PUBLIC

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

In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

Docket No. 9374

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO STAY

The Louisiana Real Estate Appraisers Board ("Respondent") seeks to stay proceedings and delay the hearing, now scheduled to begin on January 30, 2018, for four months until May 30, 2018.[1] The purpose of the proposed stay is not to allow time for settlement discussions—which Respondent has declined to engage in—but to allow Respondent time to implement a recent Executive Order and related Board Resolution, and apparently to prepare a motion to dismiss this case as moot. Respondent claims that the Executive Order and Resolution "fundamentally change the legal and factual issues pertinent to this proceeding" and "moot" the Complaint because of the purported applicability of the state action doctrine to everything Respondent has done or will do. (Resp't Mot. at 1.) These actions do no such thing.

This case will not be moot at the expiration of the requested stay. Respondent's claim that its implementation of the Executive Order and Resolution will exempt all of its future actions from the antitrust laws is incorrect. And nothing Respondent can do in the future will exempt its

[1] *See* Respondent's Proposed Order. Under Rule 3.21(c), the Commission has the exclusive authority to "order a later date for the evidentiary hearing than the one specified in the complaint," and only upon a showing of good cause. Therefore, whether the Court considers Respondent to move for a postponement of a hearing or for a stay of the proceedings that would require a postponement of the hearing, Complaint Counsel requests that, pursuant to Rule 3.22(a), the Court certify Respondent's motion to the Commission for its consideration. *See In re Phoebe Putney Health Sys.*, 2014 FTC LEXIS 272 (F.T.C. Oct. 22, 2014) (certifying motion to stay).

past conduct from antitrust scrutiny. Because a stay will only impede the efficient resolution of the issues raised in the Complaint, Respondent's motion should be denied.

ARGUMENT

I. Respondent cannot show good cause to stay the proceeding

The 2009 amendments to Part 3 of the Commission's rules were designed in significant part to "minimize delay" in administrative litigation. *See* 74 Fed. Reg. 1804, 1805 (2009). To this end, the rules direct that an administrative hearing in a non-merger matter "*shall be*" held eight months from the date the complaint is filed. Rule 3.11(b)(4). The deadlines or time specified in the July 6, 2017, scheduling order can be changed only "upon a showing of good cause." Rule 3.21(c)(2).[2]

Respondent cannot show good cause under the Commission's rules. Commission Rule 3.22(b) provides that a dispositive motion before the Commission "shall not stay proceedings before the Administrative Law Judge unless the Commission so orders." *See also In re LabMD, Inc.*, No. 9357, 2013 FTC LEXIS 131, at *3 (F.T.C. Dec. 13, 2013) (denying motion to stay pending resolution of dispositive motion and appeal); *In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 640, 643 (F.T.C. Feb. 15, 2011) (denying motion to stay pending parallel federal court proceedings). Here, Respondent seeks a stay not because it has filed a dispositive motion, but rather because Respondent plans to file a dispositive motion in 120 days or later. A stay is not warranted.

Nor do the two orders cited by Respondent support its motion. In *Phoebe Putney Health Systems*, the Commission granted an unopposed motion for a temporary stay because "it appeared at that time" that complaint counsel could not get the relief it sought due to the order of a state hearing officer, which the head of the agency had announced he would affirm. *In re*

[2] The good cause standard would also be applicable if the Commission considers Respondent's request for a new hearing date. Rule 3.21(c)(1); *see* note 1 *supra*.

Phoebe Putney Health Syst., Inc., No. 9348, 2014 FTC LEXIS 281, at *1 (F.T.C. Oct. 30, 2014). The Commission made clear that "[w]e also base our decision on the fact that Complaint Counsel has not opposed Respondents' Motion." *Id.* In *South Carolina State Board of Dentistry*, the Commission, applying its pre-2009 rules, granted an unopposed motion for a stay of discovery pending its ruling on an already filed (not contemplated) motion to dismiss arguing that the respondent was immune from suit and could not be subjected to discovery. *See* No. 9311, 2006 FTC LEXIS 44, at *3 (F.T.C. Aug. 9, 2006). These rulings are a far cry from Respondent's contention that, after a complaint is filed and without a motion to dismiss, a respondent can obtain a contested stay of the litigation while it figures out how to keep its practices, or their effect, intact while avoiding antitrust liability.

II. Recent developments have not eliminated the need for Commission intervention

Respondent assumes that, at the end of the stay, Louisiana will have in place a legal regime for state supervision of all Board activities relating to regulation of appraisal fees. However, neither the Executive Order nor the steps contemplated by Respondent will yield an effective supervision regime. These actions also will not undo past competitive harm as alleged in the Complaint.

A. The Executive Order does not ensure that Respondent will not violate the antitrust laws in the future

Respondent's Answer asserts as an affirmative defense that its actions are exempt from federal antitrust laws because they constitute state action. (Answer, Affirmative Defenses ¶ 9.) Under applicable Supreme Court precedent, Respondent's state action defense must satisfy two requirements: (1) the challenged restraint must be "clearly articulated and affirmatively expressed as state policy;" and (2) the policy must be "actively supervised by the State." *See,*

e.g., *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101, 1110 (2015) (citation omitted).[3]

Active supervision requires, at a minimum, (i) that the supervisor review the substance of the anticompetitive decision, not merely the procedures by which it was adopted, and have the power to veto or modify particular decisions to ensure they accord with state policy; (ii) that supervision must actually occur, not be merely possible; and (iii) that the supervisor must not be an active market participant. *Id.* at 1106, 1114.

The Executive Order does not require active supervision when Respondent promulgates or enforces a rule regulating appraiser fees. As to promulgation, the order provides that the Commissioner of Administration shall have the power to approve, reject, or modify certain proposed regulations. But the mere existence of an approval procedure does not satisfy the active supervision requirement. *See id.* at 1115–16; *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992). The Commission has previously ruled that active supervision of price regulation requires assembling relevant information such as costs, revenues, and profit margins; providing an opportunity for public input; performing substantive economic analysis; and issuing a written opinion. *See In re Ky. Household Goods Carriers Ass'n, Inc.*, 139 F.T.C. 404, 417–18 (F.T.C. 2005). Here, the Executive Order neither contemplates nor requires any of these substantive steps.

Nor does the review by an administrative law judge of (some of) Respondent's enforcement activities that is contemplated by the Executive Order satisfy the active supervision requirement. Under the Louisiana Administrative Procedures Act, a reviewing ALJ must defer to an agency's interpretation unless "it is arbitrary, capricious, or contrary to its rules and regulations." *Women & Children's Hosp. v. Dep't of Health & Hosp.*, 2 So. 3d 397, 402–03 (La.

[3] Respondent's motion does not even address the Complaint allegation that the Board is not acting pursuant to a clearly articulated state policy to displace competition. (Compl. ¶ 52.)

2009). To constitute active supervision, however, a supervisor's review may not be deferential or concerned primarily with the supervised entity's procedures. Rather, the review must focus on the substance of the anticompetitive decision and whether it comports with state policy. *See N.C. Dental*, 135 S. Ct. at 1116. In *Patrick v. Burget*, the Supreme Court rejected a supposed supervisory regime by a state court because the "state court would not review the merits of a privilege termination decision to determine whether it accorded with state regulatory policy." 486 U.S. 94, 105 (1988). Similarly, a federal district court in Texas recently rejected as inadequate to constitute active supervision the review of agency decisions by a state court under a similar statute, holding that "the review available under this section is limited, and fails to confer on the reviewing court a method for looking to whether the decision of the [regulatory board] is 'in accord with state policy.'" *Teladoc, Inc. v. Texas Medical Board*, No. 1-15-CV-343, 2015 WL 8773509, at *14 (W.D. Tex. Dec. 14, 2015)

Another crucial gap in the asserted supervisory regime is that the Executive Order does not require review of all of Respondent's actions that could restrain price competition. The Executive Order contemplates review of Respondent's future administrative complaints and formal settlements. But, as the Complaint alleges, Respondent has (i) announced that its commissioned surveys set forth Respondent's expectations for customary and reasonable fees; (ii) investigated AMCs that have paid less; and (iii) resolved investigations through informal agreements to pay more. (Compl. ¶¶ 33–36, 42, 48.) The Executive Order does not provide for review of any such future actions.

Other gaps also allow Respondent undue leeway in regulating appraisal fees without supervision. For example, the Executive Order does not require Respondent to submit a *judgment* against an AMC for review, potentially allowing Respondent to impose draconian penalties or take other actions against offending AMCs. And the Executive Order provides for

review only of actions designated by Respondent as pursuant to one provision of the Louisiana Code, potentially allowing Respondent to sanction AMCs for price-related conduct pursuant to other provisions.

B. Implementation of the Executive Order and Respondent's Resolution would not moot this proceeding

Even if Respondent were to fully implement the Executive Order and its July 17 Resolution, this proceeding would not be moot. Thus, delay will have accomplished nothing.

Under the mootness doctrine, Respondent carries the heavy burden to show that it would be "impossible for a court to grant 'any effectual relief whatever' to the prevailing party." *F.T.C. v. Cephalon, Inc.*, 36 F. Supp. 3d 527, 529 n.2 (E.D. Pa. 2014) (citation omitted). Accordingly, so long as the court has any way to create a remedy, particularly to "prevent anti-competitive activity in the future," the case is not moot. *FTC v. Actavis, Inc.* (*In re Androgel Antitrust Litig.*), No. 1:09-CV-955, 2017 U.S. Dist. LEXIS 84438, at *16–17 (N.D. Ga. June 2, 2017) (citations omitted). As articulated in Section II.A. above, the Executive Order fails to meet the active supervision requirement in several crucial respects. A Commission remedy addressing Respondent's future conduct is thus not only possible, but needed.

Moreover, the Executive Order fails to address Respondent's past conduct. Nor does Respondent's July 17 Resolution effectively address past conduct. In enforcing its customary and reasonable fee regulation, Respondent brought actions against AMCs that allegedly paid fees below the fees reported in Respondent's commissioned fee surveys, and pressured AMCs to pay appraisers fees as least as high as those reported in the surveys. The Complaint seeks an order that will require Respondent to rescind orders it issued against AMCs. Rather than doing so, however, Respondent's Resolution provides only that Respondent will seek some vague settlement. In addition, the Resolution does not address informal resolutions of past investigations of AMCs or public pronouncements about Respondent's expectations for

reasonable appraisal fees. Thus, neither the Executive Order nor the Resolution obviates the need for a Commission Order that would address Respondent's past conduct.

In addition to these fundamental problems with the Executive Order and Board Resolution, the case does not become moot simply because "the respondent has voluntarily ceased the challenged activity" unless the Respondent shows "that there is no reasonable expectation that the alleged violation will recur and that interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." *In re Mass. Board*, 110 F.T.C. 549, 615 (F.T.C. 1988) (quotation marks and citation omitted). In fact, the Commission has long held that state boards cannot claim mootness during trial simply because they have rescinded anticompetitive rules or allowed them to elapse. *See In re S.C. State Bd. of Dentistry*, 138 F.T.C. 229, 261–262 (F.T.C. 2004); *Mass. Bd.*, 110 F.T.C. at 615.

Under Commission precedent, the remedial actions cited by Respondent do "not alter the inference that the Board may engage in the challenged conduct in the future." *S.C. Dental*, 138 F.T.C. at 263. Among the considerations for whether Respondent is likely to re-offend are the "bona fides of the expressed intent to comply, the effectiveness of the discontinuance, and in some cases, the character of the past violations," *Mass. Board*, 110 F.T.C. at 616 (citation omitted), all of which provide evidence that "the cessation or abandonment of the practice was undertaken in good faith." *In re TRW, Inc*., 93 F.T.C. 325, 376 (F.T.C. 1979).

Like the respondents in *S.C. Dental* and *Mass. Board*—where the Commission denied mootness motions—Respondent did not even attempt to take remedial action until after the Commission issued a Complaint. *See S.C. Dental*, 138 F.T.C. at 263; *Mass. Board*, 110 F.T.C. at 615; *see also TRW, Inc*., 93 F.T.C. at 376. Similarly to the conduct of the respondent in *Mass. Board*, Respondent was aware since at least the Supreme Court's *N.C. Dental* opinion, issued in 2015, that the state must supervise conduct that restrains competition, but took no steps to

rescind its regulation of appraisal fees, suspend its enforcement activities, or submit its actions for appropriate supervision. *See Mass. Board*, 110 F.T.C. at 616. Respondent cannot establish that its voluntary cessation of anticompetitive activity will resolve all harm due to its conduct, or that its conduct is unlikely to recur.

III. A stay will not affect the cost of conducting pre-trial discovery

Respondent asserts that the course and cost of pre-trial discovery depends upon events that will occur over the next 120 days. The focus of discovery, however, is on Respondent's past conduct promulgating and enforcing the existing rule, not on whether the promulgation and enforcement of some forthcoming rule governing customary and reasonable fees will enjoy antitrust immunity. As neither the Executive Order nor Respondent's Resolution resolve the allegations in the Complaint relating to this past conduct, they will not limit the need for discovery.

CONCLUSION

Granting a 120-day stay will require postponing the trial, with no benefit. The request for a stay should be denied.

Dated: July 24, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 2017, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

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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: July 24, 2017

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