PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Maureen K. Ohlhausen, Acting Chairman**
Terrell McSweeny

ORIGINAL

In the Matter of	
Louisiana Real Estate Appraisers Board, Respondent	Docket No. 9374

COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S RENEWED EXPEDITED MOTION TO STAY DISCOVERY

Just three weeks ago the Commission denied Respondent's request for a stay pending the Commission's decision regarding certain dispositive motions.[1] Respondent now makes its fourth motion for a stay[2]—effectively a motion for reconsideration of the Commission's order dated January 12, 2018. Nothing has changed in the 19 days since the Commission ruled. There is not a single new fact. There has been no change in the applicable law. Instead, Respondent asks the Commission to consider two *amicus* briefs filed in *Salt River Project v. Solar City Corp.*, a pending Supreme Court case.[3] Amici in those briefs argue that denials of state action immunity claims by state agencies should be immediately appealable under the collateral order doctrine because, they say, antitrust litigation is costly, and state agencies should be afforded special

[1] *See* Commission Order Denying Respondent's Expedited Motion to Stay Party 3 Administrative Proceedings and Move the Evidentiary Hearing Date ("Comm'n Order") at 2, *In re Louisiana Real Estate Appraisers Board*, Docket No. 9374 (Jan. 12, 2018).
[2] *See* Respondent's Expedited Motion for a Stay, dated January 11, 2018, Respondent's Motion for Stay, dated July 18, 2017, and Joint Motion for Stay, dated October 16, 2017 (joint motion at Respondent's request), *In re La. Real Estate Appraisers Bd.*, Docket No. 9374.
[3] Brief for the States of Tennessee, Arizona, Arkansas, Colorado, Georgia, Idaho, Indiana, Louisiana, Kansas, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, West Virginia, Wisconsin, Wyoming ("States' Brief"), *Salt-River Project v. SolarCity Corp.*, No. 17-368 (Jan. 22, 2018); Brief of the National Governors Association *et al.*, *Salt-River Project v. SolarCity Corp.*, No. 17-368 (Jan. 22, 2018). These briefs are attached to Respondent's Renewed Motion as Exhibits 1 and 2 respectively.

treatment. Whatever the merits of allowing immediate appeals of state action denials—which is not at issue here, and which the Commission has previously opposed[4]—the amici briefs add nothing new for the Commission to consider in this case. The Commission should again deny Respondent's motion for a stay.

BACKGROUND

On January 12, 2018, the Commission denied Respondent's motion for a stay, considering and rejecting Respondent's arguments that (1) a stay would conserve resources; (2) Respondent is a state agency with limited resources; and (3) there is no prejudice to either party or the public interest. The Commission noted that "[t]he expenses at issue . . . are normal consequences of litigation, routinely borne by litigants while dispositive motions are pending," and that "routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters." Comm'n Order at 2. The Commission explained that the presumption against a stay while a dispositive motion is pending is particularly applicable here because this proceeding has already been stayed for several months. *See* Comm'n Order at 2.

ARGUMENT

A. Respondent's Arguments Based on the *Amicus* Briefs Are Neither New Nor Persuasive Regarding Whether a Stay Is Appropriate

In its present motion, Respondent asks the Commission for the same relief it requested on January 11—that the Commission stay discovery until it decides the pending dispositive motions. Thus, Respondent's "renewed" motion for a stay is in substance a motion for reconsideration. Under Commission precedent, "[m]otions for reconsideration should be granted only sparingly," *In re Basic Research*, No. 9318, 2006 FTC LEXIS 7, at *4 (Feb. 21, 2006), and "are not intended to be opportunities 'to take a second bite at the apple' and relitigate previously

[4] *See, e.g., S.C. State Bd. of Dentistry v. F.T.C.*, 455 F.3d 436 (4th Cir. 2006).

decided matters." *In re Intel Corp.*, No. 9341, 2010 FTC LEXIS 47, at *4 (May 28, 2010) (citation omitted).

To meet its burden, Respondent must show "(1) a material difference in fact or law from that presented to the [court] before such decision, that in the exercise of reasonable diligence could not have been known to the moving party; (2) the emergence of new material facts or a change of law occurring after the time of such decision; or (3) a manifest showing of a failure to consider material facts presented to the [court] before such decision."[5] *In re Intel Corp.*, 2010 FTC LEXIS 47, at *5.

Respondent satisfies none of these conditions. Respondent admits that it cannot show any new fact: "LREAB recognizes that . . . the filing of *amicus* briefs by State and local governmental officials across the country is not *per se* a new fact." Respondent's Renewed Expedited Motion for a Stay at 2 ("Respondent's Renewed Motion"), *In re La. Real Estate Appraisers Bd.*, Docket No. 9374 (Jan. 31, 2018). And Respondent has previously argued that "LREAB is not an ordinary litigant." In its January 11 motion, Respondent maintained that the stay should be granted because Respondent was "a self-funded governmental entity with limited financial resources." Respondent's Expedited Motion for a Stay at 4, *In re La. Real Estate Appraisers Bd.*, Docket No. 9374 (Jan. 11, 2018). The Commission denied Respondent's motion then, and it should deny Respondent's motion now.

In addition to being repetitive, Respondent's arguments still do not establish good cause to grant a stay in discovery during the pendency of a dispositive motion. Respondent has not identified any state interest, apart from the expenditure of time and money, that would be imperiled by the continuation of discovery. As the Commission noted, "[t]he expenses at issue,

[5] This standard is similar to the federal court standard for reconsideration: "an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Foster v. Sedgwick Claims Mgmt. Servs.*, 842 F.3d 721, 735 (D.C. Cir. 2016) (citation and internal quotation marks omitted).

however, are normal consequences of litigation, routinely borne by litigants while dispositive motions are pending." Comm'n Order at 2.

In this regard, it is significant that Respondent has not moved to dismiss this case pursuant to the state action doctrine. Thus, even if Respondent were to prevail with respect to Complaint Counsel's motion for summary judgment on the state action defense, the matter will still proceed to trial. Discovery will still be had on all of the other issues in the litigation. In this context, Respondent's stay will accomplish only delay.

Finally, accepting Respondent's argument would directly frustrate the vital "public interest in the efficient and expeditious resolution of litigated matters." Comm'n Order at 2. It would mean that any Part 3 litigation involving a state respondent will be eligible for a stay so long as some potentially dispositive motion is pending before the Commission.

B. The *Amicus* Briefs Address the Collateral-Order Doctrine, Not the Appropriateness of a Stay of Discovery

The question before the Supreme Court in *Salt River* is "Whether orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine."[6] The collateral-order doctrine addresses whether a particular pre-judgment order is "'too important' to be denied immediate review" by an appellate court, *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 103 (2009); it does not address whether a court should stay discovery while deciding a dispositive motion. The word "stay" does not appear in either *amicus* brief, and there is no argument that mere invocation of the state action defense should quiet all discovery. In fact, in the *Salt River* matter, the Ninth Circuit denied a co-defendant's motion for

[6] Order Granting Certiorari and Setting Question Presented, *Salt-River Project v. SolarCity Corp.*, No. 17-368 (Dec. 1, 2017) (attached as Exhibit 1).

a stay pending an application of *certiorari* to the Supreme Court.[7] This order has not been appealed to the Supreme Court.

The *amicus* briefs argue that state sovereignty is impugned if parties asserting a state action defense cannot immediately appeal an adverse order as of right.[8] The Commission has repeatedly rejected this argument. *See* Brief for the United States and the Federal Trade Commission as Amici Curiae at 4, *Aurora Student Housing at the Regency, LLC, v. Campus Village Apartments*, No. 11-1569 (10th Cir.) (April 13, 2012) ("The collateral order doctrine . . . is narrow and does not apply to an order denying a motion to dismiss an antitrust claim under the 'state action' doctrine of *Parker v. Brown*, 317 U.S. 341 (1943)."); Brief for the United States and the Federal Trade Commission as Amici Curiae at 13, *Teladoc, Inc. v. Texas Med. Bd.*, No. 16-50017 (5th Cir.) (Sept. 9, 2016) (emphasis added) ("The Supreme Court based the *Parker* doctrine *not on concerns about facing trial*, but instead on the assumption that Congress did not intend the Sherman Act to include 'an unexpressed purpose to nullify a state's control over its officers and agents.'"); *see also id.* at 8 (arguing that the state action defense is particularly inappropriate where, as here, the matter involves "state regulatory boards controlled by active market participants").

The Commission defended this position before the Fourth Circuit in *S.C. State Bd. of Dentistry v. F.T.C.*—and prevailed. 455 F.3d 436 (4th Cir. 2006). The Fourth Circuit held that in an FTC enforcement action, an order denying a state action defense may not be appealed immediately. The Fourth Circuit explained: "Although it is undoubtedly less convenient for a party—in this case the Board—to have to wait until after trial to press its legal arguments, no protection afforded by *Parker* will be lost in the delay." 455 F.3d at 445.

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[7] *See* Order Denying Motion for Stay of Mandate Pending Application of Writ of Certiorari, *SolarCity Corp. v. Salt River Project AI&P Dist.*, No. 15-17302 (9th Cir. Nov. 23, 2015) (attached as Exhibit 2).

[8] Respondent has not moved for summary decision based on the state action doctrine. If Respondent is truly concerned about the threat to state sovereignty posed by unnecessary litigation, perhaps Respondent should affirmatively assert the state action defense and thereby protect it.

CONCLUSION

There has been no showing of any new fact or law relevant to the Commission's order denying a state of discovery during the pendency of dispositive motions in this matter. Accordingly, this most recent request for a stay should be denied.

Dated: February 12, 2018

Respectfully submitted,

/s/ Michael J. Turner
Michael J. Turner
Geoffrey M. Green
Lisa B. Kopchik
Kathleen M. Clair
Christine M. Kennedy
Thomas H. Brock
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580
(202) 326-3649
mturner@ftc.gov

EXHIBIT 1

17-368 SALT RIVER PROJECT V. SOLARCITY CORPORATION **PUBLIC**

DECISION BELOW: 859 F.3d 720

LOWER COURT CASE NUMBER: 15-17302

QUESTION PRESENTED:

Whether orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine.

CERT. GRANTED 12/1/2017

EXHIBIT 2

PUBLIC

FILED

JUL 6 2017

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOLARCITY CORPORATION, Plaintiff-Appellee, v. SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, Defendant-Appellant.	No. 15-17302 D.C. No. 2:15-cv-00374-DLR District of Arizona, Phoenix ORDER

Before: KOZINSKI, GILMAN,* and FRIEDLAND, Circuit Judges.

Appellant's motion for stay of the issuance of the mandate pending application for writ of certiorari is denied. *See* Fed. R. App. P. 41(d)(2)(A).

* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

CERTIFICATE OF SERVICE

I hereby certify that on February 12, 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 12, 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.

Date: February 12, 2018

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