

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

COMMISSIONERS: Maureen K. Ohlhausen, Acting Chairman
Terrell McSweeney

In the Matter of

Louisiana Real Estate Appraisers Board,
Respondent

Docket No. 9374

COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION TO STAY

Commission rules, policy and practice are *not* to stay administrative proceedings when a dispositive motion has been filed, absent unusual circumstances. Rule 3.22(b). The motion of Louisiana Real Estate Appraisers Board (“Respondent”) to stay this proceeding should be denied because Respondent has not shown any unusual circumstances.

This is Respondent’s third motion for a stay of proceedings.¹ The prior stays have already delayed a resolution of this matter for 120 days, during which time consumer harm has continued. Respondent now requests that the Commission delay resolution for an additional 90 days because the Commission has scheduled oral argument on two pending dispositive motions, and Respondent wants to avoid litigation expenses.² But for a decade, the Commission’s policy has been that the burden of ordinary litigation costs during the pendency of a dispositive motion does not justify a stay. The mere fact that the Commission has chosen to hear oral argument changes nothing about that policy. This case should proceed as expeditiously as possible—as

¹ See 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.

² See *id.* at 1-3; see also Commission Order Scheduling Consolidated Oral Argument and Extending Deadlines for Commission Rulings, *In re La. Real Estate Appraisers Bd.*, Docket No. 9374 (Jan. 10, 2018).

intended in the Part 3 Rules—to mitigate harm to Louisiana residents and assure efficient and timely resolution.

ARGUMENT

Rule 3.22(b) provides that “[a] motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders or unless otherwise provided by applicable rule.” The purpose of Rule 3.22(b) is “to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions . . . [so as] to expedite the proceedings.” *In re LabMD, Inc.*, No. 9357, 2013 FTC LEXIS 131, at *4 (F.T.C. Dec. 13, 2013) (quoting FTC, *Rules of Practice*, Interim Final Rules with Request for Comment, 74 Fed. Reg. 1804, 1809, 1810 (Jan. 13, 2009) (alterations in original)).

In 2008, when the Commission first proposed the amendment adding subsection (b) to Rule 3.22, it entitled subsection (b) “Pendency of Proceedings.” FTC, *Rules of Practice*, Proposed Rule Amendments and Request for Public Comment, 73 Fed. Reg. 58,832, 58,843 (Oct. 7, 2008). In the final rules, it made a very deliberate change, instead entitling 3.22(b) “Proceedings Not Stayed.” The Commission explained the purpose of this change in the final rules:

The Commission has revised the caption of paragraph (b) to “Proceedings not stayed,” to more accurately describe the subject matter of the paragraph *The purpose of proposed paragraph (b) was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motion. . . .*

Interim Final Rules with Request for Comment, 74 Fed. Reg. at 1810 (emphasis added). The Commission’s objective was clear: it intended that proceedings would go forward even during the pendency of dispositive motions.

Respondent argues that the potential avoidance of litigation expenses constitutes “good cause” to stay the proceedings. The Commission rejected this argument in *In re LabMD*. There, the respondent proposed that proceedings before the administrative law judge should be stayed pending the resolution by the Commission of its motion to dismiss. *In re LabMD*, 2013 FTC LEXIS 131, at *3-5. Respondent argued specifically that a stay was appropriate to avoid “‘extensive and abusive discovery’ that would impose ‘ruinous litigation costs’ on the company.” *Id.* at *5. The Commission rejected this argument and denied the motion for a stay, explaining: “The Supreme Court has clearly ruled that the ‘expense and disruption incurred by the respondent in defending itself in protracted adjudicatory proceedings’ before the Commission does not justify halting those proceedings prior to their conclusion, even where, as here, the respondent ‘alleged unlawfulness in the issuance of the complaint.’” *Id.* at *7 (*quoting FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980)); *see also id.* at *16-18 (holding, in *LabMD*’s parallel motion for a stay pending the outcome of related federal court litigation, that “[a] party seeking a stay must show that it will be irreparably injured absent a stay . . . and mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury”).

While reducing litigation expenses is a worthy goal, litigation expenses of the type Respondent points to, such as the attorney fees, travel expenses, and court reporter costs (Resp. Mot. at 3-4), do not constitute an adequate basis for a stay under the Commission’s rules. Every Commission enforcement action requires discovery and attendant expenses. If avoidance of ordinary litigation expenses constitutes grounds for a stay, discovery would halt during the pendency of any dispositive motion, contrary to the Commission’s considered policy. As the Commission has explained, “when we adopted the current version of Section 3.22 of our Rules of Practice, we anticipated that parties might file dispositive pre-hearing motions, but concluded that the public interest in expediting our adjudicatory process supports allowing the proceedings

before the Administrative Law Judge to continue notwithstanding the pendency of such motions.” *In re LabMD*, 2013 FTC LEXIS 131, at *6. To permit delay in order to save routine expenses would arm every respondent with the tools to stymie every Commission enforcement action.

The cases cited by Respondent³ are inapposite, if only because both involved motions to stay that were unopposed. Further, the order in the *South Carolina Dental* case was entered in 2003, six years before Rule 3.22(b) was adopted. And, the Commission entered the stay in *Phoebe Putney* pending the final resolution of a collateral issue *by a state agency* that could render a remedy in the Commission proceedings infeasible. *Phoebe Putney* did *not* involve a request for a stay pending resolution of a dispositive motion by the Commission, and thus Rule 3.22(b) was not implicated.

CONCLUSION

There has been no showing of any unusual circumstances that would justify a stay in contradiction of Commission rules, policies, and procedures. Accordingly, the request for a stay should be denied.

³ See Order Granting Respondent’s Unopposed Motion for Temporary Stay of Proceeding, *In re Phoebe Putney Health Sys., Inc.*, Docket No. 9348 (Oct. 30, 2014); Order Granting Respondent’s Unopposed Motion to Stay Discovery, *In re S.C. State Bd. of Dentistry*, Docket No. 9311 (Oct. 23, 2003).

Dated: January 12, 2018

Respectfully submitted,

/s/ Lisa B. Kopchik

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

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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: January 12, 2018

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