

1 UNITED STATES OF AMERICA

2 FEDERAL TRADE COMMISSION

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4 In the Matter of: )

5 LOUISIANA REAL ESTATE ) Docket No.

6 APPRAISERS BOARD, ) 9374

7 Respondent. )

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11 ORAL ARGUMENT ON RESPONDENT'S MOTION TO DISMISS

12 AND

13 COMPLAINT COUNSEL'S MOTION FOR PARTIAL SUMMARY DECISION

14

15 Thursday, February 22, 2018

16

17 BEFORE:

18 CHAIRMAN MAUREEN K. OHLHAUSEN

19 COMMISSIONER TERRELL McSWEENEY

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25 Reported by: Sally Jo Quade

1 APPEARANCES:

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## 1 P R O C E E D I N G S

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3 CHAIRMAN OHLHAUSEN: Good afternoon, everyone.

4 The Commission is meeting today in open session to hear  
5 oral argument in the matter of Louisiana Real Estate  
6 Appraisers Board, Docket Number 9374, on the motion to  
7 dismiss filed by the Respondent, and the motion for  
8 partial summary decision filed by counsel supporting the  
9 complaint.

10 The Respondent is represented by Mr. Seth D.  
11 Greenstein, and counsel supporting the complaint are  
12 represented by Ms. Lisa Kopchik.

13 During this proceeding, each side will have 30  
14 minutes to present their arguments. Counsel for the  
15 Respondent will make the first presentation, and will be  
16 permitted to reserve up to five minutes for rebuttal.  
17 Counsel supporting the complaint will then make her  
18 presentation. Counsel for the Respondent may conclude  
19 the argument with a rebuttal presentation.

20 So, Mr. Greenstein, do you wish to reserve any  
21 time for rebuttal?

22 MR. GREENSTEIN: Yes, ma'am, Madam Chairman, I  
23 would like to reserve five minutes, please.

24 CHAIRMAN OHLHAUSEN: Okay, so the Bailiff will  
25 do that. You may begin.

1           MR. GREENSTEIN: Thank you, Chairman Ohlhausen,  
2           Commissioner McSweeney. My name is Seth Greenstein with  
3           the law firm of Constantine Cannon representing  
4           Respondent, Louisiana Real Estate Appraisers Board.

5           The Board would like to thank the Commission for  
6           holding this hearing to discuss important issues at the  
7           intersection of antitrust law and state sovereignty.  
8           Louisiana Real Estate Appraisers Board is a state agency  
9           empowered under Louisiana's law to protect the integrity  
10          of the appraisal market. It does so by licensing and  
11          regulating appraisers and AMCs, they are the agents who  
12          procure appraisals for mortgage lenders.

13          The law also requires the Board, among other  
14          things, to promulgate and enforce the mandate under  
15          Dodd-Frank that AMCs must pay customary and reasonable  
16          fees to residential appraisers. The state and the Board  
17          believe that none of the Board's actions violate Section  
18          5, and that the Board's actions complied with Dodd-Frank  
19          and Louisiana law.

20          The Board also believes the state legislature,  
21          the governor, the courts, historically have actively  
22          supervised the Board's actions, and that the Board has  
23          had state action immunity all along. Notwithstanding,  
24          the complaint asserts that the state has not done enough  
25          to make the Board's actions state action. Those

1 allegations became moot last July. The Governor issued  
2 an Executive Order creating an additional layer of  
3 supervision by the Commissioner of Administration over  
4 the Board's promulgation of the customary fee rule, now  
5 known as Replacement Rule 31101. That supervision  
6 occurred, and the rule has come into effect.

7 The Governor's order also inserts an additional  
8 layer of political and adjudicatory supervision over the  
9 Board's enforcement of Replacement Rule 31101 by the  
10 Division of Administrative Law. That also is in place  
11 now.

12 That active supervision, combined with clear  
13 articulation that the intent of the customary and  
14 reasonable fee requirement would constrain and displace  
15 price competition, exempts the Board from prospective  
16 Section 5 liability under the state-action doctrine.

17 With respect to the past, the Board has taken  
18 additional and extraordinary steps to moot any effective  
19 relief possible as to the Board's past enforcement of  
20 its customary and reasonable fee rule. With no  
21 effective relief available as to the past, and  
22 state-action exemption as to the future, none of the  
23 relief requested in the complaint would have any effect,  
24 and a cease and desist order from the Commission cannot  
25 fashion any meaningful relief. There is nothing left to

1       cease and desist from. Because the causes of action and  
2       the relief sought are moot, the complaint should be  
3       dismissed.

4               That mootness also disposes of complaint  
5       counsel's motion for partial summary decision, but it  
6       should be denied on the merits. The 2013 legislative  
7       and gubernatorial oversight of the Board's promulgation  
8       of prior Rule 31101 and the state court review of any  
9       Board enforcement orders constituted active supervision,  
10      even without the actions of the Executive Order.

11              Moreover, the banker and commercial appraisal  
12      members that comprise a majority of the Board, cannot be  
13      deemed active market participants in this separate  
14      residential appraisal market, but at minimum, the  
15      evidence submitted by the Board shows genuine issues of  
16      material fact exist that cannot be resolved on a  
17      dispositive motion, and therefore, we ask the Commission  
18      to grant the motion to dismiss and to deny the motion  
19      for partial summary decision as moot.

20              Focusing --

21              CHAIRMAN OHLHAUSEN: Maybe I can jump in.

22              MR. GREENSTEIN: Please.

23              CHAIRMAN OHLHAUSEN: With a question here. Kind  
24      of starting with the end of your argument first. How do  
25      you square your argument that active supervision of the

1 Board members wasn't required, that they're not active  
2 market participants, with what the Supreme Court said  
3 and the FTC said in the North Carolina Dental  
4 case?

5 MR. GREENSTEIN: Well, the composition of the  
6 Board and the actions of the Board and the supervision  
7 of the Board are all completely different from what  
8 happened in North Carolina Dental. In North Carolina  
9 Dental, you had a Board that was elected of dentists by  
10 dentists. Here we have, by law, composition of the  
11 Board from four different groups, each with a different  
12 perspective on the residential appraisal market. No  
13 single group comprises a majority of the Board, and they  
14 are all appointed by the Governor and approved by the --  
15 and confirmed by the Senate.

16 CHAIRMAN OHLHAUSEN: But does appointment by the  
17 governor make them any more or less active market  
18 participants?

19 MR. GREENSTEIN: Well, as shown, if you look at  
20 tab A6 of the materials we provided to you, there is a  
21 chart that shows the composition of the board  
22 historically through the relevant period, from 2012, I  
23 believe, through the current Board of 2017. And you  
24 will see that a majority of the Board did no active --  
25 was not engaged in active residential appraisal.

1           CHAIRMAN OHLHAUSEN: But was the majority of the  
2 Board licensed by the Board?

3           MR. GREENSTEIN: They were licensed by the  
4 Board; however, there were different licenses that were  
5 issued and differentiations among the licenses under  
6 Louisiana law.

7           CHAIRMAN OHLHAUSEN: And can general appraisers  
8 engage in residential real estate appraisals, if they  
9 wish to?

10          MR. GREENSTEIN: Are they permitted to by law?

11          CHAIRMAN OHLHAUSEN: Yes, are they permitted  
12 under the license that's issued to them?

13          MR. GREENSTEIN: They are permitted under the  
14 license that's issued; however, the facts show that a  
15 majority of the Board of the general appraisers did not  
16 actively engage in residential appraisal.

17          CHAIRMAN OHLHAUSEN: But looking at North  
18 Carolina Dental, I don't think it was dispositive that a  
19 majority of the dentists didn't engage in tooth  
20 whitening.

21          MR. GREENSTEIN: Well, as I recall the facts of  
22 North Carolina Dental, eight out of 10 dentists on the  
23 board, in fact, did engage in tooth whitening. While  
24 that was not dispositive, it was certainly an  
25 influential fact. If the purpose of the rule is to

1 prevent any actual conflicts of interest, any actual  
2 personal interest from interfering with the Board's  
3 decisions, that would not apply here, because the  
4 majority of the Board does not actively -- actively  
5 engage in residential appraisals, which are subject to  
6 the C&R fee rule. And so if the conflict doesn't exist,  
7 the rule should not apply.

8 CHAIRMAN OHLHAUSEN: So what if there were some  
9 sort of new service, right, that was coming onto the  
10 market and that would be covered by the Board, that  
11 would be subject to the licensing by the Board? The  
12 fact that no one is getting engaged in this, would that  
13 be dispositive to say that they aren't an active market  
14 participant if the market circumstances changed and they  
15 decided that they did want to engage in this, and that  
16 would be permitted under the scope of the license?

17 MR. GREENSTEIN: It could be dispositive in that  
18 case, but again, it depends on the facts, and whether,  
19 in fact, there was any actual conflict of interest that  
20 existed. If the personal interests of the Board members  
21 interfere with their ability to render a decision, then  
22 the active market participation, and the Board's  
23 supervision requirements, would kick in. But in the  
24 case where there is no actual conflict of interest,  
25 it's -- there are -- a board, any board, regulates a lot

1 of different aspects of commerce, and a lot of those  
2 aspects --

3 CHAIRMAN OHLHAUSEN: Isn't a potential  
4 conflict of interest sufficient under the case law?

5 MR. GREENSTEIN: Again, looking to the purpose  
6 of the rule, the purpose of the rule is to prevent  
7 personal interests from interfering with the Board's  
8 decisions, and if the Board's members have no personal  
9 interest, then, per se, it does not make sense to  
10 require active supervision over that particular decision  
11 by the Board.

12 COMMISSIONER McSWEENEY: I would like to ask just  
13 one followup question about the composition of the  
14 Board. I understand that partly you're arguing that  
15 some intervening executive action was taken by the state  
16 to mitigate some of the concerns here. I was wondering  
17 whether any thought was given during that process to  
18 changing the composition of the Board itself.

19 MR. GREENSTEIN: The composition of the Board is  
20 prescribed by statute, and so only the legislature could  
21 have changed it. The legislature in Louisiana, like  
22 most states, meets only part-time. It meets from -- I  
23 think this year it will be from March until the  
24 beginning of June. And so there was no opportunity  
25 under the circumstances for the legislature to consider

1 the composition of the Board. And so the remedy  
2 available to the state was an Executive Order by the  
3 Governor that would insert additional active  
4 supervision -- two layers of active supervision over  
5 both the promulgation of the Board's rule, and also over  
6 the enforcement of the Board's rule.

7 CHAIRMAN OHLHAUSEN: I'd like to ask a question  
8 about the promulgation of the new rule, 31101. So what  
9 are we to make of the fact that the new rule seemed to  
10 have been adopted on August 14th, 2007, before there  
11 were any hearings or any public comment submitted?

12 MR. GREENSTEIN: The rule was not adopted under  
13 Louisiana law until it was published in the Louisiana  
14 Register, which occurred on November 20th, 2017. What  
15 happened was that there was active supervision by the  
16 Commissioner of Administration's office, both before the  
17 rule was submitted to the public by the first  
18 publication in the Louisiana Register, which initiated  
19 the public comment and hearing process, and then after  
20 that, the legislative committees had the opportunity to  
21 exercise their oversight as well.

22 CHAIRMAN OHLHAUSEN: But didn't the general  
23 counsel for the Division of Administration say that the  
24 rule had basically effectively been adopted on August  
25 14th, and that they didn't have any power subsequent to

1 that to make any changes to the rule?

2 MR. GREENSTEIN: The Commissioner of  
3 Administration's office, as I understand it, the same  
4 documents that you were reading, took the position that  
5 they only had the obligation to review the rule before  
6 it was published in the Louisiana Register. We  
7 respectfully read the order differently.

8 The Executive Order, if you look at tab A1, at  
9 Section 2 on the second page, says that "the  
10 Commissioner of Administration is directed to review any  
11 proposed regulation along with its rule-making record."  
12 The rule-making record obviously consists of both the  
13 publication in the Louisiana Register, any public  
14 comments received, and any public hearing comments made  
15 as well.

16 So from our reading, in fact, the Board went  
17 overboard, if you will, by asking the Commissioner of  
18 Administration to give a prior review before the initial  
19 publication. Really what the Executive Order, to our  
20 reading, requires, is the subsequent approval.

21 Notwithstanding, it's clear from the letters  
22 from the Commissioner of Administration, the second  
23 letter in particular, that's at -- the second document  
24 at A3, that, in fact, they reviewed it both times, and  
25 that in the second reading, they looked specifically at

1 the background on Dodd-Frank, the prior rule and its  
2 rule-making record, the current rule and its rule-making  
3 record. And based on that review, it found that all of  
4 the evidence showed that the rule would comply and  
5 promote -- comply with and promote Louisiana's policy of  
6 promoting the integrity of mortgage appraisals in the  
7 state.

8 COMMISSIONER McSWEENEY: If I may ask, since I'm  
9 not very familiar with the role of the Commissioner of  
10 Administration in Louisiana, are there other  
11 circumstances in which the commissioner reviews proposed  
12 regulations to ensure that they conform to state policy?  
13 Is that a typical function?

14 MR. GREENSTEIN: The Commissioner of  
15 Administration provides, as I understand it, leading  
16 review and assistance to the Governor as part of the  
17 Governor's office, but I do not know specifically the  
18 answer to that question. And if the Commissioner would  
19 like, we can follow up and let you know.

20 So the Executive Order does reinforce active  
21 supervision, and as we said, first with respect to  
22 promulgation, the Commissioner of Administration  
23 reviewed the proposal, he had the authority to approve,  
24 modify or reject the proposed rule.

25 CHAIRMAN OHLHAUSEN: And can I ask you, what did

1 the Commissioner of Administration review ahead of the  
2 August 14th letter?

3 MR. GREENSTEIN: Right. That would be found at  
4 tab -- at Exhibit 8, I believe, of the motion to  
5 dismiss. It's an extensive record. It includes both  
6 the rule itself, the publication in the Louisiana  
7 Register, all public comments received, a transcript of  
8 the --

9 CHAIRMAN OHLHAUSEN: Wait, so I'm sorry. I  
10 thought the public comments were received after August  
11 14th.

12 MR. GREENSTEIN: Right. So the initial  
13 review --

14 CHAIRMAN OHLHAUSEN: So, what I'm asking is the  
15 initial review, because according to the general counsel  
16 of the Department of Administration, he adopted or  
17 approved the rule on August 14th. So what I'm trying to  
18 see is what did he look at before he approved that rule.

19 MR. GREENSTEIN: Right. What he looked at was  
20 the promulgation record for the prior rule, prior Rule  
21 31101. The text of the rule was the same, and so the  
22 Board believed that it would give the Commissioner of  
23 Administration some context as to whether the rule made  
24 sense to publish in the first instance, even before the  
25 public comment period, by reference to the public

1 comments that were received with respect to the prior  
2 record.

3 CHAIRMAN OHLHAUSEN: And where in the record is  
4 that indicated that that's what he reviewed?

5 MR. GREENSTEIN: I believe that is certainly set  
6 forth in the affidavit of Mr. Unangst, I'm not certain  
7 whether -- I'm not certain whether we included that,  
8 also, as an exhibit, but I believe that it is an  
9 exhibit. I can let you know the exhibit number.

10 CHAIRMAN OHLHAUSEN: Okay.

11 MR. GREENSTEIN: The Commissioner of  
12 Administration had the authority to approve or modify or  
13 reject the proposed rule based on public policy and  
14 approved it, approved it both before its initial  
15 publication for public comment, and then after, after  
16 reviewing the entirety of the record.

17 Following that, legislative oversight occurred  
18 from the House and Senate Commerce Committee Oversight  
19 Subcommittees. In accordance with Louisiana's  
20 Administrative Procedures Act, they received a  
21 prescribed summary report from the Board and also the  
22 full rule-making record that had also been submitted to  
23 the Commissioner of Administration.

24 COMMISSIONER McSWEENEY: Did those subcommittees  
25 ever have a hearing?

1           MR. GREENSTEIN: So Louisiana, like many states,  
2 as I said, has a part-time legislature that gives --  
3 whose laws require promulgation of rules by full-time  
4 boards. And so they have to deal with a practical  
5 problem of how do you get rules to be adopted more  
6 quickly, in the off season, and the way that they do it  
7 is through a negative option. And what it -- what it  
8 requires is that a summary report and a record be sent  
9 up to the Commission -- to the committees, the  
10 committees then will review it and decide whether they  
11 want to hold a hearing or whether they want the rule to  
12 go into effect. And the decision not to hold a hearing  
13 is a decision to allow the rule to become law.

14           The use of negative option procedures, by the  
15 way, has been approved by the Commission in the past and  
16 has never been -- has never been rejected by the Supreme  
17 Court. In the Motor Transport Association of  
18 Connecticut case, the Board -- the Commission wrote,  
19 "the use of negative option procedures need not  
20 demonstrate the absence of active supervision unless  
21 administrative silence is deemed equivalent to the  
22 abandonment of administrative duty." That's at 11-12 --  
23 112 FTC 342.

24           And here, there is neither administrative  
25 silence, and no abandonment of duty. We have evidence

1 in the affidavit of Mr. Unangst and the correspondence  
2 with the chairs of those respective House and Senate  
3 committees that, in fact, the review occurred and that  
4 not a single request was made for the rule to be -- to  
5 have a hearing held.

6 Again, not surprising, because the rule  
7 basically takes language from the AMC Act and from  
8 Dodd-Frank and from the implementing federal  
9 regulations, and --

10 CHAIRMAN OHLHAUSEN: So, actually, I have a  
11 question about that.

12 MR. GREENSTEIN: Yes.

13 CHAIRMAN OHLHAUSEN: So as I read the Dodd-Frank  
14 Act and sort of the circumstances that brought that  
15 about, and then also read the Louisiana statute, it  
16 seems to me that it could cover appraisal fees that are  
17 above reasonable and customary and below reasonable and  
18 customary, but in the Board's discussion of it, it only  
19 seems to be concerned with appraisal fees that are below  
20 reasonable and customary.

21 How are we supposed to think about that? I  
22 mean, if some of the concerns were that some appraisers  
23 were giving inflated appraisals and then also getting  
24 sort of inflated fees as a return from that, does this  
25 rule actually capture that? Because so much of the

1 discussion and concerns just seem to be about if the fee  
2 is low. So how do we match up what the Dodd-Frank Act  
3 says with what Louisiana says in its statute, and how  
4 that's been implemented?

5 MR. GREENSTEIN: The federal rules, in fact,  
6 address it in a very specific way. The Truth in Lending  
7 Act says that customary and reasonable fees can be paid  
8 for complex assignments, and you can have higher-than  
9 fees for complex assignments, but there is no parallel  
10 statement in the federal regulations, or in the  
11 interpretive statements, that say that an AMC can pay  
12 less for something that is lower in complexity. The  
13 rule, in fact, means that customary and reasonable  
14 always must be paid, although a higher fee can be paid  
15 in the case of a more complex assignment.

16 And this makes sense, because the whole purpose  
17 of the customary and reasonable fee requirement is  
18 Congress has prudential judgment that by paying the  
19 customary and reasonable price, a lender and a consumer  
20 are more likely to obtain a thorough appraisal from a  
21 competent appraiser. It was, in fact, intended to stop  
22 the race at the bottom that it characterized what had  
23 happened prior to the housing collapse of 2008, where  
24 appraisers were being hired based on price alone. And  
25 if you look to the factors, for example, in the federal

1 rules, that are implemented and carried forward into the  
2 state's rules, into the Board's rule, you will see that  
3 none of the factors relates to price. It's all about  
4 quality. It's all about competence. It's all about  
5 knowledge and experience. Nothing relating to price.

6 And that is because there are a number of  
7 elements of Dodd-Frank that are intended to regulate  
8 prices. This is explicitly price regulation, and the  
9 idea was to stop the race at the bottom that had proven  
10 so destructive to the housing appraisal market.

11 CHAIRMAN OHLHAUSEN: So I have another question  
12 about what makes up active supervision, what the Supreme  
13 Court and the FTC's decisions have said must make up  
14 active supervision. And some of the issues are whether  
15 the supervisor got the relevant information for a proper  
16 evaluation, which has kind of motivated some of my  
17 questions about what the Commissioner of Administration  
18 had before him when the August 14th letter was issued,  
19 and that they evaluated the substantive merits and  
20 assessed whether the courts would state standards, and  
21 then gives a written explanation.

22 Are those factors present here? And then  
23 secondly, is it your contention that they -- they aren't  
24 required in all cases for active supervision, and if  
25 that's the case, what's the factor that decides how

1 active and in depth the supervision needs to be?

2 MR. GREENSTEIN: So, active supervision in this  
3 particular case did not mandate the submission of the  
4 initial prior record to the Commissioner of  
5 Administration. That was done as a belt and suspenders,  
6 and an abundance of caution by the Board to make sure  
7 that they weren't going to start this entire process and  
8 go down the road of publishing in the Louisiana Register  
9 without some indication from the Governor's office  
10 through the Commissioner of Administration that, in  
11 fact, the rule would still be acceptable. And so that  
12 was given. But the actual approval of the rule by the  
13 Commissioner of Administration, the more significant  
14 one, was the second one that occurred in September on  
15 its way to being finally -- finally approved and  
16 published in the Louisiana Register, at which time the  
17 rule became final.

18 CHAIRMAN OHLHAUSEN: But I mean, just going back  
19 to the letter from the general counsel of the Division  
20 of Administration, he says, "as noted above, the  
21 Commissioner approved the adoption of the rule via  
22 letter on August 14th, 2017."

23 MR. GREENSTEIN: Right.

24 CHAIRMAN OHLHAUSEN: So maybe you could clarify  
25 for me a little more this mechanism for this second

1 approval.

2 MR. GREENSTEIN: The mechanism for the second  
3 approval is actually what is set forth in Louisiana  
4 Administrative Procedures Act by law, and also, in our  
5 view, in the Executive Order. By law, under  
6 Louisiana -- under Louisiana Administrative Procedures  
7 Act, any rule that become effective has to be published  
8 in the Louisiana Register, it has to go through a public  
9 comment period, it is optional to hold a hearing or not,  
10 depending on the nature of the public comments. Here,  
11 the Board decided to hold that hearing. The hearing was  
12 held, and a transcript of it is included in the record.

13 All --

14 CHAIRMAN OHLHAUSEN: So, are you saying that the  
15 Louisiana Administrative Procedures Act itself is  
16 sufficient for active supervision?

17 MR. GREENSTEIN: Yes, because the Louisiana  
18 Administrative Procedures Act also requires active  
19 supervision by the legislative houses, by the House and  
20 Senate Commerce Committee Oversight Committees. That is  
21 explicitly provided for and required under the Louisiana  
22 Legislative Procedures Act. And for that reason, yes,  
23 it does.

24 And there's also the second level, of course,  
25 where the Governor still has the opportunity, as well,

1 to reject the rule even if both houses of the Senate and  
2 the House approve the rule. If either one of those  
3 legislative committees, however, disapproves of the rule  
4 and wants to hold -- or wants to hold a hearing, either  
5 one, then the rule stops and does not go forward at that  
6 time.

7 So, yes, our view is that active supervision was  
8 clearly in place under the provisions of the Louisiana  
9 Administrative Procedures Act alone, and what the  
10 Executive Order did was, as it says, specifically,  
11 intended to remove any questions that prevented the  
12 Board from fulfilling its obligation to regulate the --  
13 protect the integrity of the residential appraisal  
14 market.

15 CHAIRMAN OHLHAUSEN: I just have a question  
16 about the second part of your review process, where the  
17 ALJ then conducts a review of an action taken pursuant  
18 to the rule.

19 MR. GREENSTEIN: Yes.

20 CHAIRMAN OHLHAUSEN: Is this something that's  
21 been done for other Louisiana agencies, or was this a  
22 procedure specifically adopted just for this matter?

23 MR. GREENSTEIN: The Division of Administrative  
24 Law regularly provides administrative law judges to  
25 various agencies for various purposes; sometimes to

1     conduct hearings, and sometimes, as I understand, to  
2     review them.  So in that respect, it is not that  
3     unusual, and the Division of Administrative Law was the  
4     natural choice by the Governor for this -- for this  
5     obligation.

6             COMMISSIONER McSWEENY:  What about the new  
7     procedures that the Board has implemented pursuant to  
8     Rule 31101?

9             MR. GREENSTEIN:  Other than the rule itself, the  
10    Board has taken some actions with respect to the prior  
11    rule to make sure that any further enforcement of Rule  
12    31101 would not be affected by anything that happened  
13    before.  So the prior rule has been repealed, and will  
14    not be enforced further; the -- any pending -- there are  
15    no pending investigations under the prior rule; any  
16    settlements that were entered into previously under the  
17    prior rule have expired by their own terms as of mid to  
18    late 2016 and are no longer in effect; there was only  
19    one enforcement order that the Board had ever issued  
20    under the prior rule, and that has been vacated by the  
21    Board; and the Board has returned the fee, the fine that  
22    was paid by that company.

23             It also has provided that any actions taken by  
24    any AMC prior to the acceptance of the new rule on  
25    November 20th, 2017, cannot be introduced as evidence in

1 any future proceeding -- any future enforcement  
2 proceeding by the Board. And, finally, the complaint  
3 refers to a survey that was conducted by an independent  
4 academic institution and paid for by the Board, the SLU,  
5 Southeastern Louisiana University survey. The Board  
6 believes that that was, in fact, in response to  
7 complaints and requests from AMCs and was actually  
8 intended to not be mandatory, to be a courtesy and to be  
9 helpful to those who wanted to comply with the rule.

10 Nevertheless, given the allegations of the  
11 complaint, the survey is no more, it has expired by its  
12 own terms, recent rates are what the -- what Dodd-Frank  
13 looks to, and those recent rates would reflect payments  
14 that were made in the prior 12 months. So the survey is  
15 now out of date and the Board has affirmatively  
16 committed that it will not fund such a survey in the  
17 future.

18 At this point, unless the Commissioners have any  
19 additional questions, I would like to reserve the rest  
20 of my time.

21 CHAIRMAN OHLHAUSEN: Yes. You can reserve the  
22 rest of your time, but I do have one more question that  
23 won't come out of your five minutes.

24 MR. GREENSTEIN: Please.

25 CHAIRMAN OHLHAUSEN: So I have a question about

1     how we should interpret the holding in Ticor Title or  
2     the statement in Ticor Title about the fact that  
3     procedures that appear sufficient on their face may not  
4     constitute active state supervision in practice, and the  
5     mere potential for state supervision isn't an adequate  
6     substitute for a decision by the state.

7             How does that apply to your argument that the  
8     case is moot at this point, the procedures are in place,  
9     and that we should feel confident that all the problems  
10    are resolved?

11            MR. GREENSTEIN:  So, certainly, the facts in  
12    Ticor were such that those procedures that were in place  
13    were hypothetical, because they were not, in fact,  
14    observed by the state.  Here, you have only evidence  
15    that the state has complied with every obligation fully  
16    that was imposed on it by active supervision.

17            What NC Dental says, and I think it's quoting  
18    from Patrick v. Burget, that whether the state's review  
19    mechanisms provide a realistic assurance that the  
20    nonsovereign actor's actions are, in fact, the actions  
21    of the state, is the key, it's that the mechanism has to  
22    be in place.  And the mechanisms clearly are in place  
23    here through the actions of the Executive Order, as well  
24    as from the Louisiana APA itself.

25            As Ticor said, also, the question is not how

1 well the state regulation works, but whether the  
2 anticompetitive scheme is the state's own, and here, the  
3 state has taken it as its own by exercising supervision  
4 over both the promulgation of the rule and the rule's  
5 enforcement going forward.

6 CHAIRMAN OHLHAUSEN: Thank you.

7 COMMISSIONER McSWEENEY: I have one more  
8 question, if you don't mind. I would love to know how  
9 you respond to complaint counsel's argument that the  
10 state's new supervisory regime will not apply to certain  
11 elements of the Board's conduct going forward, it's just  
12 securing the AMC agreement regarding future appraiser  
13 fees without issuance of an administrative complaint.

14 MR. GREENSTEIN: The way that the -- the MOU,  
15 the contract between the Division of Administrative Law  
16 and the Board provides for prior approval over several  
17 different things. First, over the issuance of any  
18 complaints. It also provides for review over any formal  
19 or informal settlements or any dismissals of any action  
20 by the Board. So the Board is required, by law, by  
21 federal law, to investigate any complaint that comes its  
22 way.

23 So if an appraiser makes a complaint to the  
24 Board and says, this particular AMC is not paying a fee  
25 that's customary and reasonable, the Board has an

1 obligation under federal law and under the principles of  
2 the Appraisal Subcommittee, which is the federal agency  
3 that oversees and monitors, essentially sanctions, state  
4 boards. Under those procedures, the Board has an  
5 obligation to investigate.

6 That investigation can lead to a couple of  
7 different directions. It could lead to the -- as  
8 happened, in fact, in the past -- the AMC saying, you  
9 know, you're right, I was not applying any of these  
10 particular methods of complying with the customary and  
11 reasonable fee rule, here's my compliance plan going  
12 forward. And the Board agreed to it.

13 And so by accepting that agreement, that would  
14 have to be reviewed by the DAL going forward. The  
15 initial investigation is something that is a federal  
16 requirement, but the review of the -- of the settlement,  
17 whether formal or informal, would have to happen through  
18 DAL.

19 In addition, the DAL contract and the Executive  
20 Order require that the DAL exercise some supervisory  
21 powers over any dismissal to make sure that a dismissal  
22 of a complaint also is in the public interest, or the  
23 dismissal of an enforcement action is in the public  
24 interest.

25 So if, for example, the AMC says, I actually

1 don't believe that I violated the law, I believe that I  
2 complied with it, and the Board believes that the AMC is  
3 still in violation, at that point, a complaint would be  
4 issued by the Board. The DAL would have to review that  
5 complaint before the complaint would be issued. And so  
6 there's really no action that specifically affects the  
7 market or affects the application of the C&R fee rule  
8 that would not require DAL supervision.

9 CHAIRMAN OHLHAUSEN: Thank you. Thank you very  
10 much.

11 MR. GREENSTEIN: Thank you.

12 CHAIRMAN OHLHAUSEN: Ms. Kopchik, your turn.

13 MS. KOPCHIK: Chairman Ohlhausen, Commissioner  
14 McSweeney, may it please the Commission.

15 I am Lisa Kopchik, and I am here representing  
16 the positions of the complaint counsel in this matter.  
17 The case concerns price fixing. The price regulation  
18 here is similar to the price regulation that was  
19 condemned in Ticor and Kentucky Movers.

20 Now, there are two motions before the  
21 Commission. Respondent Board has moved to dismiss the  
22 complaint based on mootness because it has implemented  
23 or put in place what it calls supervisory duties that  
24 will apply going forward. The Respondent Board says  
25 that antitrust violations are now impossible because of

1 this supervision scheme.

2 Now, I would discuss why even if the Louisiana  
3 new procedures for supervision are facially adequate,  
4 and we contend they are not, antitrust violations can  
5 occur and the motion to dismiss should fail. I will  
6 then explain how Louisiana's new procedures are  
7 inadequate to provide active supervision for  
8 state-action purposes, and why the cease and desist  
9 order should issue regardless of whether you find the  
10 procedures that are now in place facially adequate or  
11 inadequate.

12 This applies to both the proposed supervision of  
13 future enforcement actions, as well as the  
14 re-promulgation of the customary and reasonable fee  
15 rule, which I will discuss. I will then discuss  
16 complaint counsel's motion for partial summary decision  
17 on Respondent's state-action affirmative defenses that  
18 relate to state action, and that would apply to the  
19 behavior of the Board and the conduct from 2013 to 2016.

20 Respondent has offered no evidence of active  
21 supervision for that period of time, and has only argued  
22 perhaps that supervision is not required. Of course,  
23 whatever the Respondent has done with regard to future  
24 activity, the complaint -- the future activity cannot  
25 retroactively immunize the Board for its activities from

1 2013 to 2016. Therefore, the state-action defense  
2 should fail and we request that decision on our motion  
3 for partial summary decision.

4 Now, let's discuss the motion to dismiss. The  
5 Commission has asked, since the issuance of the  
6 complaint, has the state of Louisiana taken sufficient  
7 steps to establish active supervision over the conduct  
8 of the Respondent, and the answer is plainly no. It's  
9 no regardless of whether you find that this -- these  
10 steps and procedures that have been put in place are  
11 adequate on their face or not adequate on their face.

12 To prevail on the motion to dismiss, the  
13 Respondent would need to show that there could not  
14 possibly be any meaningful relief that the Commission  
15 could issue. But even if the supervision scheme is  
16 acted on paper, active supervision requires that the  
17 supervision actually take place, not merely the  
18 potential.

19 As described in Tigor, even if the regime is  
20 facially adequate, there is no supervision if it fails  
21 to be implemented. And where post-complaint changes are  
22 put in place and adequate, an active supervision scheme,  
23 the Commission has in the past issued cease and desist  
24 orders that contain a stated action proviso. The  
25 Commission easily fashioned cease and desist orders in

1 Ticor, New England Motor Rate Bureau and Kentucky Movers  
2 that were appropriate for the circumstances, depending  
3 for each state on whether there was facial adequacy of  
4 the supervision regime, and whether it was adequately  
5 implemented.

6 So, clearly, the Commission can and has issued  
7 meaningful relief in situations such as this. And, of  
8 course, the cease and desist order would have no effect  
9 on lawful behavior and activities. Therefore, the  
10 Respondent's motion to dismiss utterly fails and cannot  
11 meet the standard required for a motion to dismiss on  
12 mootness.

13 But let's look at the way the procedures that  
14 have recently been put in place are not adequate. The  
15 Board states that it is intending to continue  
16 enforcement of its customary and reasonable fee rule,  
17 the way it has in the past, and the way it has in the  
18 past is to displace competition in the market for real  
19 estate -- residential real estate services.

20 But regardless of the Respondent's  
21 representation that AMCs are not required to follow  
22 their survey rule, their survey that they've published,  
23 the facts, as alleged in the complaint, show otherwise.  
24 For example, the Respondent invites appraisers to  
25 explain to the Board when the appraiser is not satisfied

1 with a fee paid by an AMC, an appraisal management  
2 company; the Respondent investigates complaints made by  
3 these appraisers that the fees are too low; the  
4 Respondent commissioned surveys to establish benchmark  
5 prices against which it judged prices that AMCs were  
6 paying; and although the Respondent has said that there  
7 will no longer be these surveys commissioned by the  
8 Board, we can be confident that there will be a  
9 benchmark against which the Board will judge prices --  
10 fees that AMCs have paid.

11 The Respondent enforces these benchmark prices,  
12 as I said, against AMCs, they're paying appraisers less  
13 than those fees; and the Respondent requires, sometimes  
14 informally and sometimes formally, that the investigated  
15 AMC going forward pay median fees from those surveys.  
16 That's the benchmark, and it creates effectively a price  
17 schedule.

18 As you just discussed, in some of these cases,  
19 the settlements are put before the complaint issues, and  
20 therefore the Department of Administrative Law will not  
21 ultimately review those. The MOU says specifically that  
22 it will review resolutions of previously approved  
23 complaints.

24 The benchmark is critical here in understanding  
25 the import and the effect of the Board's anticompetitive

1 activity, but it is only one element of what the  
2 Board -- of the Board that requires supervision, but I  
3 would like to focus on that just as an example.

4 The Respondent has never submitted these  
5 benchmark prices to supervision. Clearly they are  
6 critical to the enforcement scheme; they have never been  
7 reviewed. As we have seen in Ticor and Kentucky Movers,  
8 the specific rates that the Board enforces must be  
9 reviewed in order to qualify the conduct as state  
10 action. But the Respondent has, again, not submitted  
11 any of the benchmarks or even a description of how it  
12 will enforce the rule going forward, except to say that  
13 its prior practices will continue.

14 CHAIRMAN OHLHAUSEN: So could you describe for  
15 me what you think the case law requires as the minimum  
16 concrete steps that a state must always undertake to  
17 establish active supervision over regulatory board  
18 control by active market participants?

19 MS. KOPCHIK: The case law makes it clear that  
20 there is no particular single step that is a sine qua  
21 non, that is a required step, but it has articulated  
22 indicia of active supervision. Those include the  
23 gathering of facts, that would include in this kind of  
24 case business or economic facts, or studies; and  
25 opinions of other stakeholders, for which there is no

1 provision here; and the supervisor should have analyzed  
2 the facts and issued a written opinion. These are the  
3 three indicia of active supervision. The written  
4 opinion would explain the supervisor's reasoning and  
5 analysis to the public so that the public could judge  
6 whether the state policy is promoted by the conduct at  
7 issue.

8           Those indicia are missing here, but more  
9 importantly than missing, because they are not  
10 absolutely required, what is missing here is the kind of  
11 supervision that these indicia indicate, and that is  
12 substantive review, including information about the  
13 industry questioned and how the anticompetitive effect  
14 will or will not affect the market.

15           COMMISSIONER McSWEENEY: So, here's my question,  
16 and it's actually slightly different: What I'm trying  
17 to understand from your perspective is, is it your  
18 position that the promulgation of the rule itself  
19 violates the antitrust laws, or is it just in the  
20 enforcement of that rule that you find the violation;  
21 and so therefore could active supervision over the  
22 Board's enforcement activities obviate the need to  
23 actively supervise the promulgation of the rule?

24           MS. KOPCHIK: Thank you for that question. We  
25 allege that both violate the antitrust laws. The reason

1 for, in particular, the promulgation of the rule is  
2 because the rule requires that appraisal management  
3 companies substitute market negotiations for their fees  
4 with a system, either the system of looking at a survey,  
5 or the system of using the six factors that is described  
6 in various places.

7 In contrast, the federal law makes clear that  
8 those two options are presumptions of compliance and not  
9 required. The Board has made very clear that those --  
10 those alternative systems are required; one or the other  
11 has to be used.

12 The Louisiana procedures are too limited in  
13 scope and in time to end up producing an adequate active  
14 supervision procedure.

15 COMMISSIONER McSWEENEY: A followup to that.

16 MS. KOPCHIK: Yes?

17 COMMISSIONER McSWEENEY: Have you all given any  
18 thought to whether if the changes were made via  
19 legislation, that would be relevant to your thinking  
20 about the degree of active supervision here?

21 MS. KOPCHIK: If the legislature determines  
22 through actual legislation that it wants to replace the  
23 free market competitive system with a scheme of  
24 regulation, it can do that. That is the baseline  
25 principle in Parker, and it's not something that

1 obviously we contend is wrong. That's exactly right.  
2 However, the problem is, when you have market  
3 participants acting by color of state law, that in  
4 particular requires supervision to make sure that the  
5 activities of the market participants are the state's  
6 own, and the state has actively engaged in the  
7 production of those activities.

8 COMMISSIONER McSWEENEY: So let's assume for a  
9 second that the legislature had acted and the clear  
10 articulation prong is satisfied and, in fact, they  
11 reconstitute the Board so that it no longer has a  
12 majority of licensed appraisers/market participants on  
13 that, would that moot the case?

14 MS. KOPCHIK: That might moot the case, yes. In  
15 that case, the legislature has clearly articulated, and  
16 it is not market participants executing the legislative  
17 intent, and therefore no supervision is required.

18 But to supervise benchmark prices, the  
19 supervisor must have the requisite data in hand in order  
20 to determine whether those benchmark prices are  
21 appropriate. And the supervisor must exert significant  
22 and meaningful control over the specifics of those  
23 rates.

24 It was made clear in Ticor and Kentucky Movers  
25 that supervision over rates requires assembling business

1 data, performing economic studies, determining whether  
2 the rates are reasonable in light of costs, risk  
3 factors, and even profit ratios.

4 CHAIRMAN OHLHAUSEN: So let me ask a question.  
5 If the Department of Administration had issued the  
6 August 14th letter after the Board undertook the notice  
7 and comment period, had held public comments, held a  
8 public hearing and accepted comments, would those steps  
9 have been sufficient to establish active supervision  
10 here?

11 MS. KOPCHIK: No. A review simply of public  
12 comments is not adequate. As Ticor and Kentucky Movers  
13 said, in order to substantively supervise actual rates  
14 that are being enforced, like a public rate commission,  
15 those supervisors must look at business data, economic  
16 studies, determining whether the rates are reasonable in  
17 light of and in the context of the market at issue.  
18 Merely looking at public comments is not adequate.

19 Further, there's no evidence that the  
20 administrative law judges in the Division of  
21 Administration -- Division of Administrative Law here  
22 have the authority to gather evidence. Nor is there any  
23 evidence that the ALJs in Louisiana have the resources,  
24 the training or the skills needed to conduct this kind  
25 of supervision. In fact, the MOU, as you've discussed,

1 the Louisiana -- in the MOU, the Louisiana ALJs will be  
2 limited to the factual record. They will have no basis  
3 to determine if the price benchmarks the Board has  
4 chosen are the best ones.

5 And another indication that the supervision will  
6 be inadequate is that the Louisiana ALJs will have only  
7 30 days in which to perform their review, hardly enough  
8 time to conduct the kind of supervision that's required  
9 under Ticor.

10 Also according to Ticor, the state must  
11 consciously consider the anticompetitive effects of the  
12 challenged activity. Again, without an exhaustive  
13 understanding of the market, the Louisiana ALJ will be  
14 unequipped to make that decision as to whether or not  
15 the anticompetitive effects of the challenged activity  
16 further the state policy.

17 Active supervision requires substantive review,  
18 but here, the ALJ is limited to an APA-style review.  
19 North Carolina Dental specifically tells us it is not  
20 enough to determine if the rule is within the  
21 Respondent's authority, but the rule -- but the review  
22 must go to the substance of the conduct, which here, at  
23 least part of that conduct is these benchmark prices.

24 The State has to have played a substantial role  
25 in the formulation of the policy, but the MOU's 30-day

1 limit makes that very difficult, if not impossible, and  
2 obviously, it never really expected that the State would  
3 play a significant role or perform a substantive review  
4 because it set that 30-day limit.

5 Rather, based on the MOU, it appears that the  
6 state and the Respondent expect the state ALJs to merely  
7 defer to the decision and the judgment of the market  
8 participants. And North Carolina Dental and Patrick  
9 tell us that that simple deference to market  
10 participants is not active supervision.

11 CHAIRMAN OHLHAUSEN: I'm going to ask the  
12 question about who is an active market participant. So  
13 Respondent is arguing that the general appraisers,  
14 because they don't generally do residential appraisals,  
15 shouldn't be considered active market participants. How  
16 has the case law treated who is an active market  
17 participant and how in depth an inquiry has to be done  
18 to people's particular financial interest to make that  
19 determination?

20 MS. KOPCHIK: Right. As you yourself have  
21 noted, Madam Chairman, North Carolina Dental sets that  
22 standard. And the question it asks is are a majority of  
23 the decisionmakers on the Board, do they have private  
24 interest in the occupation that the Board regulates?  
25 The question is about licensing, and whether the

1 licenses that the market participants hold are regulated  
2 by that Board.

3 I would also like to refer the Commission to  
4 Goldfarb, in which the bar association set fees for  
5 title exams, where not all appraisers -- not all  
6 attorneys do title exams, and yet the rule applied to  
7 everyone. Similarly to North Carolina.

8 I would also like to point out that if we were  
9 to -- if the Commission were to accept the Respondent's  
10 test for this, we have two very important problems: One  
11 is the Board itself will not know whether it is a Board  
12 that requires supervision or not, it will depend on each  
13 individual activity that the Board undertakes; and the  
14 fact-finder would be required to look at individual  
15 financial records and interests and judge whether the  
16 nexus is close enough or not close enough. We think  
17 that as a matter of policy, this would be a very bad way  
18 to determine control of the Board.

19 CHAIRMAN OHLHAUSEN: I have another question.

20 MS. KOPCHIK: Okay.

21 CHAIRMAN OHLHAUSEN: If we were to find that the  
22 re-issuance of the rule didn't satisfy active  
23 supervision, do we even need to consider the procedures  
24 in the MOU to say whether they're sufficient also to  
25 constitute active supervision under the enforcement

1 proceedings?

2 MS. KOPCHIK: Well, if they're -- because we  
3 think that both the promulgation of the rule and the  
4 enforcement of the rule are anticompetitive practices,  
5 and if the Commission agrees with that interpretation,  
6 then lack of supervision over any part could be a fatal  
7 blow. However, if in the course of the ALJ's review,  
8 there is review of these fundamental decisions about the  
9 benchmark pricing, et cetera, it's possible that that  
10 review could take place rather than the review of the  
11 rule at the commissioner level.

12 In conclusion, though, the Commission should  
13 have no confidence that the review of even the  
14 enforcement actions will satisfy state-action criteria.  
15 But I would like to look also at the Commissioner of  
16 Administration's review of the promulgation.

17 The Louisiana newly required steps require that  
18 any regulation by this Respondent Board promulgated only  
19 about customary and reasonable fees and promulgated  
20 pursuant to a VF40 of a certain statutory provision are  
21 the ones that will be reviewed. Clearly the Board would  
22 promulgate regulations pursuant to different statutory  
23 authority and would have no supervision.

24 As you pointed out, Madam Chairman, the  
25 Commissioner of Administration approved the rule only

1 for publication for public comment. There is nothing in  
2 the letter that he issued to tell us what he based the  
3 decision on, whether there were facts that were gathered  
4 or analysis conducted, and we do not know that he -- we  
5 have no proof that he did anything other than look at  
6 the wording of the rule.

7 Now, after the comment period, as you've noted,  
8 the commissioner disclaimed even the authority to review  
9 the rule, approve it, modify it, or disapprove it. So  
10 there has been no showing by the Respondent at all that  
11 there is any supervision that is adequate in this case,  
12 and we can assume that there was nothing done other than  
13 that. It's, of course, the Respondent's burden to show  
14 state action, which includes, obviously, clear  
15 articulation and active supervision.

16 There are a couple of other issues I would like  
17 to talk about, particularly about our motion for the  
18 dismissal of the state-action affirmative defenses. As  
19 we've noted, active supervision is absolutely required,  
20 because the Board is made up of ten persons, eight of  
21 whom, by law, must be appraisers, and including the AMC  
22 representatives.

23 We have no evidence of supervision, and so  
24 because supervision is required, and we have no evidence  
25 of it, the affirmative defenses should be dismissed.

1           In summary, I would like to say that the  
2 Commission cannot be confident that future supervision  
3 will be adequate here. The procedures on their face do  
4 not ensure that the activities will become state  
5 actioned, and even facially adequate supervision  
6 procedures can fail in practice. Supervision must  
7 actually occur, be implemented, and be implemented  
8 adequately.

9           Of course, nothing the Board has done for its  
10 activities going forward can immunize the activities  
11 that occurred before the complaint was issued, and that  
12 is the basis on which the Board has asserted the  
13 affirmative defenses of state action. Therefore, we ask  
14 that those affirmative defenses be dismissed.

15           CHAIRMAN OHLHAUSEN: I have a question, not  
16 going to affirmative defenses, but for the mootness  
17 issue. What weight should we give the Board's argument  
18 that we should treat a government entity cessation or  
19 alteration of administrative policies with more  
20 solicitude than if this case involved a private party  
21 and we were taking the same kinds of actions?

22           MS. KOPCHIK: The answer to that question really  
23 depends on what the facts of the case are. Where a  
24 government -- state government changes a law that  
25 creates a situation where supervision is no longer

1 needed, obviously that can make a huge difference, but  
2 if, as here, the Government agency, the Board, has  
3 re-promulgated the same rule, has a policy statement  
4 saying it will enforce that rule just as it enforced the  
5 old one, that we see no supervision in the past and we  
6 see no prospect of even facially adequate supervision in  
7 the future. I think that the Commission can rightly  
8 take from that that this cessation, and re-promulgation,  
9 is really meaningless.

10 COMMISSIONER McSWEENEY: I have no further  
11 questions, thank you.

12 MS. KOPCHIK: Any other questions?

13 CHAIRMAN OHLHAUSEN: No.

14 MS. KOPCHIK: Okay. I would like to finish,  
15 then, by saying, we hope that you will take the  
16 complaint counsel's brief and arguments and render the  
17 decision that is just. Thank you.

18 CHAIRMAN OHLHAUSEN: Thank you.

19 Mr. Greenstein, you have five minutes for  
20 rebuttal.

21 MR. GREENSTEIN: Thank you, Madam Chairman,  
22 Commissioner McSweeney.

23 Let me begin by dispelling two inaccuracies or  
24 two underlying incorrect assumptions in the presentation  
25 by the complaint counsel. First of all, to accept our

1 arguments, you would have to assume that the Governor  
2 and the Commissioner of Administration, the House  
3 Commerce Committee Oversight Committee, the Senate  
4 Oversight Subcommittee, and the Division of  
5 Administrative Law, as well as the state courts of  
6 Louisiana, cannot be trusted to do their job, that they  
7 will innately be derelict in their duties, that they  
8 will not take seriously the requirements of the  
9 Louisiana Administrative Procedures Act or the  
10 requirements of the Executive Order.

11 I respectfully submit, at least as a matter of  
12 state sovereignty, that the Commission cannot make that  
13 assumption. Here, in addition, there's actual evidence  
14 of what the commissioner has done, the Commissioner of  
15 Administration has done, and of what the Senate and  
16 House subcommittees have done. Bad evidence cannot be  
17 disregarded. They have, in fact, performed their  
18 obligations as required under the Executive Order and  
19 the Administrative Procedures Act.

20 Second, what you have heard from complaint  
21 counsel is that this case is a price fixing case, just  
22 like Ticor, just like Kentucky Movers. That, with due  
23 respect, is nonsense. In Kentucky Movers and in Ticor,  
24 collective rate-making resulted in a proposal that was  
25 supposed to be reviewed by a state board and was, in

1 fact, not reviewed by a state board.

2 Here, the Louisiana Board does nothing of the  
3 sort. If you take a look again at A6, which compares  
4 federal law and regulations to the Louisiana law and  
5 regulations, you will see that everything that complaint  
6 counsel asserts is anticompetitive about the Louisiana  
7 rule -- law, and the Louisiana rule, comes directly out  
8 of Dodd-Frank, and comes directly out of the implemented  
9 federal regulations.

10 The ability to use an independent, objective  
11 survey comes right out of Dodd-Frank. The statement  
12 that that independent, objective survey cannot rely on  
13 fees paid by AMCs to appraisers, comes right out of  
14 Dodd-Frank. The six-factor test she talked about comes  
15 right out of the federal regulations.

16 And, in fact, if you read the -- what is set  
17 forth at A5, the statement of policy that the Board  
18 issued on November 20th, when the new rule came into  
19 effect, they explicitly state, those are "two  
20 presumptive means of compliance."

21 There is a third, because one of the differences  
22 between Louisiana's regulation and the federal  
23 regulations is that it says -- when it talks about the  
24 six factors, it says, "Shall review them at minimum."  
25 At minimum means you can look to other facts and

1 circumstances as well. And what the motion for partial  
2 summary decision -- the complaint counsel doesn't tell  
3 you, but the opposition to it does -- is that, in fact,  
4 there were a number of occasions where the AMC -- the  
5 investigator came forward and said, I'm using the  
6 six-factor test, or I'm using the all fact and  
7 circumstances test. And the Board said, fine, you're in  
8 compliance, thank you very much, and the investigation  
9 ended right there and then.

10 And the reason for that is because the Board  
11 does not set rates. All the Board investigates is  
12 whether the AMC has used a method that is set forth in  
13 Dodd-Frank or in the interim federal regulations, as  
14 implemented in Louisiana's rule, to determine what a  
15 customary and reasonable fee is. And if they can show  
16 that that -- that they used one of those methods, they  
17 will not be liable. The investigation will close.

18 The reason that iMortgage was held liable, for  
19 example, was because they could not show compliance with  
20 one of the provided methods, any of the three methods.

21 So the whole idea that somehow or another there  
22 have to be price benchmarks or some kind of an analysis  
23 of the marketplace by the Board makes no sense. They  
24 are not setting rates, and, in fact -- in fact, any  
25 effect on competition is not because of what the Board

1 does, it comes right out of Dodd-Frank and right out of  
2 the federal regulations.

3 Finally, with respect to the state-action  
4 proviso, the state-action proviso has been confused by  
5 the Commission in cases where state action was not in  
6 place at the time liability was found. It makes no  
7 sense to apply that here. You have now before you, even  
8 before the hearing is conducted, evidence that  
9 state-action immunity applies, that there's active  
10 supervision, and as you heard again, there is no contest  
11 as to whether there's the articulation, it's plain on  
12 its face.

13 So, given those two factors, it makes no sense  
14 to have a state-action proviso. In fact, that is the  
15 crux of what we're discussing here today. We are  
16 discussing whether the Board can show and the state can  
17 show that there is sufficient state-action -- active  
18 supervision to constitute state-action immunity. It  
19 makes no sense to have a proviso when the Board is being  
20 asked -- or the Commission is being asked to decide that  
21 fact right here.

22 So we therefore request -- if I may briefly,  
23 we've been talking a lot about what Louisiana law did.  
24 I think it's important to understand why. The Executive  
25 Order makes it clear that the reason that he issued this

1 order is because of these antitrust questions that were  
2 preventing the Board from doing its job.

3 The State of Louisiana was hit by dual  
4 catastrophes. In 2007, their housing market was  
5 decimated by Hurricane Katrina; in 2008, it was  
6 decimated by the housing bubble collapse that decimated  
7 the industry across the United States.

8 When Dodd-Frank came along, it was clear that  
9 there was a solution that was available to Louisiana to  
10 be able to deal with the problem that was posed by  
11 inaccurate appraisals, and by the race at the bottom to  
12 just find the cheapest appraiser who would give you the  
13 number that you wanted.

14 Dodd-Frank requires the payment of customary and  
15 reasonable fees as a prudential measure to make sure  
16 that you get -- that if you're paying the same amount of  
17 money to somebody, you're going to find an appraiser  
18 who's qualified and you're going to make sure that they  
19 do a thorough job. That's what Dodd-Frank was, that's  
20 what the Louisiana AMC Act was, and that's what the  
21 Board's rule is intended to justify.

22 The Governor and the legislature want the Board  
23 to get back to its important duty, to be able to protect  
24 the integrity of the appraisal market in Louisiana.  
25 That's why they've taken these extraordinary efforts.

1 They believe they have gone over and above what's  
2 required by active supervision, they believe that what  
3 they did previously was sufficient, they have gone over  
4 and above that now.

5 And interestingly, you did not hear from  
6 complaint counsel any way, or any aspect of the actions  
7 taken by the Board to moot this -- the past relief  
8 necessary. You've heard nothing as to why that relief  
9 was held insufficient, or some additional relief was  
10 necessary, other than the state-action proviso.

11 Given that, there is no additional relief that  
12 is possible, and complaint counsel has suggested none as  
13 to the past. With state-action immunity over the  
14 future, the Board asks the Commission to grant the  
15 motion to dismiss and to deny the motion for partial  
16 summary decision, and we thank you for your time and  
17 attention.

18 CHAIRMAN OHLHAUSEN: Well, thank you, Mr.  
19 Greenstein, and Ms. Kopchik, for your presentations.  
20 This concludes the oral argument, and the Commission  
21 will take both motions under advisement. Thank you.

22 (Whereupon, at 3:05 p.m., the argument was  
23 adjourned.)  
24  
25

1 C E R T I F I C A T I O N O F R E P O R T E R

2

3 DOCKET/FILE NUMBER: 9374

4 CASE TITLE: LOUISIANA REAL ESTATE APPRAISERS BOARD

5 DATE: FEBRUARY 22, 2018

6

7 I HEREBY CERTIFY that the transcript contained  
8 herein is a full and accurate transcript of the notes  
9 taken by me at the hearing on the above cause before the  
10 FEDERAL TRADE COMMISSION to the best of my knowledge and  
11 belief.

12

13 DATED: 2/22/18

14

15 s/Sally Jo Quade

16 SALLY JO QUADE, CERT

17

18 C E R T I F I C A T I O N O F P R O O F R E A D E R

19

20 I HEREBY CERTIFY that I proofread the transcript  
21 for accuracy in spelling, hyphenation, punctuation and  
22 format.

23

24 s/Sara Vance

25

SARA VANCE