UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeny

DOCKET NO. 9374

COMPLAINT COUNSEL'S REPLY IN SUPPORT OF

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INTRODUCTION

As a matter of law, the good faith regulatory compliance defense is inapplicable to the appraiser fee regulation program implemented by the Louisiana Real Estate Appraisers Board ("Respondent"). Respondent's Fourth Affirmative Defense should be dismissed.

The Dodd-Frank Act does not require, contemplate, or encourage collusion among appraisers to fix prices. Instead, Dodd-Frank *encourages* (but does not require) Louisiana and all other *states* to play a role, in partnership with the Appraisal Subcommittee (a federal agency), in regulating the fees that appraisal management companies ("[illegible]

Antitrust law and Dodd-Frank impose complementary and not conflicting standards. Antitrust law prohibits price regulation by private (non-state) actors. Price regulation by *the state* is permitted. *Parker v. Brown*, 317 U.S. 341 (1943). Dodd-Frank encourages a circumscribed price regulation by *the state*. Dodd-Frank delegates no regulatory authority over appraiser fees to private actors. Thus, a circumscribed regulation of appraiser fees by the state of Louisiana—through state action—is in accord with both statutes. Because the statutes are complementary, Dodd-Frank does not immunize or otherwise excuse Respondent from complying with the antitrust laws. *Pom Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238 (2014) ("When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other.").

Respondent advocates a radically different paradigm, what may be called "good-faith-alone." According to Respondent: "A regulated entity acting in good faith to comply with a regulatory scheme has a complete defense to antitrust liability." Respondent's Brief ("Resp. Br.") at 1. The regulated entity need not be targeting the *actual* requirements of the regulatory statute in order to earn its antitrust exemption. (Respondent does not contend that Dodd-Frank actually requires fee regulation by private market participants.) It is sufficient that the regulated entity *believes*—mistakenly but in good faith—that it is acting "pursuant to" regulatory requirements. Resp. Br. at 3, 18. In this paradigm, antitrust law plays absolutely no role in the legal analysis.

As discussed herein, the good-faith-alone doctrine proposed by Respondent is based on a fundamental misreading of the cases that develop and apply the good faith regulatory compliance defense. More importantly, it is contrary to a corpus of Supreme Court cases addressing the application of antitrust law to regulated firm

Respondent is not only wrong, but dangerous: It would up-end antitrust enforcement in regulated industries and beyond. A firm could avoid the antitrust laws simply by showing that it aspired to comply with some regulatory statute (even where the policy and requirements of the regulatory statute and antitrust do not conflict in any way).

To be sure, lower courts have recognized an antitrust defense referred to as "good faith regulatory compliance." But this affirmative defense is not satisfied merely because the defendant asserts a good faith mistake of law. *Phonetele v. AT&T* ("*Phonetele I*"), 664 F.2d 716, 738 (9th Cir. 1981). What is required is more akin to a showing that the defendant has been unfairly trapped by ambiguous regulatory standards, factual uncertainties, and a broken regulatory regime. Not surprisingly, this defense is rarely advanced, and even more rarely affirmed. To date, the good faith regulatory compliance defense has been invoked successfully only in the context of the telecommunications industry circa 1980.[1]

Respondent has failed to satisfy several essential elements

summary decision on an affirmative defense, the Commission "need not determine whether [the respondent's] activities violate the relevant antitrust laws." *In re N.C. Bd. of Dental Exam'rs*, Docket No. 9343, 151 F.T.C. 607, 611–12 (2011). The Commission addresses only "whether [the respondent's] conduct is exempt from antitrust scrutiny." *Id.*

To defeat summary decision, Respondent must show facts that, if credited, establish the elements of a valid regulatory compliance defense. *See Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 248 (1986); *EEOC v. Mach Mining, Ltd.*, 738 F.3d 171, 184 (7th Cir. 2013). It has not done so.

II. Required Elements of the Regulatory Compliance Defense

The regulatory compliance defense was first (and last) applied in the 1980s, in cases involving the telecommunications industry. An array of firms launched antitrust suits against AT&T, alleging that the telephone monopolist had improperly blocked the plaintiffs' products or services from interconnecting with the AT&T telephone network. In *Phonetele, Inc. v. AT&T* ("*Phonetele II"*), AT&T contended that its efforts to navigate compliance with both antitrust and communications law standards was impeded by (i) amorphous regulatory standards (AT&T was obligated to deny interconnection where interconnection would "adversely affect the telephone company's operations or the telephone system's utility for others"[2]), (ii) the need to resolve complex technical problems (acting at the request of the FCC, the National Academy of Sciences "identified four general types of harm which could result from the electrical connection of ancillary devices"[3]), and (iii) retroactive application of the agency's resolution of these issues (the FCC studied the interconnection issue, and permitted the challenged tariff to remain in

[2] 889 F.2d 224, 226 (9th Cir. 1989).
[3] *Id.* at 227.

III. Good Faith Alone is Not a Defense to Antitrust Liability

The Complaint alleges that Respondent fixed prices, and did so *without* active supervision.[6] According to Respondent, if Respondent had a good faith belief that its conduct "was a reasonable attempt to comply with the *perceived requirements* of [the Dodd-Frank] regulatory scheme," then it has a complete defense to antitrust liability. Resp. Br. at 18 (emphasis added). Respondent offers little explanation or authority for this contention. Respondent cites the same AT&T interconnection cases that are discussed in Complaint Counsel's opening brief. But Respondent disregards the facts and regulatory context of these cases. Instead, Respondent's brief offers the Commission un-contextualized snippets from the opinions (together with excerpted phrases from the Areeda & Hovenkamp treatise).

Respondent's good-faith-alone standard embodies the analytical error committed by the Court of Appeals in the *Silver* case, and subsequently corrected by the Supreme Court. The defendant in *Silver* was the New York Stock Exchange ("Exchange"), a self-regulatory body in turn regulated by the Securities and Exchange Act and the Securities and Exchange Commission. *Silver*, 373 U.S. at 342–43. The Exchange ordered its members to remove private direct telephone connections previously in operation between their offices and those of a nonmember securities dealer. *Id.* at 344. The nonmember, Silver, alleged that the Exchange thereby violated the antitrust prohibition against anticompetitive group boycotts. *Id.* at 345. The Court of Appeals concluded that the Exchange was exempt from antitrust liability due to its compliance with all relevant securities law obligations:

> The [Court of Appeals] held that the Securities Exchange Act "gives the Commission and the Exchange disciplinary powers over members of the Exchange with respect to their transactions in over-the-counter securities, and that the policy of the statute requires that the Exchange exercise these powers fully."

[6] Complaint Counsel contends that the clear articulation prong of the state action defense also is not satisfied here. However, this contention is not part of the present motion.

> This meant that "the action of the Exchange in bringing about the cancellation of the private wire connections . . . was within the general scope of the authority of the Exchange as defined by the 1934 Act," and dictated a conclusion that "the Exchange is exempt from the restrictions of the Sherman Act because it is exercising a power which it is required to exercise by the Securities Exchange Act." *Id.* at 346–47 (internal citations omitted).

The Supreme Court rejected this analysis because it considered securities law and policy in isolation, giving no weight to antitrust. The Court instructed that "the proper approach . . . is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Id.* at 357. The Court's assessment thus starts by examining whether a statutory conflict exists, turning first to the Sherman Act and observing: "It is plain . . . that removal of the wires by collective action of the Exchange and its members, had it occurred in a context free from other regulation, constitute a per se violation" of Section 1. *Id.* at 347. Next, the Court examined the policy and operation of the Securities Exchange Act, concluding that whereas the Exchange was required to regulate members' transactions with nonmembers, securities policy did not justify "collective action . . . without according fair procedures" that would serve as a check upon anticompetitive abuse. *Id.* at 364. Because the Exchange excluded Silver without appropriate procedural safeguards, including notice and an opportunity to be heard, the Securities and Exchange Act did not preclude application of antitrust law to the challenged boycott.[7]

Respondent identifies *Silver* as a case that "recognized" the good faith regulatory compliance defense. Resp. Br. at 16. More accurately, what the *Silver* Court recognized was that a defendant's *actual compliance* with a regulatory regime is not a sufficient basis for barring antitrust enforcement; instead, the court must consider whether there is a reasonable way of

[7] *Silver* does not teach that securities law requires, or that antitrust law is always satisfied by, the use of adequate procedural safeguards. The Court was reading the two statutes in tandem. *See Credit Suisse*, 551 U.S. at 271–72 (discussing *Silver*); *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 291–92 (1985) (same).

reconciling the two statutes. *A fortiori*, a defendant's good faith belief that it has complied with regulatory requirements is likewise an insufficient defense.

Post-*Silver*, when a defendant asserts that a regulatory regime is a defense to antitrust enforcement, courts routinely start the analysis by assessing whether there is a conflict ("plain repugnancy" or "clear incompatibility") between the standards of the antitrust laws and those of the regulatory scheme. *See Credit Suisse*, 551 U.S. at 275; *United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 734–35 (1975); *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 689 (1975)

telephone network "would endanger [AT&T's] equipment or disrupt [its] own signal transmissions in identifiable ways, and . . . [whether] the tariff was the most reasonable, narrowly focused mechanism then available to prevent such real harm from occurring." *Id.* These are factual questions, not legal questions.

2. Respondent identifies not a single case where, in the absence of a statutory conflict, a court affirmed the regulatory compliance defense. In every case affirming the regulatory compliance defense, the defendant (AT&T) faced a conflict in legal standards. *See* CC Br. at 14.

3. The original and guiding purpose of the regulatory compliance doctrine was to afford the regulated entity (AT&T) some "breathing space" when navigating between "the dictates of the regulatory scheme and the antitrust laws." *See Phonetele I*, 664 F.2d at 740–41 n.63. Absent a statutory conflict, that purpose is unserved and the defense does not apply.

Respondent has not proffered a plausible policy rationale for recognizing an antitrust exemption where there is no statutory conflict. Respondent's assertion that a firm should be required to comply with only one statute at a time is a non-starter in a complex world. *See* Resp. Br. at 17 (asserting without relevant authority that regulatory compliance defense "emanates" from the "fundamental principle" that "a regulated entity should not be punished for attempting in good faith to comply with other laws that govern its conduct").[8]

4. The Areeda & Hovenkamp treatise does not endorse Respondent's interpretation of the regulatory compliance defense. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶246. Notably, the authors offer reasons to be cautious about applying the good faith

[8] As support for this proposition, Respondent cites *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976). Resp. Br. at 17. *Cantor* addresses the state action doctrine, a doctrine that itself incorporates the principle that a state agency can be found liable under the federal antitrust laws when attempting in good faith to comply with other (state) laws. *See N.C. State Bd. of Dental Exam'rs v. F.T.C.,* 135 S. Ct. 1101 (2015).

regulatory compliance defense outside of the telecommunications/interconnection setting in which these cases arise:

> While we speak of the regulatory environment in the interconnection cases as possibly exonerating the defendant's refusal to interconnect with the plaintiff, the real issue is more complex. Indeed, it is mainly because the regulatory environment exists that the defendant is thought to have any duty of interconnection in the first place. As an ordinary matter, a dominant firm has no duty to cooperate with rivals, and no general duty to share its facilities. Thus, the regulatory framework in the above-mentioned telecommunications decisions both creates the duty to deal enforceable by the antitrust laws and assesses the good faith standard for determining when a refusal is justified. *Id.* at ¶246b.

Again, there is no precedent for applying the good faith regulatory compliance defense outside of the distinctive regulatory context faced by AT&T and other regulated common carriers. *See Phonetele I*, 664 F.2d at 737 (defense applies "[w]hen the regulated entity assertedly attempts to respond to its duties as a common carrier by filing and implementing an anticompetitive tariff").[9]

In sum, the good-faith-alone standard advanced by Respondent does not establish an affirmative defense to an antitrust claim. Respondent's argument conflicts with Supreme Court antitrust precedent and fundamental tenets of statutory construction. Further, the good-faith-alone standard cannot even be reconciled with the telecommunications/interconnection cases upon which Respondent purports to rely.

IV. Respondent Has Not Established the Required Elements of the Good Faith Regulatory Compliance Defense

The regulatory compliance defense is inapplicable to this case. Respondent has not shown an onerous or even difficult regulatory environment. Dodd-Frank and antitrust law do not conflict. Respondent is not a regulated entity. It is instead a state agency monitored by the

[9] The Commission may determine that the good faith regulatory compliance defense does not apply in the regulatory context presented here, lightyears away from the world of regulated common carriers, without deciding whether the defense is precisely limited to regulated common carriers.

Appraisal Subcommittee. Respondent has not acted in an objectively reasonable fashion. No federal agency will supervise and correct Respondent's anticompetitive conduct.

A. There is No Statutory Conflict Here

There is no statutory conflict between Dodd-Frank and antitrust law. The State of Louisiana may perform its responsibilities regarding appraiser fees by regulating directly (*i.e.*, through state actors) in lieu of delegating unsupervised discretion to active market participants. CC Br. at 14. Thus, states do not face the "Hobson's choice" decried by Respondent. Resp. Br. at 21.

Respondent suggests, incorrectly, that there is a statutory conflict here because Dodd-Frank regulations contemplate that appraisers (active market participants) will serve on state boards that regulate appraisers and AMCs. This is incorrect because the service of one or even several appraisers on a regulatory board does not itself give rise to a statutory conflict. A true conflict arises only when the state agency is controlled by appraisers *and* operates without independent state supervision *and* regulates in an anticompetitive manner (the situation in Louisiana). Significantly, Respondent cites no evidence that Dodd-Frank contemplates or requires Louisiana to structure its regulatory program in this way.

Respondent characterizes its conduct as state action, rather than unsupervised private action. This issue is most appropriately resolved in the context of Complaint Counsel's earlier-filed Motion for Partial Summary Decision on the state action defense.

B. Respondent is Not Even a Federally Regulated Entity

Although Dodd-Frank encourages states to implement an AMC regulatory program, neither Louisiana nor Respondent is required to do so. An entity that acts of its own discretion (rather than legal compulsion) is not exempt from antitrust liability. *See* CC Br. at 16.

FCC sanctions, real sanctions. As Respondent is free to forgo all regulation of appraiser fees, there is no case law precedent or rationale for excusing antitrust compliance when it voluntarily elects to regulate appraiser fees.

3. Respondent argues that it has a "public interest obligation" to regulate appraiser fees

The less anticompetitive alternative obviously present here, and neglected by Louisiana and Respondent, is appraiser fee regulation through state action. Respondent has not established that eschewing this alternative was objectively reasonable and necessary.[10]

D. No Federal Agency Has and Exercises the Authority to Supervise Respondent's Activity

The regulatory compliance defense, as applied in the telecommunications industry, shielded only transient harm. The FCC had authority to require interconnection as needed to achieve the objectives of federal law and policy. The Appraisal Subcommittee cannot require Louisiana to regulate appraiser fees through state action or through other less anticompetitive means. CC Br. at 18–19. Extending the regulatory compliance defense to this wholly different regulatory setting would mean tolerating perpetual harm to competition.

Respondent of course identifies not a single case where, in the absence of a mechanism for agency supervision, the court affirmed the regulatory compliance defense.

V. Respondent's Additional Arguments are Without Merit

1. Respondent explains that the Dodd-Frank regime is both (i) the basis for its Fourth Affirmative Defense, and (ii) relevant to assessing whether the conduct challenged in the Complaint is pro-competitive or anticompetitive. The instant motion addresses only Respondent's Fourth Affirmative Defense. Dismissing the regulatory compliance defense does not foreclose Respondent from presenting argument and evidence (if otherwise relevant and cognizable) addressing how government regulation impacts competition. *Cf. Nat'l Gerimedical*, 452 U.S. at 393 n.19 (rejecting implied immunity defense and remanding with instructions to "give attention to the particular economic context").

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[10] Respondent also has not shown that it was objectively reasonable and necessary for the agency to focus on "too low" fees, or to enforce a fee schedule, or to convert the federal presumptions of compliance into state law requirements.

2. Respondent attributes to Complaint Counsel the view that "Congress, when it passed Dodd-Frank, had no intention or purpose to regulate the appraisal marketplace." Resp. Br. at 25. In truth, Complaint Counsel is advancing a more modest claim: that Congress had no intention or purpose to permit a panel of appraisers, unsupervised by the state, to fix appraiser fees. Instead, Congress intended to reserve the power to regulate appraiser fees to the states. This conclusion is confirmed by Congress' decision to include in Dodd-Frank an antitrust savings clause.

According to Respondent, the Dodd-Frank antitrust savings clause is directed at preserving antitrust claims against private regulation that displaces competition "entirely," but is inapplicable to private regulation that merely "constrains competition in the marketplace." Resp. Br. at 28. This makes no sense. All antitrust claims are "saved." And antitrust law condemns even partial restraints on price competition. *See, e.g.*, *Catalano, Inc. v. Target Sales*, 446 U.S. 643 (1980) (condemning an agreement among competing wholesalers to standardize credit terms).

3. Respondent references private conversations that Respondent had with representatives of the Appraisal Subcommittee. That such representatives were aware of or even expressed approval of Respondent's appraiser fee regulation program is not a defense to antitrust liability. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226–27 (1940):

> Though employees of the government may have known of those [price fixing] programs and winked at them or tacitly approved them, no immunity would have thereby been obtained . . . Otherwise national policy on such grave and important issues as this would be determined not by Congress nor by those to whom Congress had delegated authority but by virtual volunteers.[11]

4. Respondent suggests that its good faith compliance with state law provides a defense. State law compliance should be given no weight for purposes of the instant motion. First,

[11] We note that if the Commission with this motion resolves all issues concerning Respondent's affirmative defense, then there should be no need for either party to call federal officials as trial witnesses, thereby streamlining the trial and benefitting those federal officials.

Respondent's Fourth Affirmative Defense references only good faith compliance with "federal regulatory mandates." Second, Respondent's brief cites no authority for the proposition that a defendant's good faith compliance with state law is a basis for an affirmative defense to a federal antitrust claim (except in connection with the state action defense, which Respondent has raised separately). We are aware of none. *See Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592–93 (1976) ("The Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity.").

5. Respondent suggests that it did not anticipate the Supreme Court's decision in *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101 (2015), applying antitrust to competitor-controlled state agencies. This was not a valid defense for the North Carolina defendant. It is not a valid defense here.

6. The instant proceeding seeks only injunctive relief. Hence, the Commission need not decide whether Respondent has presented a valid defense against a claim for money damages. *Cf. id.* ("[T]his case, which does not present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.").

CONCLUSION

For the reasons stated above, the Commission should find that Respondent's good faith compliance defense fails, and enter an Order granting summary decision in Complaint Counsel's favor regarding Respondent's Fourth Affirmative Defense.

Dated: February 28, 2018

Respectfully submitted,

/s/ Geoffrey M. Green

Geoffrey M. Green
Lisa B. Kopchik
Christine M. Kennedy
Michael J. Turner
Kathleen Clair
Attorneys

Federal Trade Commission
Bureau of Competition
600 Pennsylvania Ave., N.W.
Washington, DC 20580
Facsimile: (202) 326-3496
Telephone: (202) 326-3139
Email: LKopchik@ftc.gov

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on February 28, 2018, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

W. Stephen Cannon
Constantine Cannon LLP
1001 Pennsylvania Avenue, NW
Suite 1300N
Washington, DC 20004
scannon@constantinecannon.com

Counsel for Respondent Louisiana Real Estate Appraisers Board

Dated: February 28, 2018

By: /s/ Lisa B. Kopchik
Lisa B. Kopchik, Attorney

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.

Dated: February 28, 2018

By: /s/ Lisa B. Kopchik
Lisa B. Kopchik, Attorney