Respondent's brief acknowledges that general appraisers perform residential appraisals. Opp. at 25 (general appraisers "do residential appraisals," albeit "rarely"). And two LREAB general appraisers stated that their business includes residential appraisal work. Graham Aff. ¶ 4 ("During that period when I served on the Board, I have occasionally performed residential appraisals. . ."); Pauley Aff. ¶ 4 ("During that period when I have served on the Board, I have been actively performing residential appraisals . . ."). With respect to two LREAB general appraisers, respondent proffers no evidence to rebut the Complaint Counsel's initial showing, and thus summary decision is appropriate.

[3] Four affidavits—those of Kara Ann Platt, Rebecca Rothschild, Heidi Lee, and Wayne Pugh—are from individuals who were not on Respondent's board 2013 through 2016.

[4] Respondent admits that all of the appraiser members of LREAB were lawfully able to perform residential appraisals during the entire time of their tenures on the board of Respondent. Opp. Responses to Complaint Counsel's Statement of Undisputed Facts, ¶¶ 6, 10, 15. Only Cheryl B. Bella and Gayle Boudousquie specifically denied performing residential appraisals, in identical terms: "During that period when I have served on the Board, I have not been actively performing residential appraisals, and do not consider residential appraisals to be a part of my business." Opp. Responses to Complaint Counsel's Statement of Undisputed Facts, Exhibit 44. By contrast, Clayton Lipscomb did not deny performing residential appraisals but rather stated that he did "not consider residential appraisals to be a significant part" of his business." *Id.* Michael Graham and Leonard Pauley admitted to performing residential appraisals. *Id.*

C. Respondent's Proposed Standard is Inconsistent with Case Law

Under the appropriate legal standard, the fact that general appraisers are licensed to perform residential appraisals is a conclusive showing that Respondent is controlled by active market participants. *See* Mem. Supp. at 9–11.

Respondent proposes that a member of Respondent's board is an active market participant only if the board member has a "cognizable financial interest" in the antitrust market affected by the challenged restraint. Opp. at 28. Thus, according to Respondent, only licensed appraisers who perform *residential* appraisals are market participants for state action purposes.[5] This requires a factual inquiry into the business portfolio and finances of the board members to determine whether they actually perform regulated services that they are indisputably licensed to perform.

Rather than precisely define the relevant market or inquire closely into the finances of board members, the Supreme Court instead adopted a structural approach based on profession or occupation. *See N.C. Dental*, 135 S. Ct. at 1111 ("those authorized by the state to regulate their own profession" must be supervised). In *N.C. Dental*, a dental board prohibited teeth whitening by non-dentists. The Court concluded that the dental board was controlled by active market participants because a majority of board members were licensed dentists. *Id.* at 1107. The Court did not require that a majority of board members provided teeth whitening services, or otherwise had a financial interested in the restraint. *See id.* at 1116 (noting that only "some" board members offered teeth-whitening services).[6]

Respondent's standard is also inconsistent with *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). There, the Supreme Court found that the state agency (Virginia State Bar) was

[5] We assume, for purposes of discussion, as does Respondent, that the relevant *antitrust* market affected by Rule 31101 is limited to residential appraisals. Opp. at 27.

[6] Respondent tries to distinguish this case from *N.C. Dental* on the basis that the dentist board members were elected by fellow dentists. *See* Opp. at 31–32. However, election of board members was not essential to the ruling.

"controlled by market participants (lawyers)" when it enforced a minimum fee schedule for title searches. There was no evidence that a majority of the decision makers offered title searches or personally benefitted from the challenged fee schedule, as would be required under Respondent's standard. *See N.C. Dental*, 135 S. Ct. at 1114 (citing *Goldfarb*, 421 U.S. at 791–92); *see also Goldfarb*, 421 U.S. at 791.

D. Cases Cited in Respondent's Opposition are Not Applicable

Respondent cites several cases in support of its argument that a detailed factual inquiry into the activities of board members is required, but none is on point. In *Rivera-Nazario*, the court considered an agency with seven board seats. Five of the seats were reserved for certain categories of non-market participants, and the remaining two required no specific qualifications. Thus, according to the court "[a]t most, there could be two members—the freely selected members—out of the seven that might be active market participants." *Rivera-Nazario v. Corporacion del Fondo del Seguro del Estado*, No. CV 14-1533 (JAG), 2015 WL 9484490, at *7 (D.P.R. Dec. 29, 2015). Accordingly, the court held that "the CFSE is not controlled by active market participants." *Id.* The remainder of the discussion, upon which Respondent principally relies, dealt with the theory that active supervision might be required even though the board was not controlled by active market participants, if advice from active market participants were relied upon by the board. *Id.*at *8. Thus, contrary to Respondent's argument, Opp. at 30–31, the court's discussion related only to the question of whether to require active supervision even for a state agency not controlled by market participants, and does not support forgoing supervision where the state agency is controlled by market participants.

Respondent is also wrong to suggest that *Turner v. Va. Dept. of Med. Assistance Servs.*, 230 F. Supp. 3d 498 (W.D. Va. 2017), supports a factual inquiry into board members' affairs to

determine active market participation. *See* Opp. at 29. In *Turner*, the court held that active supervision was not required for a "prototypical state agency," but did not even discuss whether any board members or employees at the agency were active market participants. *Id.* at 506–07.[7]

Respondent's reliance on *Century Aluminum of S.C., Inc. v. S.C. Pub. Serv. Auth.*, No. CV 2:17-274-RMG, 2017 WL 4443456 (D.S.C. Oct. 4, 2017) is equally misplaced. There, the court simply held that the board members were not active market participants because "the statutes governing [defendant's] board of directors prevent board members from having private interests in the electric utility marketplace." *Id.* at *8. It looked only at the statutory regime, not a factual inquiry into individual members' finances.

E. Respondent's Standard Would Require Unreasonably Burdensome Factual Inquiries

Respondent's standard would unreasonably complicate efforts at antitrust compliance and antitrust enforcement. In order for a professional regulatory board (and an antitrust court) to know whether a particular enforcement action requires independent supervision, it would first have to determine the contours of the affected geographic and product markets. Next, the board (and an antitrust court) would require an audit of each board member's financial investments and income, the geographic and subject-matter scope of his or her professional practice, and an assessment of whether the restraint at issue would affect the member's future income. And, presumably, the results could change every time a board implemented a restraint. This exercise will be quite intrusive and burdensome for state boards, agencies, board members, and antitrust enforcers. *Cf. N.C. Dental*, 135 S. Ct. at 1113 (noting that case law "rejected subjective tests for corruption that

[7] Notably, on the eleven-member board, a controlling majority was prohibited from being part of the affected profession. *Id.* at 505 (describing the agency's structure and noting that "[t]he Board consists of eleven Virginia residents, appointed by the Governor, 'five of whom shall be health care providers and six of whom shall not . . .'").

would force a 'deconstruction of the governmental process and probing of the official intent'" (citations omitted)).

Respondent's proposed standard would bring antitrust inquiry into the realm that the Supreme Court sought to avoid in *City of Columbia v. Omni Outdoor Adver., Inc*., 499 U.S. 365 (1991). There the Court resisted requiring supervision of a municipality under a corruption or conspiracy exception because "[t]his would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Id.* at 377. Respondent's test would require a court to probe the intent and precise quantum of interest for each member of a state board for each action taken. This process is unnecessary given the "structural risk," despite their good faith, of "market participants' confusing their own interests with the State's policy goals." *N.C. Dental*, 135 S. Ct. at 1114.

V. THIS CASE IS NOT MOOT

The Commission's practice is not to dismiss a *conduct* case as moot on the basis of a post-complaint change in the state's procedures for active supervision. Respondent's attempt to identify relevant counter-examples fails.

In re Cabell Huntington Med. Ctr., No. 9366, 2016 WL 3742913 (F.T.C. July 6, 2016), challenged the proposed *merger* of two hospitals, which necessarily implicates a distinct set of state action issues. Post-complaint, the state enacted a statute purporting to confer state action immunity on the transaction. As this was a proposed merger, there was no history of anticompetitive conduct to be adjudicated and enjoined.

In *New England Motor Rate Bureau*, "in deference to [a] state action [regime]" present in Rhode Island, the prohibition on joint rate setting in Rhode Island, as set forth in the Commission's

order, was qualified by a State Action Proviso. No. 9170, 1989 FTC LEXIS 62 (Aug. 18, 1989). Rhode Island activity was not altogether exempt from the order.

Lastly, in 1985, the Commission withdrew a complaint against the City of New Orleans when, post-complaint, the state enacted a statute satisfying the clear articulation requirement. *In re City of New Orleans*, 105 F.T.C. 1 (1985). "[A]ctive state supervision is not a prerequisite to exemption under the antitrust laws where the actor is a municipality." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

VI. CONCLUSION

For the reasons stated, the Commission should grant Complaint Counsel's Motion for Partial Summary Judgment.

December 19, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2017, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

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By: /s/ Lisa B. Kopchik
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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 19, 2017

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