PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

12 19 2017
589104

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeny

In the Matter of

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

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

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

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

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

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

I. LEGAL STANDARD

The same legal standard applies to summary judgment motions made pursuant to Commission Rule 3.24 as to motions for summary judgment made under the Federal Rule of Civil Procedure. *See In re North Carolina State Board of Dental Examiners*,

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

In *N.C. Dental*, the Supreme Court held that state agencies controlled by market participants require meaningful and independent state supervision

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

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

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

It is not Complaint Counsel's contention that a formal subcommittee hearing is always a

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

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

Second, active supervision must actually occur, and cannot be contingent on other factors. See N.C. Dental, 135 S. Ct. at 1116; Ticor, 504 U.S. at 638. Review of an enforcement action depends on the AMC to appeal to the state courts. If the AMC decides for any reason not to appeal, there will be no review. Under this system, the burden of ensuring supervision lies with the target of the enforcement rather than with the regulator. Respondent does not dispute that judicial review is

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

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

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

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

As explained in Complaint Counsel's motion for summary judgment, a state agency requires supervision when "a controlling number of

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

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

Respondent's brief acknowledges that general appraisers perform residential appraisals. Opp. at 25 (general appraisers "do residential appraisals," albeit "rarely"). And two LREAB general appraisers stated that their business includes residential appraisal work. Graham Aff. ¶ 4 ("During that period when I served on the Board, I have occasionally performed residential appraisals. . ."); Pauley

gene,J224); Pauley R

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

Under the appropriate legal standard, the fact that genera

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

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

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

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

V.

CERTIFICATE OF SERVICE

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

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Date: December 19, 2017

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