UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LOUISIANA REAL ESTATE APPRAISERS BOARD	**CIVIL ACTION**
VERSUS	**19-214-BAJ-RLB**
FEDERAL TRADE COMMISSION	

MOTION TO DISMISS OF FEDERAL TRADE COMMISSION

Defendant Federal Trade Commission hereby moves this Court to dismiss the above captioned case pursuant to Fed. R. Civ. P. 12(b)(1). The FTC is contemporaneously filing its memorandum in support of this motion.

UNITED STATES OF AMERICA, by

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CERTIFICATE OF SERVICE

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prevents the Board from short-circuiting procedures mandated by Congress, disrupting the orderly conduct of administrative proceedings, and turning the enforcement agency into a defendant. Nor can the Board satisfy the finality requirement by relying on the collateral order doctrine, which

The Board claims it is exempt from antitrust scrutiny under the "state-action" doctrine of antitrust law, Compl. ¶¶ 39, 78, 89,[2] which in limited circumstances can shield state-sanctioned anticompetitive conduct from federal antitrust liability. *See Parker v. Brown*, 317 U.S. 341 (1943). The doctrine applies only if the Board shows that its price-fixing rule satisfies both prongs of the "*Midcal* test": (a) that the Board's actions were taken pursuant to a "clearly articulated and affirmatively expressed … state policy," and (b) that the Board's application of the anticompetitive state policy is "actively supervised by the State." *Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *accord N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110 (2015).

After the FTC administrative complaint was issued, the State modified its regime for supervising the Board, Compl. ¶¶ 40-41, and the Board re-promulgated Rule 31101, Compl. ¶¶ 43, 50. The Board then moved to dismiss the complaint as moot on the ground that the changes placed *all* of the Board's post-complaint conduct within the state-action doctrine. Compl. ¶ 54; ECF 9-2, Ex. 1 at 7.[3] The Board also claimed that it had eliminated any continuing effects of its pre-complaint conduct. ECF 9-2, Ex. 1 at 7.

In the decision that now serves as the basis for the Board's complaint in this Court, the Commission determined that the case was still live. It found that the new regime does not invariably provide active state supervision of the Board under the *Midcal* test. Compl. ¶ 56; ECF 9-2, Ex. 1 at 11-15. In particular, it held that the State did not actively supervise the Board's re-

[2] The Complaint is ECF 1.

[3] Exhibit 1 to the Board's motion for a stay contains the Commission's interlocutory decision. The Board filed a redacted version of the decision, but the unredacted version is also a public document and was part of the public record in the Court of Appeals.

promulgation of the price-fixing rule in 2017 and that the State's oversight of Board enforcement of the rule going forward had not been shown to satisfy the test for active supervision. ECF 9-2, Ex. 1 at 15.[4]

Complaint counsel, the

By vesting exclusive jurisdiction over FTC proceedings in the court of appeals, Congress cut off subject matter jurisdiction in district courts. Where "Congress has created a specific mode of judicial review of administrative orders, declaratory relief [in district court] is not available." *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 169 (5th Cir. 1989)9

statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action; for example, Federal Trade Commission … orders were

"intermediate" actions, because such interlocutory orders are "subject to review on the review of the final agency action." *Id.* In the absence of "final agency action," a court lacks subject matter

F.3d 25, 31 (D.C. Cir. 2014) (quoting *Aluminum Co. of Am. v. United States*, 790 F.2d 938, 942 (D.C. Cir. 1986)). Because the Board "may well emerge victorious from the [FTC adjudicative process], leaving nothing for them to appeal," *CSX Transp.*, 774 F.3d at 30, the possibility that "completion of an agency's processes may obviate the need for judicial review … is a good sign that an intermediate agency decision is not final." *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 76 F.3d 1212, 1215 (D.C. Cir. 1996). Until final resolution, judicial review of agency action

to the finality of the entire proceeding, not to one specific issue raised in its course. *See Herman*, 176 F.3d at 289, 292. The decision challenged by the Board is a quintessential interlocutory order, "subject to judicial review at the termination of the proceeding in which the interlocutory ruling is made." *Id.* at 288. The Supreme Court rejected an essentially identical argument in *Standard Oil*, ruling that the FTC's assertedly "final" determination to issue an administrative complaint was not subject to review under the APA. 449 U.S. at 243-44. "It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding." *Alcoa*, 790 F.2d at 941.

B. The FTC's Decision May Not Be Deemed "Final" Under the Collateral Order Doctrine.

The lack of finality [illegible]

destroyed if its vindication must be postponed until trial is completed," *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-99 (1989), such as a "right not to be tried," *id* at 499 (citing *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800 (1989)). The Fifth Circuit has held that a state-action question is "effectively reviewable after trial." *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287, 293-94 (5th Cir. 2000).

The Board claims that post-proceeding review will not be meaningful because the state-action doctrine gives it a right not be tried, akin to Eleventh Amendment or qualified immunity. The Board cites *Martin v. Memorial Hospital*, 86 F.3d 1391, 1394-96 (5th Cir. 1996), for the propositions that it possesses sovereign dignitary interests to be free from federal antitrust litigation and trial, and that it must be allowed to carry out the effective operation of state government free from disruption. Compl. ¶¶ 8, 62, 71.

The Board's reliance on *Martin* is misplaced. Without explanation, the Board ignores a subsequent decision by the Fifth Circuit, sitting en banc, substantially revising *Martin*'s description of state-action doctrine. In *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc), the court held that "immunity is an inapt description" of the state-action doctrine. The term "*Parker* immunity," the court instead determined, is not really an immunity at all, but is most accurately understood as a "convenient shorthand" for "locating the reach of the Sherman Act."[6] *Id.* The doctrine is not rooted in concerns

[6] The en banc Court's conclusion aligns with those of the majority of other circuits. *See SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 726 (9th Cir. 2017); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.3d 563, 567 (6th Cir. 1986); *but see Commuter Trans. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986).

about exempting states from legal proceedings, as traditional immunity doctrines are, but has a

or Eleventh Amendment immunity, that is no longer the case for essentially private entities like the Board. Unsurprisingly, the Fifth Circuit has refused to extend immunity from suit beyond municipal entities, explaining that *Martin* was based on "concerns that public defendants would be subjected to the costs and general consequences associated with discovery and trial." *Acoustic Sys., Inc.*, 207 F.3d at 293.

Indeed, the Board does not share the State's sovereign interests, as the Board alleges. Compl. ¶ 71. The Supreme Court has rejected that idea, holding instead that "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." *N.C. Dental*, 135 S. Ct. at 1111. Indeed, the Court has identified only two state acts that automatically qualify as sovereign: state legislation and decisions of state supreme courts acting in a legislative capacity. *Id.* at 1110. The Board's rule and its enforcement of the rule possesses neither attribute and thus does not share the sovereign interests of the State of Louisiana itself.

Moreover, even if the Board could assert the state's own sovereign, dignitary interests as an abstract matter, those interests cannot be asserted against the federal government. "[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents … a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 128, 140 (1965). Dignitary

Thus, even if the antitrust laws do not apply to the Board's conduct, the Board has no immunity from suit and therefore no interest that cannot be fully vindicated at the termination of the FTC administrative proceeding.

The Board also suggests (Compl. ¶ 8) that the Commission proceeding prevents the state from effectuating or enforcing its laws. The Board fails to allege any actual impairment, nor could it. The FTC's administrative complaint challenges no state law, and the FTC has not forbidden the Board from taking any action while the proceeding is pending (and it has no power of its own to do so).

ii. State action is entwined with the merits. The Board's attempt to obtain immediate review also fails because the question of state-action is intertwined with the antitrust merits. An issue is not completely separate from the merits when it "involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand*, 437 U.S. at 469 (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). A determination that the state-action doctrine protects the Board's conduct is a determination that the Board has not violated the antitrust laws. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987). By definition, that is a merits determination. For example, even though at this point the Commission has not needed to decide whether the Board can satisfy the clear-articulation prong of *Midcal*, a ruling by this Court that the Board satisfies the state-action doctrine would require it to consider whether the Board's conduct was anticompetitive and whether the "anticompetitive effects" of Rule 31101 were the "inherent, logical, or ordinary result" of Louisiana's grant of authority to the Board. *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216, 229 (2013). "That inquiry is inherently enmeshed with the underlying cause of action, which requires a determination of whether a defendant has used 'unfair methods of competition in or affecting commerce.'" *S.C.*

State Bd. of Dent