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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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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

hereby moves the Commission to stay the Part 3 proceedings in this matter pending judicial review by the U.S. April 10, 2018 Opinion and Order dismissing defenses relating to state action immunity . On April 19, 2018, LREAB filed a Petition for Review of the Order in the Court of Appeals. (Exhibit 1). The Fifth Circuit will

Rule 3.22(a). While the Commission has a strong interest in [Part 3] proceedings

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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Counsel for Respondent, Louisiana Real Estate Appraisers Board

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

In the Matter of

Exhibit 1

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 (... Federal Rule of Appellate Procedure 15(a) (providing ... and 15 U.S.C. Ä 45(c) (providing for appeal in the ... where the petitioner resides), the Court ... Opin... and Order of the Federal Trade Commission *In the Matter of Louisiana Real Estate Appraisers Board* *RFNHW LMG $LUOGHQQ*

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$SSUDLVHUVHWHQVHDQGLVLVVLQJDQG ... LQI

Mitchell v. Forsyth

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/s/ Seth D. Greenstein

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Counsel for Petitioner
Louisiana Real Estate Appraisers Board

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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 ar

assurance that the actions of a board regulating its own profession promote state public policy, rather than the private interests of the professionals. 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 "to appraise all 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). 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 3, 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 geographical area as 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 to 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 stat

In addition, following issuance of the executive order, the Board closed all pending investigations under the original Rule 31101. RX10. The Board also stated 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 in enforcement actions will not be admissible in future proceedings. Id. Any future enforcement actions will be based upon the reissued Rule 03111 (which, again, is identical to the original Rule 31101) and will be subject to the review procedures set forth in the executive order and 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

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(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 inquiry 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 rendered 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) 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 violation 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, for those circumstances Complaint Counsel urge that we issue an order that proscribes future anticompetitive conduct, but which might include

[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.3. 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 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 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 challenges 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;

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 now 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 issuance 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: 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 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 'reasonable 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 committees 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.

[14] [15] 16

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 th this qualifies as a "written decision on the merits" in any meaningful sense, and it certainly doe 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 Divisi of Administration dated November 9, 2017. RX11. It states that the General Counsel reviewe materials submitted by the Board, including "a substantive history of Rule 31101, backgro 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 ar 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 tha Rule 31101 achieves that public policy goal" because it "reasonably codifies the more general requirements set forth in law without becoming inflexible, 'one size fits all' decree." Id. at 2.

The General Counsel's letter does not remedy the defects in the Commissioner's earlie 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 th 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 the Commissioner had alread "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 Supre 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 "the 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 th [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 th 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 b agency. See La. Rev. Stat. § 49:968.[18] Briefly, when notice of the proposed rule is submitted 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 containi inter alia, a copy and brief summary of the rule, a statement of the circumstances that require 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, whic must include summaries of any hearing held by the agency and comments received by th 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 subcommitt 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 follo for the reissuance of Rule 31101. According to the Board, no subcommittee member request 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 i 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 propose rules, establishing compensation rules set by private 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.

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

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, enters remedial orders resolving allegations that AMCs have failed to comply with the customary and reasonable fee requirements of La. 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 § [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 Ay.7(r)4po(di)3i discra di dir(di)3.7(scri)y.siALJ o- >>BD2 DC -007014 T*994requ-4.62(i

In Patrick v. Burget, the Supreme Court held that judicial review of the actions of private

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 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 disputs

although we noted that many of the dental board members did perform teeth whitening service 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 (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 elected 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 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 or 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 licensed appraisers with at least five years' experience, thus 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 be answered affirmatively without defining relevant antitrust markets or delving into the de of individual board members' income streams. It follows that there is no genuine dispute material fact that would preclude summary decision on this issue. We hold that the Board 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. ROppa 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. § 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 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." 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 subcommittee 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 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 by a 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 insure compliance with federal and Louisiana [customary and reasonable] requirements").

D. Conclusion

We conclude that there is no genuine issue of material fact 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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