PUBLIC

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

MOTION OF LOUISIANA REAL ESTATE APPRAISERS BOARD
TO STAY PROCEEDINGS PENDING APPELLATE REVIEW

Respondent Louisiana Real Estate Appraisers Board ("LREAB" or "Board") hereby moves the Commission to stay the Part 3 proceedings in this matter pending judicial review by the U.S. Court of Appeals for the Fifth Circuit of the Commission's April 10, 2018 Opinion and Order dismissing the Board's defenses relating to state action immunity ("Order"). On April 19, 2018, LREAB filed a Petition for Review of the Order in the Court of Appeals. (Exhibit 1). The Fifth Circuit will obtain exclusive jurisdiction over this dispute upon the filing of the record by the Commission with that Court. 15 U.S.C. § 45(d). The Commission is ordinarily allowed forty days to file the record after it is served the petition for review by the Circuit Court. Fed. R. App. P. 17(a). Given the current schedule, exclusive jurisdiction could vest in the Circuit Court in early June – on the eve of trial.

The Board submits this Motion and a Motion for Expedited Review to stay all administrative proceedings pending resolution of the pending appeal of the Order. This stay will protect Louisiana's sovereign interests, will cause no undue prejudice to either party in the

action, and will spare the Commission and the parties the expense of preparing for a trial that will be delayed and may become unnecessary. Complaint Counsel have informed undersigned counsel that they intend to oppose this Motion. For the reasons set forth below, the Board's motion should be granted.

Background and Procedural History

The Commission issued an administrative complaint on May 30, 2017, asserting that the Board has violated Section 5 of the FTC Act. Compl. 1.[1] The Board's Answer asserted its Third and Ninth Affirmative Defenses relating to state action immunity under *Parker v. Brown*, 317 U.S. 341 (1943). On November 27, 2017, the Board moved to dismiss the Complaint on the basis that the "actions of the Board are State actions that are immune from federal antitrust scrutiny," that the Governor's Executive Order and the Board's new rule created "active supervision" that "has eliminated any ongoing or proposed effects of its prior regulation," and thus that "none of the contemplated relief sought in the Complaint can be granted" under State action immunity and mootness. MTD 1-2. Also on November 27, 2017, Complaint Counsel filed a motion for partial summary decision with respect to the Board's Third and Ninth affirmative defenses. *See* MPSD; CCOpp. On April 10, 2018, after oral argument on February 22, 2018, the Commission issued an Order Denying the Board's Motion to Dismiss and Granting Complaint Counsel's Motion for Partial Summary Judgment. *See* Order. The Board has filed a petition in the Fifth Circuit to review the Order. Fed. R. App. 15(a)(1); 15 U.S.C. § 45(c).

Argument

The Commission may, for good cause, stay the proceeding of an administrative adjudication during the pendency of a collateral federal court action. Rule 3.41(f)(1)(i); *see also*

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

Rule 3.22(a). While the Commission has a strong interest in "conducting [Part 3] proceedings expeditiously," Rule 3.1, the "applicability of the state action doctrine is a key issue" whose resolution by the Fifth Circuit "will avoid a waste of resources and will not prejudice either side." *In re Phoebe Putney Health System*, Dkt. No. D-9348, 152 F.T.C. 1035, 1035 (July 15, 2011) (staying proceeding pending Eleventh Circuit review); *see also In re South Carolina State Bd. of Dentistry*, Dkt. No. 9311, 2004 WL 1942070 (Aug. 17, 2004) (granting unopposed motion to stay discovery and further proceedings). The Commission should thus grant the Board's motion to stay the Part 3 proceedings.

The Commission has good cause to stay the Part 3 proceedings. In the Fifth Circuit, a denial of *Parker* immunity is appealable under the collateral order doctrine. *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1394-95 (5th Cir. 1996). Under *Martin*, state action immunity is recognized as an immunity from suit, and "is effectively lost if a case erroneously is permitted to go to trial." *Id.* at 1395 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 536 (1985)). Absent a stay, LREAB will effectively be denied the relief it seeks on appeal, *i.e.*, its right as an agency of a sovereign state to be immune from antitrust litigation. *Parker* immunity is "predicated on principles of federalism and state sovereignty stemming from the Supremacy Clause of the Constitution." *Martin*, 86 F.3d at 1397 (citation omitted). As the Fifth Circuit further observed, the immunity protects important State interests in protecting officials from the risks of trial, including deterrence and distraction of State officials from their governmental duties. *Id.*, 86 F.3d at 1396. Compelling LREAB to proceed to trial while appealing the denial of state action immunity would irreparably harm all these rights of LREAB and the State.

Under the FTC Act, once the Commission files the administrative record with the Court of Appeals, the jurisdiction of that Court to affirm, enforce, modify, or set aside orders of the

Commission shall be exclusive. 15 U.S.C. § 45(d). The Federal Rules ordinarily allow the Commission 40 days to prepare and submit the record after service of the petition. Fed. R. App. P. 17(a).[2] In practical effect, this means that the Fifth Circuit may not obtain exclusive jurisdiction over the present dispute until early June – on the eve of trial scheduled to begin on June 11, 2018. *See* Second Revised Scheduling Order (Jan. 24, 2018).

Thus, the issues before the Fifth Circuit in its appellate review of the Commission's Order require that the trial should be delayed until after the Fifth Circuit rules on the merits.[3] Staying the administrative proceedings pending a determination of the rights of the State of Louisiana will neither harm the public's interest in "conducting [adjudicative] proceedings expeditiously," Rule 3.1, nor "prejudice either side," *Phoebe Putney Health System*, 152 F.T.C. 1035, 1035 (July 15, 2011) (staying proceedings pending judicial review).

[2] The Fifth Circuit "may shorten or extend the time to file the record." *Id.*

[3] The Board moreover has been diligent in pursuing its defense of *Parker* immunity. The Board filed its Motion to Dismiss the Complaint the day the prior stay on proceedings was lifted, and filed its Petition for Review within 10 days after receiving the Commission's Order.

Conclusion

For the foregoing reasons, the Board respectfully requests that the Commission stay administrative proceedings pending judicial review in the Fifth Circuit.

Dated: April 20, 2018

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

Docket No. 9374

[PROPOSED] ORDER ON RESPONDENT'S
MOTION TO STAY PENDING JUDICIAL REVIEW

On April 20, 2018, Respondent filed a Motion for Stay Pending Judicial Review. Good cause having been show, the motion is hereby GRANTED.

IT IS ORDERED that this proceeding be, and it hereby is, stayed pending final resolution of the petition for review in Fifth Circuit, Case No. 18-60291. Within ten days of any decision affirming the Commission's Order, counsel for the parties shall jointly propose a revised scheduling order.

By the Commission.

_____
Donald S. Clark
Secretary

ISSUED:

Exhibit 1

PUBLIC

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOUISIANA REAL ESTATE APPRAISERS BOARD, 9071 Interline Avenue Baton Rouge, LA 70809	)
Petitioner,	)
v.	)
FEDERAL TRADE COMMISSION, 600 Pennsylvania Avenue, NW Washington, D.C. 20580	)
Respondent.	)

PETITION FOR REVIEW

Louisiana Real Estate Appraisers Board ("LREAB"), pursuant to Federal Rule of Appellate Procedure 15(a) (providing for appellate review of agency orders) and 15 U.S.C. § 45(c) (providing for appeal in the court of appeals within the circuit where the petitioner resides), hereby petitions the Court for review of the Opinion and Order of the Federal Trade Commission in *In the Matter of Louisiana Real Estate Appraisers Board*, Docket No. 9374, issued April 10, 2018, (1) denying LREAB's Motion to Dismiss Complaint and (2) granting Complaint Counsel's Motion for Partial Summary Decision regarding LREAB's Third and Ninth Affirmative Defenses and dismissing LREAB's Third and Ninth Affirmative

Defenses (hereinafter "Order"). As explained below, the Order denies LREAB its entitlement to state action immunity against federal antitrust claims, and therefore is appealable to this Court under the collateral order doctrine. *Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1394 (5th Cir. 1996).

LREAB, by state statute, is constituted as a state board within the office of the Governor of Louisiana and authorized to regulate real estate appraisals and to license and regulate appraisers and appraisal management companies. La. R.S. 37:3391, *et seq.*; La. R.S. 27:3415.1, *et seq*. The Complaint issued by the FTC on May 31, 2017, alleges LREAB promulgated and enforced one of its regulations in violation of federal antitrust law, 15 U.S.C. § 45 (Section 5 of the FTC Act). LREAB asserted in its Answer to the Complaint on June 19, 2017, affirmative defenses based on state action immunity from federal antitrust claims under *Parker v. Brown*, 317 U.S. 341 (1943). Thereafter, the Governor of Louisiana issued an Executive Order reinforcing LREAB's assertion of state action immunity by mandating additional active State political supervision over LREAB's rulemaking and enforcement authority, and expressing concern that "the possibility of federal antitrust law challenges to state board actions affecting prices … may prevent the LREAB from faithfully executing mandates under the Dodd-Frank Act and Louisiana law under La. R.S. 37:3415.15." Executive Order 17-16, "Supervision of the Louisiana Real Estate Appraisers Board Regulation of Appraisal Management Companies" (July 11, 2017).

State action immunity from suit "is effectively lost if a case erroneously is permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 536 (1985). The Order denies LREAB and, thereby, the State of Louisiana, their entitlement to state action immunity from federal antitrust claims, thereby depriving LREAB of immunity from a trial upon such claims and preventing LREAB from fulfilling its obligation to enforce State law. The Order (a) is effectively unreviewable on appeal after trial; (b) conclusively determines the question of LREAB's state action immunity both before and after the Governor's Executive Order; and, (c) resolves an important issue completely separate from the merits of the case. *Martin v. Mem'l Hosp.*, 86 F.3d at 1394; *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). Therefore, the Order is appealable to this Court under the collateral order doctrine.

A copy of the Public Record Version of the Order is submitted herewith.

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Date: April 19, 2018

Respectfully submitted,

/s/ Seth D. Greenstein

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PUBLIC

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,	)	**Docket No. 9374**
Respondent	)	
	)	**Public Record Version**

OPINION AND ORDER OF THE COMMISSION

By Maureen K. Ohlhausen, Acting Chairman:

Federal antitrust law plays a crucial role in our economy, serving as "a central safeguard for the Nation's free market structures,"[1] by protecting U.S. consumers from anticompetitive conduct. In our federal system, individual states are sovereigns that retain substantial authority to regulate the commerce that occurs within their borders, including displacing competition. Because "[s]tate agencies are not simply by their government character sovereign actors,"[2] however, antitrust law has a legitimate role in challenging certain types of government-related activities that restrain competition.

The state action doctrine guides this analysis. When an action is truly that of the state sovereign, antitrust law gives way. But immunity for anticompetitive action by state agencies "requires more than a mere facade of state involvement . . . ."[3] States can ensure immunity is available to their agencies by adopting clear policies to displace competition, and, if those agencies are controlled by market participants, by providing active supervision.[4]

To be clear, neither antitrust enforcement nor the state action doctrine is a vehicle for the federal government to micromanage the affairs of the sovereign states.[5] Instead, the state action

[1] *North Carolina State Board of Dental Examiners v. FTC*, 135 S.Ct. 1101, 1109 (2015) ("*N.C. Dental*").

[2] *Id*. at 1114.

[3] *Id*. at 1111.

[4] *See id*. at 1115-16.

[5] *Id*. at 1110 ("If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate.").

doctrine only arises in relation to anticompetitive conduct that, if not done by a sovereign actor, violates federal antitrust law. Thus, the critical inquiry is "whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'"[6]

This matter presents one of the most common scenarios in which state action issues arise: a state board with market participants exercising regulatory oversight of their own industry or profession. Although oversight by industry participants, with or without the involvement of the state, can have socially beneficial and even laudatory purposes, such arrangements can also present significant antitrust concerns. Indeed, "[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor."[7]

One critical check on such influences is the requirement of "active supervision" by the state sovereign of active market participants exercising regulatory powers. The appropriate scope of the active supervision requirement in the state action defense is the central issue raised by the instant Motions we decide here.

Respondent, the Louisiana Real Estate Appraisers Board ("LREAB" or "the Board"), is a ten-member board that regulates the practice of real estate appraisals in Louisiana. *See* La. Rev. Stat. §§ 37:3394, 37:3395. By statute, at least eight of its members must be Board-licensed appraisers. On May 31, 2017, the Commission issued a Complaint alleging that the Board had unreasonably restrained price competition for appraisal services provided to appraisal management companies ("AMCs") by adopting in 2013 and subsequently enforcing a regulation known as Rule 31101. In its Answer, the Board invoked the state action defense, asserting that the challenged conduct is exempt from antitrust scrutiny.

The legal landscape has not been static following issuance of the Complaint. Beginning with an executive order issued by the Louisiana Governor on July 11, 2017, the State of Louisiana and the Board have implemented a series of administrative changes (without any changes in the underlying statutory scheme) intended to increase the level of state supervision over the Board's actions and shield it from antitrust review. The Board revoked the original Rule 31101, reissued it in identical form under the new procedures, and entered into a contract with a state administrative agency to review certain of its enforcement decisions. In light of these changes, the Board has moved to dismiss the Complaint as moot. Complaint Counsel argue that the changes do not moot the proceeding and have moved for partial summary decision on the Board's state action defense.

We conclude that the evidence proffered by the Board is insufficient to demonstrate that the State of Louisiana actively supervised the reissuance of Rule 31101 in 2017, or that it will actively supervise enforcement proceedings under the Rule in the future. The contours of the active supervision requirement are flexible and context-dependent. However, they require, at minimum, a more substantive engagement by the State in a review mechanism that provides

[6] *Id.* at 1115-16 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-101 (1988)).

[7] *Id*. at 1111.

assurance that the actions of a board regulating its own profession promote state public policy, rather than the private interests of the profession. Accordingly, we deny the Board's Motion to Dismiss the Complaint. We further conclude that there is no genuine dispute of fact either that the Board is subject to the active supervision requirement or that the Board's conduct prior to 2017 was not actively supervised. We therefore grant Complaint Counsel's Motion for Partial Summary Decision on Respondent's Third and Ninth Affirmative Defenses.

I. BACKGROUND

A. The Board

The Louisiana Legislature has given the LREAB broad authority to regulate real estate appraisals, including the power to issue licenses, set standards, issue rules and regulations, and conduct disciplinary proceedings, including proceedings to suspend or revoke licenses or to censure or fine licensees. La. Rev. Stat. § 37:3395. The Board also licenses and regulates AMCs, which act as agents for lenders in arranging for real estate appraisals, and thus effectively function as the purchasers of appraisal services. *Id.* §§ 37:3415.2(2), 37:3415.3.

Since August 1, 2014, the Board has consisted of ten members appointed by the Louisiana Governor, all drawn from real estate-related businesses. *Id.* § 37:3394(B). Two are selected from a list submitted by the Louisiana Bankers Association. *Id.* § 37:3394(B)(1)(a). Seven members must be certified real estate appraisers who have been licensed by the Board for at least five years, including at least four "general appraisers" and two "residential appraisers." *Id.* §§ 37:3394(B)(1)(c), (B)(2). General appraisers are licensed "for appraisal of all types of real estate regardless of complexity or transaction value." *Id.* § 37:3392(7). By contrast, residential appraisers are licensed "to appraise one to four residential units, without regard to transaction value or complexity, and perform appraisals of other types of real estate having a transaction value of two hundred fifty thousand dollars or less." *Id.* § 37:3392(13). The last member must be an employee or representative of a Louisiana-licensed AMC, who must also be a Board-licensed appraiser. *Id.* § 37:3394(B)(1)(b).[8]

B. Initial Adoption of Rule 31101

The Truth in Lending Act, as amended by the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, provides that lenders and their agents must compensate 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). These provisions of the statute appear within a section of the law focused on ensuring "appraisal independence" and detail various prohibited practices, such as bribery or other coercion aimed at improperly influencing valuations provided by appraisers. Louisiana adopted a similar "customary and reasonable" rate requirement in 2012. La. Rev. Stat. § 37:3415.15(A) (added by Act of May 31, 2012, No. 429, 2012 La. H.B. 1014).

[8] Prior to August 1, 2014, there was no AMC representative and the Board had only nine members, but its composition was otherwise the same. *See* La. Rev. Stat. § 37:3394(B) (2013).

In 2013, the Board first adopted the regulation at the heart of this dispute. Rule 31101 specifies how AMCs must comply with the customary and reasonable requirement. *See* La. Admin. Code tit. 46, pt. LXVII, § 31101 (2017).[9] It provides that AMCs can demonstrate compliance by using "objective third-party information such as government agency fee schedules, academic studies, and independent private sector surveys" or by using a schedule of fees established by the Board. *Id.* AMCs not using one of these methods must, at a minimum, review a set of six factors on each assignment made and then "make appropriate adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable." *Id.* § 31101(A).

Pursuant to Louisiana law, the Board sent Rule 31101 to the relevant oversight subcommittees in the Louisiana Legislature before it was formally issued. *See* La. Rev. Stat. § 3415.21(B) (2013) (repealed by Act of June 19, 2014, No. 764, 2014 La. S.B. 575); La. Rev. Stat. § 49:968; Unangst Aff. ¶ 33.[10] Neither the House nor the Senate subcommittee held a hearing, thereby allowing the Rule to go into effect as proposed. *Id.* ¶ 34. The Louisiana Governor had authority to disapprove Rule 31101, but issued no disapproval order. *Id.* ¶ 36.

C. Complaint and Answer

The Complaint alleges that Rule 31101 amounts to an unlawful restraint of competition on its face because it prohibits AMCs from arriving at an appraisal fee through the operation of the free market. Compl. ¶¶ 30-31. It also alleges that the Board has unlawfully restrained price competition by its enforcement of the Rule, because it effectively requires AMCs to set rates at least as high as those set forth in a survey conducted by the Southeastern Louisiana University Business Research Center. *Id.* ¶¶ 32-43. It alleges that the Board was "controlled at all relevant times by active market participants." *Id.* ¶ 6.

The Board's Answer denies that the Rule unlawfully restrains competition either on its face or as applied and asserts several affirmative defenses. As relevant to these Motions, the Third Affirmative Defense states, "The Complaint fails adequately to allege that the Board has a controlling number of active participants in the relevant residential appraisal market" (emphasis omitted), and the Ninth Affirmative Defense states that the Board "is immune from federal antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943)."

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[9] For convenience, we cite to the current version of the rule, which (as discussed in the text) is identical to the version promulgated in 2013.

[10] We use the following abbreviations for purposes of this opinion:

Compl.:	Complaint
MTD:	Memorandum of Points and Authorities in Support of Motion of Respondent Louisiana Real Estate Appraisers Board to Dismiss the Complaint
CCOpp:	Complaint Counsel's Opposition to Respondent's Motion to Dismiss the Complaint
RRB:	Reply in Support of Respondent Louisiana Real Estate Appraisers Board Motion to Dismiss
RX:	Respondent's Exhibits (attached to MTD)
MPSD:	Memorandum of Law in Support of Complaint Counsel's Motion for Partial Summary Decision
ROpp:	Memorandum of Respondent Louisiana Real Estate Appraisers Board in Opposition to Complaint Counsel's Motion for Partial Summary Decision
Unangst Aff.:	Affidavit of Bruce Unangst (attached to ROpp)
Tr. Oral Arg.:	Transcript of Oral Argument on Respondent's Motion to Dismiss and Complaint Counsel's Motion for Partial Summary Decision (Feb. 22, 2018)

D. Post-Complaint Events

Following issuance of the Complaint, Louisiana officials and the Board took several steps intended to increase the level of state supervision over the Board's conduct and thereby insulate the Board from antitrust scrutiny. Those efforts began on July 11, 2017, when Louisiana's Governor issued an executive order directing changes both in the way the Board promulgates rules relating to the customary and reasonable fee requirement and in the way it enforces those rules. RX1.

1. Promulgation of Rules

The executive order directs the Board to submit any proposed rule, along with the rulemaking record, to the state Commissioner of Administration (or the Commissioner's designee) for approval, rejection, or modification. It directs the Commissioner (or his/her designee) to review the proposed rule to "ensure that [it] serves Louisiana's public policy of protecting the integrity of the residential mortgage appraisals by requiring that the fees paid by AMCs for an appraisal are to be customary and reasonable." RX1, at § 2.

In light of this directive, on July 31, 2017, the Board apparently voted to repeal Rule 31101 and adopt a "Replacement Rule" with precisely the same language. MTD at 9.[11] By letter dated August 14, 2017, the Commissioner of Administration advised that it was his opinion that the proposed Rule would further Louisiana public policy. RX3. The Board thereafter proceeded to solicit public comments and hold a hearing. It then submitted the proposed Rule, along with the comments and hearing transcript, to the relevant legislative oversight subcommittees and provided the comments and transcript to the Commissioner of Administration. Neither the House nor the Senate subcommittee held a hearing, and the reissued Rule 31101 became effective in November 2017 upon publication in the *Louisiana Register*. MTD at 14; RX 12-14.

2. Enforcement Proceedings

The executive order also called for the State of Louisiana's Division of Administrative Law ("DAL") to review certain Board enforcement actions. Specifically, it provided that before finalizing a settlement with or filing an administrative complaint against an AMC regarding compliance with the customary and reasonable fee requirement, the Board would submit the proposed action to the DAL for approval, rejection, or modification. The executive order stated that the purpose of the review is "to ensure fundamental fairness and that the proposed action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such an appraisal are customary and reasonable." RX1, at § 1.

The executive order also directed the Board to enter into a contract with the DAL to establish the review procedures. In accordance with this directive, the Board and the DAL entered into a memorandum of understanding ("MOU") that specifies the procedures and standards for the DAL's review. RX9.

[11] The Board has not submitted records of the July 31 vote or a copy of what it allegedly sent to the Commissioner of Administration.

In addition, following issuance of the executive order, the Board closed all pending investigations under the original Rule 31101. RX10. The Board asserts that all enforcement actions based on the Rule prior to its reissuance in November 2017 either expired by their own terms or were vacated or terminated with no finding of violation, and that any prior payments or enforcement actions will not be admissible in future proceedings. *Id.* Any future enforcement actions will be based upon the reissued Rule 31101 (which, again, is identical to the original Rule 31101) and will be subject to the review procedures set forth in the executive order and the MOU.

II. THE STATE ACTION DOCTRINE

In *Parker v. Brown*, the Supreme Court held that the Sherman Act does not reach anticompetitive conduct by states acting in their sovereign capacity. 317 U.S. at 350-51. The Court has applied the same rule in antitrust cases brought by the Commission under Section 5 of the FTC Act, 15 U.S.C. § 45. *See, e.g., N.C. Dental*, 135 S. Ct. at 1111-14; *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216, 219 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

The Court has long held that two conditions must be satisfied for private parties to avail themselves of the state action doctrine to avoid antitrust liability: first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy, and second, the policy must be actively supervised by the state itself. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980). In *N.C. Dental*, the Court held that the same test applies to "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates." 135 S. Ct. at 1114. As noted above, the Court explained: "State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." *Id.* at 1111. Rather, application of the doctrine "requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control." *Id.* Thus, "*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own." *Id.*

The primary issues presented by these Motions concern the active supervision requirement. Active supervision is a "flexible and context-dependent" inquiry. *N.C. Dental*, 135 S. Ct. at 1116. It "need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide realistic assurance that a nonsovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Id.* (internal quotation marks omitted).

The Court recognized, however, several "constant requirements" for active supervision. *Id.* First, "the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it." *Id.* Second, "the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy." *Id.* Third, "the 'mere potential for state supervision is not an adequate substitute for a decision by the State.'" *Id.*

(quoting *Ticor Title*, 504 U.S. at 638). Finally, "the state supervisor may not itself be an active market participant." *Id.* at 1117.

With these principles in mind, we now turn to the two Motions before us. In addressing the state action issues, we emphasize that the question before us "is not whether the challenged conduct is efficient, well-functioning, or wise. Rather, it is whether anticompetitive conduct engaged in by nonsovereign actors should be deemed state action and thus shielded from the antitrust laws." *Id.* at 1111 (citations, internal quotation marks, and internal brackets omitted).

III. THE BOARD'S MOTION TO DISMISS

We first consider the Board's Motion to Dismiss. The Board argues that the case is now moot in light of "[r]ecent sovereign actions by the State of Louisiana" taken since July 2017. MTD at 1. It argues first that the Louisiana Legislature has clearly articulated a policy to displace competition in the market for residential real estate appraisal fees and that Rule 31101 effectuates that policy. *Id.* at 15-18. It then argues that the State actively supervised the reissuance of Rule 31101 in 2017 and has put procedures in place to ensure that any future enforcement of the Rule will be actively supervised. *Id.* at 18-22.[12] With respect to the reissuance of the Rule, the Board points to the review by the state Commissioner of Administration and the actions of the state legislative committees and various other state officials. With respect to enforcement, the Board primarily relies on the executive order and the review procedure established in the MOU, as well as the availability of judicial review. It argues that as a result it is "[b]eyond cavil" that "the State of Louisiana has accepted political accountability for any anticompetitive effects of promulgation or enforcement of Replacement Rule 31101." RRB at 8. Finally, the Board argues that it has eradicated any ongoing effects of the pre-2017 enforcement of Rule 31101. MTD at 22-24. Because (in the Board's view) the state action doctrine will shield its conduct going forward and there are no continuing effects from the prior Rule, it argues that there is no reasonable expectation that the alleged violations can recur and no meaningful relief that the Commission can issue. *Id.* at 24-28.

Complaint Counsel oppose Respondent's Motion on several grounds. They contend that the regime that Louisiana has established to supervise Respondent's activities is "unproven, incomplete, and facially deficient." CCOpp at 1; *see also id.* at 22-32.[13] According to Complaint Counsel, "The procedure for review of Respondent's regulation 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." *Id.* at 1. Moreover, say Complaint Counsel, even were the new supervision regime facially sufficient, "a supervision regime that looks fine on paper may fail in execution." *Id.* at 2. In the event we conclude "that there is both an antitrust violation and a facially adequate state action regime," Complaint Counsel argue, the case still would not be moot; in those circumstances Complaint Counsel urge that we issue an order that proscribes future anticompetitive conduct, but which might include a

[12] For purposes of the Motion to Dismiss, the Board does not dispute that active supervision is necessary. *See id.* at 15 n.9.

[13] Although Complaint Counsel do not concede that the clear articulation requirement has been satisfied, their briefing focuses on active supervision. CCOpp at 10 n.4. Because we find that active supervision has not been demonstrated, we do not address the clear articulation issue.

"State Action Proviso" that expressly allows future conduct that falls within the protections of the state action doctrine. *Id.* at 22; *see also id.* at 2.

We conclude that the Board has not shown that the reissuance and enforcement of Rule 31101 have been and will be actively supervised, and, thus, the Board has not met its burden to demonstrate mootness. We therefore do not address Complaint Counsel's argument that post-complaint changes to the supervision regime – even if facially sufficient to constitute active supervision – cannot moot the case.

A. Legal Standard

The Board correctly states that we review motions to dismiss under the standards of Rule 12 of the Federal Rules of Civil Procedure, MTD at 3, but does not expressly address which provision of that rule applies here. In *South Carolina State Board of Dentistry*, 138 F.T.C. 229 (2004), cited by the Board, we considered a motion to dismiss on state action grounds under the standards of Rule 12(b)(6), which governs motions to dismiss for failure to state a claim. But in that case, the respondent challenged the sufficiency of the complaint's allegations based on the state action doctrine (although it also raised a claim of mootness based in part on post-complaint events). In this case, by contrast, the Board's Motion to Dismiss is not directed to the sufficiency of the Complaint. Rather, the Board contends that the case is moot in light of actions taken by Louisiana officials and the Board *after* the Complaint was issued.

Mootness is a justiciability issue and a motion to dismiss on this ground is properly evaluated under the standards of Rule 12(b)(1). *See, e.g.*, *Nat'l Ass'n of Bds. of Pharmacy v. Bd. of Regents*, 633 F.3d 1297, 1308 (11th Cir. 2011). The difference is significant because on a Rule 12(b)(1) motion, unlike a Rule 12(b)(6) motion, a court is not bound by the allegations of the complaint at least as to the jurisdictional facts. As to those facts, the court is "free to weigh the evidence and resolve factual disputes in order to satisfy itself that it has the power to hear the case." *Montez v. Dep't of the Navy*, 392 F.3d 147, 149 (5th Cir. 2004).

In this case, however, the basic facts relating to the Board's mootness argument do not appear to be in dispute. The Board has submitted 14 exhibits in support of its Motion and suggests that we take official notice of these materials. MTD at 3. Complaint Counsel challenge only two of these exhibits (RX12 and RX13), arguing that they are not official government records and that they recite facts that are a subject of dispute and hence not eligible for official notice. CCOpp at 26 & n.8. But as noted above, on a Rule 12(b)(1) motion, courts are not limited to matters that are judicially noticeable; they may consider any evidence going to the jurisdictional facts. *See Montez*, 392 F.3d at 149; *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir. 2002). Complaint Counsel have not challenged the authenticity of any of the Board's exhibits. Accordingly, we will consider all of the Board's exhibits to the extent they are relevant and assume for purposes of the Board's Motion that they are what they purport to be.

The standard for determining whether a case is moot is well settled. Ordinarily, the moving party must show that the challenged conduct has ceased and that there is no possibility that it could recur. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). Of course, in this case, there has been no change in the language of Rule 31101, and the Board does not allege that the remaining challenged conduct – enforcement of the Rule in a manner that may restrain

competition – has changed substantively. Rather, the Board contends that the effects of its past alleged violations have been eradicated, and that the state action doctrine shields its future conduct from antitrust scrutiny, such that the Commission can no longer grant any effective relief.

Thus, the critical question before us is whether the Board has shown that its conduct is protected by the state action doctrine going forward. After identifying certain key characteristics that typically contribute to active supervision, we separately address (i) whether the Board has shown that the state actively supervised the reissuance of Rule 31101, and (ii) whether the Board has shown that the state will actively supervise future enforcement of the Rule.

B. The Active Supervision Inquiry

We begin by discussing the showing that a board with a controlling number of active market participants must make to demonstrate that its conduct is actively supervised by the state. Citing *N.C. Dental*, the Board contends that "[a]ctive supervision exists where the supervisor: (1) reviews the substance of the anticompetitive decision, not merely the procedures followed to produce it; (2) has the power to veto or modify particular decisions to ensure they accord with state policy; and (3) is not itself an active market participant." MTD at 19. Although the Supreme Court described these – along with the important consideration (entirely omitted from the Board's list) that the "mere potential for state supervision is not an adequate substitute for a decision by the State" – as "constant requirements," *N.C. Dental*, 135 S. Ct. at 1116, it did not suggest that active supervision exists if and only if these requirements are satisfied. To the contrary, it eschewed a rigid formula, making clear that "the inquiry regarding active supervision is flexible and context-dependent" and that "the adequacy of supervision will depend on all the circumstances of a case." *Id.* at 1116-17.

Our prior cases offer further guidance. In *Kentucky Household Goods Carriers Association, Inc.*, 139 F.T.C. 404 (2005), we explained that the Supreme Court decisions make clear that "a state official or agency must have ascertained the relevant facts, examined the substantive merits of the private action, and assessed whether the private action comports with the underlying statutory criteria established by the state legislature in a way sufficient to establish the challenged conduct as a product of deliberate state intervention rather than private choice." *Id.* at 416-17. After surveying case law from the circuit courts and prior Commission decisions, we identified three elements that should be considered as part of the active supervision analysis: (1) the development of an adequate factual record, including notice and an opportunity to be heard; (2) a written decision on the merits; and (3) a specific assessment – both quantitative and qualitative – of how the private action comports with the substantive standard established by the legislature. *Id.* at 420. We addressed the same three elements in *North Carolina. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 629 (2011). Although we cautioned in both cases that "no single one of these elements is necessarily a prerequisite for active supervision," we noted that the absence of all of the factors would support a conclusion that the state had not adequately supervised the private actors' activity. *Id.*; *Kentucky Household Goods*, 139 F.T.C. at 421.

These factors accord with the Supreme Court's recent teachings in *N.C. Dental*. We emphasize again that these factors are merely guidelines; there is no one-size-fits-all set of immutable characteristics that a state supervising entity must satisfy in every context. The

ultimate question is always simply "whether the State's review mechanisms provide 'realistic assurance' that a nonsovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" *N.C. Dental*, 135 S. Ct. at 1116 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988)). In general, when these three elements are all satisfied, a finding of active supervision is normally appropriate. However, when one or more of these factors are missing, it becomes increasingly likely that the scope of state supervision is inadequate.

C. Reissuance of Rule 31101

The Board contends that the State actively supervised the reissuance of Rule 31101 in two principal ways.[14] First, the Louisiana Commissioner of Administration reviewed the Rule, in accordance with the Governor's executive order of July 11, 2017. Second, the Board submitted the Rule to the appropriate oversight subcommittees in the Louisiana Legislature. According to the Board, the subcommittee members "required no information, found no hearing necessary, and allowed promulgation to proceed." RRB at 6. The Board has not demonstrated that either of these procedures was sufficient to constitute active supervision.

The defects in the review by the Commissioner of Administration are readily apparent.[15] As a preliminary matter, the Board has not submitted with its Motion what, if anything, it submitted to the Commissioner on July 31, 2017.[16] But in any event, it is clear that the Board did not submit the Rule "along with its rulemaking record," as required by the executive order (RX1, § 2), because the rulemaking record was far from complete at that time; the Board had yet to solicit public comment or conduct a hearing. Thus the first element we identified in *N.C. Dental* and *Kentucky Household Goods*, an adequate factual record with notice and opportunity to be heard, is not present here.[17]

Moreover, the record fails to show that the Commissioner "exercised sufficient judgment and control" to show that the reissuance of Rule 31101 was "a product of deliberate state intervention, not simply [an] agreement among private parties." *Ticor Title*, 504 U.S. at 634-35. The Commissioner's letter of August 14, 2017 approving the proposed Rule (RX3) consists of three sentences. The operative sentence reads: "After careful consideration of LREAB's regulatory role, the circumstances leading to these proposed rules, and the goals sought by their promulgation, I am of the opinion that these rules will further the public policy of the State of

[14] The Board also notes that the staff director of the Louisiana Legislative Fiscal Office approved the Fiscal and Economic Impact Statement for the proposed Rule and that the *Louisiana Register* accepted the Rule for publication. These ministerial actions do not reflect any active supervision by state officials to ensure that the Rule furthers a state policy to displace the antitrust laws.

[15] We express no view as to whether a review required by a governor's executive order, as opposed to one that the legislature has mandated by statute, is sufficient to satisfy the active supervision requirement.

[16] At oral argument, counsel for Respondent stated that what the Commissioner of Administration looked at prior to his August 14, 2017 approval letter was "the promulgation record for the prior rule, prior Rule 31101." Tr. Oral Arg. at 14. While this material might have been relevant, the Commissioner could not reasonably have made the necessary determinations regarding the 2017 reissuance without reviewing the 2017 rulemaking record.

[17] We express no view as to whether review by the Commissioner of the factual record developed by the Board, as opposed to his own development of a factual record, would satisfy the first element of the framework we applied in *N.C. Dental* and *Kentucky Household Goods.*

Louisiana of protecting the integrity of the residential mortgage appraisals by requiring that the fees paid by AMCs for an appraisal are to be customary and reasonable." We do not think that this qualifies as a "written decision on the merits" in any meaningful sense, and it certainly does not reflect any "specific assessment . . . of how the [Board's] action comports with the substantive standard established by the legislature." *N.C. Dental*, 151 F.T.C. at 629. The letter merely recites the standard set forth in section 2 of the executive order, with no analysis, discussion, or explanation of the Commissioner's reasoning. Under the circumstances – including the fact that the Board was proposing to reissue, word-for-word, the same rule it had issued in 2013 – the letter strongly suggests that the Commissioner simply rubber-stamped the Board's decision.

The Board has also submitted a two-page letter from the General Counsel of the Division of Administration dated November 9, 2017. RX11. It states that the General Counsel reviewed materials submitted by the Board, including "a substantive history of Rule 31101, background information on Dodd-Frank and its requirements, the pertinent state and federal laws, the rulemaking record from the past promulgation of Rule 31101, as well as all documents and public comments related to the 2017 promulgation of the rule." Based on that review, the General Counsel concluded that "all sides seem to be in agreement that the payment of customary and reasonable fees is an important public policy goal" and stated that "I believe that Rule 31101 achieves that public policy goal" because it "reasonably codifies the more general requirements set forth in law without becoming an inflexible, 'one size fits all' decree." *Id.* at 2.

The General Counsel's letter does not remedy the defects in the Commissioner's earlier letter. Critically, on its face, the General Counsel's letter disavows any authority to review the Rule: "[A]t this point of the rulemaking process, the legislative oversight committee and the Governor – not the DOA – have the formal authority to disapprove proposed rules." *Id.* at 1. It states that under the executive order, "any action on the part of DOA to approve, reject, or modify the proposed rule was prior to its promulgation," and that the Commissioner had already "approved the adoption of the rule via letter on August 14, 2017." *Id.* By his own words, the General Counsel thus lacked "the power to veto or modify particular decisions" that the Supreme Court tells us "the supervisor must have." *N.C. Dental*, 135 S. Ct. at 1116.

Moreover, although noting that the Real Estate Valuation Advocacy Association (representing a number of AMCs) had voiced concern that "Rule 31101 is unlawfully more restrictive than the federal requirements set forth in Dodd-Frank and its accompanying regulations," the General Counsel brushed the issue aside, stating that it was "not the role of the [Division of Administration] to issue a legal opinion on the matter." RX11, at 2. Although not quite as terse as the Commissioner's earlier letter, the General Counsel's letter still lacks any analysis or discussion of how the reissued Rule furthers Louisiana's policy and whether the criticisms voiced in public comments identified flaws in the Rule or suggested viable improvements. It thus fails to satisfy the third criterion of *N.C. Dental* and *Kentucky Household Goods*, which looks at whether the state has provided "a specific assessment . . . of how the private action comports with the substantive standards established by the legislature."

Nor has the Board shown that the Louisiana Legislature actively supervised the reissuance of the Rule. To the contrary, the materials submitted by the Board do not show that the Louisiana Legislature played an active role in supervising the Board's reissuance of Rule 31101.

Louisiana law provides a procedure for legislative review of regulations proposed by an agency. *See* La. Rev. Stat. § 49:968.[18] Briefly, when notice of the proposed rule is submitted to the *Louisiana Register* for publication, the agency must also submit a report to the presiding officers of each legislative house and the appropriate standing legislative committees containing, *inter alia*, a copy and brief summary of the rule, a statement of the circumstances that require its adoption, amendment or repeal, and statements of the fiscal and economic impact of the proposed action. *Id.* §§ 49:968(B)-(C). The chair of each standing committee appoints an oversight subcommittee, which "may conduct hearings" on the proposed rule. *Id.* § 49:968(D)(1)(a). The agency thereafter submits a second report to the subcommittees, which must include summaries of any hearing held by the agency and comments received by the agency. *Id.* § 49:968(D)(1)(b). If the subcommittee holds a hearing, it will determine whether the rule "is acceptable or unacceptable." *Id.* § 49:968(D)(3)(d). But "[f]ailure of a subcommittee to conduct a hearing or to make a determination regarding any [proposed] rule . . . shall not affect the validity" of the rule. *Id.* § 49:968(E)(2). If neither the House nor the Senate subcommittee finds the proposed rule unacceptable, the agency may adopt it as proposed. *Id.* § 49:968(H)(1).

The materials submitted by the Board appear to show that this procedure was followed for the reissuance of Rule 31101. According to the Board, no subcommittee member requested a hearing or submitted any questions about the proposed Rule. MTD at 14; RX12; RX13. At most, this shows a "potential for state supervision," which the Supreme Court has held "is not an adequate substitute for a decision by the State." *Ticor Title*, 504 U.S. at 638. This procedure is substantively similar to the "negative option rule" addressed in *Ticor Title*, under which state agencies had an opportunity to review rates proposed by private entities and "[t]he rates became effective unless they were rejected within a set time." *Id.* Similarly, here, the Board's proposed rules, establishing compensation rules set by active market participants, automatically become effective if not rejected by the legislative subcommittees in a set time. Here, as in *Ticor Title*, the failure of the state to act does not "signif[y] substantive approval," *id.*, and thus does not demonstrate active supervision.[19]

Finally, the Board has also submitted no evidence that Louisiana's Governor actively supervised the reissuance of Rule 31101. Respondent cites La. Rev. Stat. §§ 49:968(D)-(F) and 49:970 in arguing that every rule promulgated by the Board must be reviewed by the Governor. MTD at 19-20. La. Rev. Stat. §§ 49:968(D)-(G) provide for review by the Governor when a legislative oversight subcommittee finds that a proposed rule change is unacceptable, an event

[18] We note that an additional statute governing legislative review of Board regulations that was in force in 2013 when Rule 31101 was originally adopted had been repealed by 2017. *See* La. Rev. Stat. § 3415.21(B) (2013) (discussed below in connection with Complaint Counsel's Motion for Partial Summary Decision).

[19] At oral argument, the Board's counsel cited *Motor Transport Association of Connecticut, Inc.*, 112 F.T.C. 309 (1989), for the proposition that we have previously approved negative option procedures. Tr. Oral Arg. at 16. In *Motor Transport*, however, the record showed that the state public utilities commission "regularly review[ed] proposed tariffs and consider[ed] the reasonableness of proposed rates ." *Id.* at 349. The record contained specific examples of active oversight, including situations where the agency had suspended rules, held a hearing, and issued a written decision, and the record showed that the "when the [agency] allows a proposed rate to become effective without invoking its hearing procedures, that action results from the decision of the agency that the proposed rate meets the requirements of the statutes and regulations." *Id.* (internal quotation marks and brackets omitted). There is no comparable evidence of active legislative supervision here, and nothing in *Motor Transport* suggests that a state's decision not to hold a hearing on a proposed rule can be deemed active supervision.

that did not occur here. La. Rev. Stat. § 49:970 permits the Governor to suspend or veto any rule or regulation of a state board within 30 days of its adoption, a procedure much like that which the Supreme Court found a mere "potential for state supervision" that did not qualify as a "decision by the State." *Ticor Title*, 504 U.S. at 638. Here, there is nothing in the record to suggest that the Louisiana Governor even looked at reissued Rule 31101, much less conducted the type of analysis that would be necessary to qualify as active supervision. Accordingly, we find the State of Louisiana failed to actively supervise the reissuance of Rule 31101.

D. Supervision of Enforcement Proceedings

Whether the changes to the Board's procedures for enforcing Rule 31101 are sufficient to show active supervision is a more difficult question, complicated by the fact that the new procedures have never been implemented. As a starting point, *Ticor Title* makes clear that a program for state supervision that appears adequate on paper is not, by itself, sufficient to establish active supervision; state officials must actually exercise their supervision authority in a meaningful way. *See Ticor Title*, 504 U.S. at 637-38. In this case, however, certain features of the review procedure adopted by the Board are problematic on their face.

As noted above, the review procedure is spelled out in an MOU between the Board and the DAL, which is authorized to provide administrative law judges on a contractual basis for state agencies. *See* La. Rev. Stat. § 49:999.1.[20] The MOU provides that before "finaliz[ing] a settlement agreement with" or "filing an administrative complaint against" an AMC, the Board will "transmit its proposed action and the record thereof to the DAL." RX9, § 4. The DAL then has 30 days to "approve, reject, or modify" the Board's proposed action, and may remand the proceeding to the Board "with instructions or to obtain additional evidence for the record on review." *Id.* § 5.

When the Board seeks to initiate an administrative complaint, the DAL will review the request to determine "(i) whether the evidence presented is sufficient to show a likelihood that the AMC has not complied with the customary and reasonable requirements . . . and (ii) whether the proposed enforcement action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals." *Id.* § 5(a). When the Board seeks approval of a "proposed settlement agreement, dismissal, or informal resolution of any DAL-approved enforcement action," the DAL will "determine whether the proposed enforcement action serves Louisiana's policy of protecting the integrity of residential mortgage appraisals by requiring that fees paid by AMCs for such appraisals are customary and reasonable in accordance with [Louisiana law]." *Id.* § 5(b).

The MOU also provides that the DAL "shall review the entirety of the hearing record and evidence of each enforcement proceeding conducted by the LREAB, the written proposed determination by the LREAB as to whether one or more violations by an AMC . . . have occurred, and any proposed remedy with respect to any such violation." *Id.* § 5(c). The DAL will conduct this review according to the standards set forth in La. Rev. Stat. § 49:964(G), which

[20] We express no view as to whether an agreement on enforcement procedures between state agencies imposed pursuant to an executive order, as opposed to procedures that the legislature has mandated by statute, can be sufficient to satisfy the active supervision requirement. We note that the MOU procedures may be terminated by either party on 30 days' notice. RX9, § 9.

governs judicial review of administrative adjudications.[21] The DAL will review "all questions of law and statutory and regulatory interpretations . . . without deference to the LREAB determinations." RX9, § 5(c)(i). It will review findings of fact "in accordance with Section 964(G)(6), giving deference to the LREAB's determination of credibility issues." *Id.* § 5(c)(iii). And it will review the proposed remedy "in accordance with Section 964(G)(5), in light of the underlying policies of the State of Louisiana and the determination by the DAL of the findings of fact." *Id.* § 5(c)(ii).

Without passing on the sufficiency of the other aspects of this scheme, we find the provision for review of the Board's proposed remedy to be problematic.[22] The remedy is likely to be a critical issue in Board enforcement proceedings, as the Board investigates, settles, and enters remedial orders resolving allegations that AMCs have failed to comply with the customary and reasonable fee requirements of La. Rev. Stat. § 37:3415.15(A) and has authority to suspend or revoke licenses and impose fines and civil penalties of up to $50,000. *See* La. Rev. Stat. § 37:3415.19; RX1, at § 1; [redacted]. But under the MOU, the DAL would review the Board's remedy only to determine if it is "[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion." La. Rev. Stat. § 49:964(G)(5). This is a deferential standard that the Louisiana Supreme Court has described as "quite limited." *Allen v. La. State Bd. of Dentistry*, 543 So. 2d 908, 915 (La. 1989). But "[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." *Ticor Title*, 504 U.S. at 633. Application of such deferential review is insufficient to make the Board's remedial determination "the State's own," or to ensure that the State has accepted "political accountability" for any anticompetitive conduct attributable to the Board. *See N.C. Dental*, 135 S. Ct. at 1111.

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[21] Section 49:964(G) provides: The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (6) Not supported and sustainable by a preponderance of evidence as determined by the reviewing court. In the application of this rule, the court shall make its own determination and conclusions of fact by a preponderance of evidence based upon its own evaluation of the record reviewed in its entirety upon judicial review. In the application of the rule, where the agency has the opportunity to judge the credibility of witnesses by first-hand observation of demeanor on the witness stand and the reviewing court does not, due regard shall be given to the agency's determination of credibility issues.

[22] Complaint Counsel raise a number of other potential concerns, including that the ALJ reviews only the evidence before the Board; the review process is closed to consumers and many other potentially interested parties; the ALJ is required to defer to the Board's determinations of credibility; and the MOU does not require the ALJ to issue a sufficiently detailed written decision.

In *Patrick v. Burget*, the Supreme Court held that judicial review of the actions of private actors was not active supervision when the review was "of a very limited nature." 486 U.S. at 104. Courts applying *Patrick* have consistently found that deferential forms of limited judicial review are not sufficient to qualify as active supervision. *See Pinhas v. Summit Health Ltd.*, 894 F.2d 1024, 1030 (9th Cir. 1989); *Shawahy v. Harrison*, 875 F.2d 1529, 1535-36 (11th Cir. 1989). We see no reason why the rule should be different when the State has provided for a deferential form of administrative review, rather than judicial review.[23]

In addition, we find significant coverage gaps in the DAL's review of the Board's enforcement actions. DAL review of proposed settlement agreements, dismissals, and informal resolutions is limited to those resulting from "DAL-approved enforcement actions." RX9, § 5(b). The entire realm of Board activity that never gives rise to a DAL-approved administrative complaint under RX9, § 5(a), is to be resolved without any DAL review. [redacted] Gaps in the coverage of DAL review both draw the sufficiency of supervision of enforcement proceedings into question and highlight the fact that an absence of supervision of the reissuance of Rule 31101 means that significant aspects of the Board's activities receive no supervision whatsoever.

E. Conclusion

For the foregoing reasons, we conclude that the evidence proffered by the Board is insufficient to show either that the State of Louisiana actively supervised the reissuance of Rule 31101 in 2017 or that it will actively supervise enforcement proceedings under the Rule going forward. The Board's contention that this case is moot rests critically on its claim that the state action defense shelters its future activities from antitrust scrutiny, leaving no conduct for the Commission to prevent and no relief for the Commission to grant. As noted above, for purposes of its Motion to Dismiss, the Board does not dispute that active supervision is necessary. Consequently, our conclusions regarding active supervision establish that the Board has failed to demonstrate a state action defense and that its mootness claim must fail. We therefore deny the Board's Motion to Dismiss.

IV. COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

We turn now to Complaint Counsel's Motion for Partial Summary Decision. This Motion raises two main issues. First, is the Board subject to the active supervision requirement? This primarily turns on the resolution of a legal dispute regarding the proper interpretation of *N.C. Dental*'s "active market participant" standard. Second, if the Board is subject to the active supervision requirement, did the State actively supervise the Board's conduct? We first set forth the governing legal standard, and then address these issues in turn.

[23] The same consideration contributes to our conclusion that the potential for judicial review of the Board's actions under the deferential standard of La. Rev. Stat. § 964(G) cannot constitute active supervision. *See infra* Section IV.C.

A. The Legal Standard

We review Complaint Counsel's Motion under Rule 3.24 of our Rules of Practice, 16 C.F.R. § 3.24, which is "virtually identical" to Federal Rule of Civil Procedure 56, governing summary judgment in the federal courts. *N.C. Dental*, 151 F.T.C. at 607. "A party moving for summary decision must show that 'there is no genuine dispute as to any material fact,' and that it is 'entitled to judgment as a matter of law.'" *Jerk, LLC*, 159 F.T.C. 885, 889 (2015) (quoting Fed. R. Civ. P. 56(a)). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Furthermore, once the moving party has adequately supported its motion, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). It must instead establish "specific facts showing that there is a genuine issue for trial." *Id.* at 587 (internal quotation marks and emphasis omitted). "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Id.* (internal quotation marks omitted).

B. Whether the Active Supervision Requirement Applies

N.C. Dental held that the active supervision requirement of the state action doctrine applies when "a controlling number of decisionmakers are active market participants in the occupation the board regulates." 135 S. Ct. at 1114. The parties disagree sharply about what this language means. Complaint Counsel argue for a bright-line rule that the standard is satisfied when a controlling number of board members must be licensed to practice the occupation the board regulates – in this case, real estate appraisal. MPSD at 1, 9-13. Under this approach, it would not be necessary to distinguish between general appraisers and residential appraisers; both need Board licenses. Nor would it be necessary to consider to what degree particular Board members actually conduct residential appraisals or stand to benefit from Rule 31101.

The Board argues that we must undertake a much more fact-intensive inquiry. It contends that we must first define the "relevant market," *see generally Brown Shoe Co. v. United States*, 370 U.S. 294, 324 (1962), and then determine which Board members actually perform services within that market. In the Board's view, the relevant market is limited to residential real estate appraisals for "covered transactions," *i.e.*, those where the mortgage is secured by a consumer's principal dwelling. ROpp at 27.

The Board's approach would require us to scrutinize the actual business activities of Board members to determine whether they have "any cognizable pecuniary interest in the regulations at issue." *Id.* at 28. The Board argues that its general appraiser board members lack such an interest and that only residential appraisers – who make up a minority of the Board – should be deemed active market participants. *Id.* at 27. At the very least, it asserts that there are factual questions regarding market definition and the degree to which general appraiser Board members participate in the residential market. *Id.* at 30.

The Board concedes that general appraisers can appraise residential property. But it argues that general appraisers "rarely" perform residential appraisals, and that "they may lack

geographic or other competence factors necessary" for such work. *Id.* at 25. It has submitted eight affidavits from past or present Board members who are licensed as general appraisers.[24] Three of the affiants state that they did at least occasionally conduct residential appraisals during the time they served on the Board, with one stating that most of his residential appraisal work was in connection with VA loans – *i.e.*, residential mortgage loans.[25] Three other affiants state that they work for banks, in which capacity they reviewed appraisals rather than conducting them; they all state that they "occasionally" reviewed residential appraisals.[26] Five of these six individuals state that they do not consider residential appraisals to be a "significant" part of their business. The other two affiants state that they did not actively perform residential appraisals during their time on the Board and do not consider residential appraisals to be part of their business.[27]

The Board further argues that we must determine whether its members "pursued proper policy or private interests," and that this is also a fact-intensive inquiry that cannot be resolved on summary decision. *Id.* at 30. It argues that the Board has "[e]ssential . . . structural features that protect against members pursuing private over public interests." *Id.* at 32. In particular, it argues that the Board's membership represents different industry categories – general appraisers, residential appraisers, an AMC member (who must also be a licensed appraiser), and banking representatives – with no single category constituting a majority. *Id.* It notes that the Board members are not elected by industry members, as in *N.C. Dental*, but are appointed by the Governor and confirmed by the Louisiana Senate, and that the Governor may remove them at any time for cause. *Id.* And it further notes that the executive director of the Board, who by statute is the executive director of the Louisiana Real Estate Commission, is not selected by the Board (and hence is not under its control) and is not an appraiser. *Id.*

We conclude that Complaint Counsel's approach is more consistent with both the case law and the underlying purpose of the active supervision requirement. The Board's argument is very similar to one that we explicitly rejected in *N.C. Dental.* That case involved a rule issued by the State Board of Dental Examiners that barred non-dentists from performing teeth whitening services; in opposing summary decision, the board argued that Complaint Counsel had "presented no evidence that the individual dentist members of the Board . . . derived substantial revenues in their private practice from teeth whitening services." *N.C. Dental*, 151 F.T.C. at 627. We rejected this argument, holding that "the determinative factor in requiring supervision is not the extent to which individual members may benefit from the challenged restraint, but rather the fact that the Board is controlled by participants in the dental market." *Id.* Thus,

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[24] The Board also submitted additional affidavits (from some of the same individuals and some new ones), as well as a chart purporting to summarize the Board's membership from 2011 to 2017, in connection with its opposition to Complaint Counsel's separate, subsequent Motion for Partial Summary Decision on Respondent's Fourth Affirmative Defense. These additional materials are not part of the record of the instant summary decision motion, but in any case do not change our disposition.

[25] *See* Affidavit of Leonard E. Pauley ¶¶ 4-5; Affidavit of Michael E. Graham ¶¶ 4-5; Affidavit of Rebecca Rothschild ¶ 5 (all attached to ROpp).

[26] *See* Affidavit of Heidi C. Lee ¶¶ 4-5; Affidavit of Clayton Lipscomb ¶¶ 4-5; Affidavit of Kara Ann Platt ¶¶ 4-5 (all attached to ROpp).

[27] *See* Affidavit of Cheryl B. Bella ¶ 5; Affidavit of Gayle Boudousquie ¶ 4 (all attached to ROpp).

although we noted that many of the dental board members did perform teeth whitening services in their private practices, our holding was "not predicated on the Board members' actual financial interests." *Id.* In affirming our decision, the Supreme Court likewise did not focus on the degree to which dental board members actually provided teeth whitening services. Rather, its decision turned on the fact that the dental board members participated in "the occupation the board regulates" – *i.e.*, dentistry. *N.C. Dental*, 135 S. Ct. at 1114.

Applying those principles to this case, we conclude that the "occupation the board regulates" here is real estate appraisal. There is no dispute that by statute, seven of the ten Board members must be Board-licensed real estate appraisers with at least five years' experience (not counting the AMC representative, who must also be a licensed appraiser). *See* La. Rev. Stat. § 37:3394(B)(1). This is thus a classic instance where the state has delegated authority to a private industry group to regulate itself, with only limited participation from other industry groups. We see no basis for drawing a distinction between general appraisers and residential appraisers, since the general appraisers are licensed to appraise residential property (and the Board's own evidence shows that some of them do). Just as it was not necessary in *N.C. Dental* to determine whether individual dental board members performed teeth whitening services, it is not necessary here to probe whether particular Board members derive revenue from residential appraisals. It is enough that the Board licenses them to conduct such appraisals.

The Board's argument that we must first define a "relevant market" and then determine the extent to which individual members participate in that market improperly conflates two distinct issues. Definition of the relevant market generally is a step in determining whether a practice is anticompetitive, by identifying the groups of products or the geographic areas of competition that could be subject to an exercise of market power. *See, e.g.*, U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* §§ 4.1, 4.2 (2010). The "active market participant" test concerns a different issue: whether a board empowered by the state to regulate a given industry is, as a practical matter, controlled by that industry. If it is, a significant risk exists that the board will act to further the interests of the industry, rather than the public interest, and active supervision is required before the state action doctrine can be invoked.

Moreover, the Board's proposed test would be difficult, if not impossible, to apply as a practical matter. Under the Board's approach, it would be impossible to know whether a particular action required active supervision without first conducting an analysis of the relevant market affected by the action and the degree to which each Board member derived income from that market. Variations in the impact on individual members' revenues would require repeating this analysis every time the Board took a new action that potentially might give rise to an antitrust challenge. Such a regime would be extremely burdensome not only for the Board and its members, but also for agencies and courts tasked with reviewing such conduct.

The Board is correct that in *N.C. Dental*, we placed weight on the fact that the board members were elected by North Carolina dentists. 151 F.T.C. at 626-28. But the fact that Board members here are appointed by the Louisiana Governor, rather than elected, does not alter our analysis. The statute requires the Governor to appoint seven Board-certified appraisers with at least five years' experience, posing a significant risk that at least these seven Board members will represent the interests of their industry. Of course, there is nothing inherently wrong with such a structure, but a board that is controlled by representatives of the industry it regulates

cannot shield itself from antitrust scrutiny unless the state actively supervises the board's activities.[28]

Complaint Counsel are correct that the dispositive question is whether a controlling number of Board members are licensed to practice the occupation the Board regulates. This can be answered affirmatively without defining relevant antitrust markets or delving into the details of individual board members' income streams. It follows that there is no genuine dispute of material fact that would preclude summary decision on this issue. We hold that the Board is controlled by active market participants and is therefore subject to the active supervision requirement. We therefore grant partial summary decision in favor of Complaint Counsel as to the Board's Third Affirmative Defense.

C. Whether the Board's Prior Conduct Was Actively Supervised

The Board argues that Louisiana actively supervised both the initial promulgation of Rule 31101 in 2013 and the enforcement of that Rule prior to the adoption of new procedures in 2017. We reject these arguments for essentially the same reasons that we reject the Board's similar contentions in connection with its Motion to Dismiss Complaint.

The Board first contends that the Louisiana Legislature and the Governor actively supervised the promulgation of Rule 31101. ROpp at 19-21. The record shows just the opposite. In 2013, a Louisiana law (since repealed) provided that any rules issued by the Board required "affirmative approval" by the Louisiana House and Senate oversight committees. La. Rev. Stat. § 3415.21(B) (2013). But the statute also provided that "[i]f the board submits its proposed rules for affirmative approval and the legislature is not in session, the proposed rules shall be deemed affirmatively approved if forty-five days have elapsed from the date the proposed rules are received by the oversight committees and no hearing is held by either committee." *Id.* In other words, legislative *inaction* would be deemed affirmative approval.

In this case, the Board submitted its report on the proposed Rule to the Legislature on September 26, 2013. Unangst Aff. ¶ 33. The Legislature was not in session at that time. *Id.* ¶ 34. Neither the House nor the Senate subcommittee opted to hold a hearing, thus allowing the rule to take effect. *Id.* The Senate subcommittee originally scheduled a hearing, but then voted to remove it from the calendar after the Chairman explained that holding the hearing could trigger the affirmative approval requirement and prevent the proposed Rule from going into effect. *See id.* (citing a video recording of a hearing on the website of the Senate Commerce Committee at http://senate.la.gov/video/videoarchive.asp?v=senate/2013/11/111313COM).

The upshot is that there is no evidence that either committee engaged in substantive analysis of the reissued Rule. Although it is clear that the legislative oversight subcommittees could have conducted a substantive review, "[t]he mere "potential for state supervision is not an adequate substitute for a decision by the State." *Ticor Title*, 504 U.S. at 638. Similarly, the fact that Louisiana's Governor allowed the Rule to proceed, *see* Unangst Aff. ¶ 36, does not show that he conducted the kind of substantive analysis necessary to satisfy the active supervision requirement. As discussed above with respect to the 2017 reissuance of the Rule, *see supra*

[28] The Board's argument that its executive director is not an appraiser and is not selected by the Board need not detain us long, because the executive director is not a member of the Board and has no voting power.

Section III.C, *Ticor Title* makes clear that approval through this type of "negative option" procedure does not constitute active supervision.

The Board also contends that its enforcement decisions prior to 2017 were actively supervised because they were reviewable in state court under the Louisiana Administrative Procedure Act ("APA"). ROpp at 21-23; *see* La. Rev. Stat. § 49:964(G). In *Patrick*, the Supreme Court held that insofar as Oregon law provided for judicial review of the decisions at issue, the review was too limited to qualify as active supervision. 486 U.S. at 103-04. The Board correctly notes that *Patrick* did not absolutely preclude the use of judicial review as active supervision, but it cites no case holding judicial review to be adequate. And *Ticor Title* and *N.C. Dental* make clear that the "mere potential" for state supervision is inadequate. *N.C. Dental*, 135 S. Ct. at 1116 (quoting *Ticor Title*, 504 U.S. at 638). Here, although Louisiana law provides for judicial review of Board enforcement decisions, it does not require such review. In many cases, parties aggrieved by a Board enforcement decision might decide not to undertake the burden and expense of a court challenge; in such cases, the Board's decision would never be reviewed. This amounts to at most potential supervision.

Furthermore, judicial review of the Board's decisions takes place under a deferential standard. The Board's governing statute provides for judicial review of "questions of law" involved in any final decision of the Board. La. Rev. Stat. § 37:3415.20(B)(1). Under the statute, "[i]f 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." *Id.* § 37:3415.20(B)(2). This is clearly a limited and highly deferential form of review akin to that the Supreme Court found inadequate in *Patrick*. *See also Ticor Title*, 504 U.S. at 638 (where state did not actively supervise ratemaking, "as in *Patrick*, the availability of state judicial review could not fill the void"). The parties' briefs do not address how the specific judicial review provision in the Board's governing statute interacts with the more general judicial review procedures set forth in the Louisiana APA, *see* La. Rev. Stat. § 49:964(G). But as discussed above, the Louisiana Supreme Court has made it clear that review under the Louisiana APA is "quite limited." *Allen v. La. State Bd. of Dentistry*, 543 So. 2d at 915.

In sum, the limited and contingent nature of judicial review here makes clear that it cannot qualify as active supervision. Furthermore, in cases that were resolved through settlement, there was not even a potential for judicial review. *See generally* Unangst Aff. ¶ 76 (acknowledging that the Board "has closed formal investigations into alleged violations of La. R.S. 37:3415.15 after the AMC provided a proposal to ensure compliance with federal and Louisiana [customary and reasonable] requirements").

D. Conclusion

We conclude that there is no genuine issue for trial as to whether the State actively supervised the Board's initial promulgation of Rule 31101 and its enforcement of the Rule prior to adoption of the new procedures in 2017. On both issues, Complaint Counsel prevail as a matter of law. Coupled with our determination in Section IV.B that active supervision was a

necessary component of the state action defense, our ruling that active supervision was absent is fatal to the Board's state action claims. We therefore grant partial summary decision in favor of Complaint Counsel as to the Board's Ninth Affirmative Defense.

Accordingly, **IT IS ORDERED THAT:**

1. Respondent's Motion to Dismiss Complaint is **DENIED**;
2. Complaint Counsel's Motion for Partial Summary Decision regarding Respondent's Third and Ninth Affirmative Defenses is **GRANTED**; and
3. Respondent's Third and Ninth Affirmative Defenses are hereby **DISMISSED**.

By the Commission.

Donald S. Clark
Secretary

SEAL:

ISSUED: April 10, 2018

Notice of Electronic Service

I hereby certify that on April 20, 2018, I filed an electronic copy of the foregoing Respondent's Motion to Stay Proceedings Pending Appellate Review, with:

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I hereby certify that on April 20, 2018, I served via E-Service an electronic copy of the foregoing Respondent's Motion to Stay Proceedings Pending Appellate Review, upon:

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