

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

TELADOC, INC., <i>et al.</i> ,	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 1:15-CV-00343-RP
	§	
TEXAS MEDICAL BOARD, <i>et al.</i> ,	§	
Defendants.	§	

**DEFENDANTS' ANSWER TO PLAINTIFFS' AMENDED COMPLAINT**

TO THE HONORABLE ROBERT L. PITMAN:

As their answer to plaintiffs' Amended Complaint (ECF doc. 55), the defendants herein<sup>1</sup> respectfully submit the following. The numbered paragraphs and titles below correspond to the numbered paragraphs and titles within the Amended Complaint.

**I. INTRODUCTION**

1. The first sentence, as the plaintiffs' conclusion of law, requires neither admission nor denial, but to the extent a response is deemed to be required, the defendants refer the Court to their discussion of *N. C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. \_\_\_, 135 S. Ct. 1101 (2015) ("*NCSBDE*"), in their Amended Motion to Dismiss. Otherwise the defendants admit only that on April 10, 2015, they voted to adopt amendments to 22 T.A.C. § 190.8, and deny the remainder of the paragraph.
2. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

---

<sup>1</sup> The TMB as an entity and the defendant board members in their individual capacity have been dismissed with prejudice. Doc. 63.

3. Denied.
4. Denied. In response to the last sentence, the defendants add that the contested rule also allows remote face-to-face examinations.
5. The first sentence is denied. Otherwise, the defendants admit only that the cited legal opinion is accurately quoted.
6. The first sentence is denied. Otherwise, the defendants admit only that the cited legal opinion is accurately quoted.
7. The defendants admit only that they adopted an amendment to section 190.8 on April 10, 2015. Otherwise, the paragraph is denied.
8. The defendants admit only that they adopted an amendment to section 190.8 in order to protect patient safety but deny that the requirement is without regard to medical need and deny that their justifications are unsupported and pretextual, and deny the last sentence. Otherwise, the defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
9. Denied, except that the second sentence would be literally true if the plaintiffs refer only to the executive branch of state government.
10. Admitted, except the comments supporting the rule were from professional associations.
11. The defendants admit only that they adopted an amendment to section 190.8 on April 10, 2015. Otherwise, the paragraph is denied.
12. The defendants admit only that twelve members who voted for the amendment are active physicians.
13. The first sentence is admitted. The second sentence is denied.

14. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
15. Admitted but moot.
16. Denied.
17. Admitted, except that the last sentence, as merely the plaintiffs' description of what they seek by their suit, does not require admission or denial. The defendants deny that they are entitled to the relief they seek.

## **II. THE PARTIES**

### **A. Plaintiffs**

18. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
19. Admitted.
20. The defendants admit the first sentence and lack sufficient knowledge and information to form a belief as to the truth of the averments in the second sentence, except that they admit that Dr. Hood is licensed to practice medicine in Texas.
21. Admitted.

### **B. Defendants**

22. Admitted.
23. The first sentence is admitted and the second sentence is denied.
24. Admitted.
25. Admitted.
26. Admitted.
27. Admitted.

28. Admitted.

29. Admitted.

30. Admitted.

31. Admitted.

32. Admitted.

33. Admitted.

34. Admitted.

35. Admitted.

36. Admitted.

### **III. JURISDICTION AND VENUE**

37. Admitted.

38. Admitted, except that jurisdiction to award damages is immaterial in this case.

39. Admitted.

40. Admitted.

41. Admitted.

### **IV. RELEVANT MARKETS**

42. The allegations in this paragraph call for legal conclusions, as to which the defendants lack sufficient knowledge and information to form a belief as to the truth of the averments.

43. After the title, the first sentence calls for a legal conclusion, as to which the defendants lack sufficient knowledge and information to form a belief as to the truth of the averments. The second sentence is admitted and the last sentence is denied.

**V. ADDITIONAL FACTUAL ALLEGATIONS**

**A. Patients' Use of Telehealth**

- 44. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
- 45. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
- 46. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
- 47. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
- 48. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
- 49. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
- 50. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
- 51. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
- 52. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph, except that they admit the third sentence and deny the fourth (last) sentence.

**B. Teladoc's Clients**

53. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
54. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
55. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
56. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
57. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
58. The defendants admit the first sentence and admit that the Texas Teacher Retirement System has contracted with Teladoc. Otherwise, the defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
59. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
60. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
61. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.
62. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

63. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

64. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

65. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

66. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

67. Denied.

68. Denied.

**C. Teladoc's Physicians**

69. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

70. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

71. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

72. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

73. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

74. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

75. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

76. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

**D. Teladoc Consultation Process**

77. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

78. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

79. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

80. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

81. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

82. The first sentence is admitted. Otherwise, the defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

83. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

84. The first sentence is denied. Otherwise, the defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

85. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

86. Denied, except that the defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in the third, fourth, fifth, and last two sentences.

87. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph, except that the first sentence is denied.

**E. Dramatic Growth of Teladoc and the Telehealth Industry**

88. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

89. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

90. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

91. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

92. Denied, except that the defendants admit that in recent years, healthcare costs have risen faster than prices generally.

93. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

94. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

**F. The TMB's Alleged Anticompetitive Actions to Put Teladoc Out of Business**

95. The second sentence is admitted. Otherwise the paragraph is denied.

**a. Allegedly Anticompetitive Amendment to "Rule 174"**

96. Denied.

97. Denied.

98. The first sentence is denied and the second sentence is admitted.

99. Denied.

100. Denied.

101. Denied.

102. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

**b. Allegedly Anticompetitive Interpretation of "Current Rule 190.8"**

103. Denied.

104. The first sentence is admitted and the second sentence is denied (see answer above to paragraph 4).

105. The defendants admit only that a copy of the letter was sent to the Texas Medical Association. Otherwise, the paragraph is denied.

106. Admitted, except that the defendants deny that the plaintiffs' claim in the referenced suit is justified.

107. In response to the first sentence, the defendants admit that Teladoc requested the emergency relief described but deny that it sought such relief for all "telehealth providers." Otherwise, the defendants admit that the plaintiffs have accurately described Judge Dietz's ruling.

108. Admitted.

109. The first sentence is admitted, except for the qualifier “new.” Otherwise, the paragraph is denied.

110. The defendants admit that the appellate holding is accurately described and that the opinion is accurately quoted.

**c. Allegedly Anticompetitive Emergency Rulemaking**

112. Admitted, except that the defendants deny that the requirement is without regard to medical need.

113. Admitted.

114. Admitted.

**d. Allegedly Anticompetitive April 2015 Rulemaking**

115. Denied, except that the defendants admit that the amended rule was formally proposed on March 6, 2015.

116. The first two sentences are admitted. Otherwise, the defendants admit only that the plaintiffs have accurately summarized and paraphrased many of the comments.

117. The defendants admit only that the plaintiffs have accurately, but incompletely, quoted the letter in question.

118. Admitted, but the defendants deny empirical evidence is required to support the rule.

119. The first sentence is admitted and the second sentence is denied.

120. The defendants admit that twelve physicians voted in favor of the amendment and admit the second sentence. Otherwise, the paragraph is denied as worded.

121. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

122. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

123. Admitted, but moot.

124. Denied.

125. In response to the first sentence, the defendants admit only that the plaintiffs have accurately but incompletely summarized the cited statute, and would add, as relevant to the first and third sentences, that under the statute the TMB has no duty to refer the proposed rules to, *but no ability to withhold the rules from*, the appropriate committees, who obtain the rules from the Secretary of State, with whom the proposed rules are filed. The second sentence is admitted. The defendants lack sufficient knowledge and information to form a belief as to the truth of what review the committees conducted or whether any statement has been issued, but add that TMB staff went beyond the requirements of the statute to insure that the appropriate legislators were fully informed of the proposed rules at issue.

126. Admitted, except the defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in the third sentence.

**VI. DEFENDANTS' CONDUCT IS ALLEGED TO HAVE HARMED COMPETITION, COMPETITORS, AND CONSUMERS.**

127. Denied.

128. Denied.

**A. "New Rule 190.8" Would Allegedly Harm Patients by Raising Prices and Reducing Supply of Physician Services.**

129. Denied.

130. Denied.

131. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

132. Denied.

133. Denied.

**B. “New Rule 190.8” Would Allegedly Harm Public and Private Payors by Raising Prices and Reducing Choice**

134. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph, except that the first sentence is denied.

135. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph, except that the first sentence is admitted.

**C. “New Rule 190.8” is Alleged not to be Reasonably Necessary of Narrowly Tailored to any Legitimate Objective**

136. Denied.

137. Denied.

138. Denied.

139. Denied.

140. Denied.

141. Denied.

**D. “New Rule 190.8” Will Allegedly Cause Irreparable Harm to Plaintiffs**

142. Denied, except that the defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in the last sentence.

143. Denied, except that the defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in the last sentence.

144. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

145. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

146. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

147. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

148. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

149. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

150. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

151. The defendants lack sufficient knowledge and information to form a belief as to the truth of the averments in this paragraph.

152. Denied.

## **VII. CLAIMS FOR RELIEF**

### **COUNT I**

#### **Alleged Violation of the Sherman Act, 15 U.S.C. §1 – Alleged Unreasonable Restraint of Trade**

153. The defendants incorporate by reference their answers to paragraphs 1-152.

154. Denied.

155. Denied.

156. Denied.

157. Denied.

**COUNT II**

**42 U.S.C. § 1983 – Dormant commerce Clause**

158. Denied.

159. Denied.

160. Denied.

161. Denied.

162. Denied.

163. Denied.

**VIII. DEMAND FOR JURY TRIAL**

164. Moot.

**IX. PRAYER FOR RELIEF**

165. through 169. The defendants deny that the plaintiffs are entitled to any of the relief for which they pray.

**X. AFFIRMATIVE DEFENSES**

170. The plaintiffs have failed to mitigate the alleged injuries for which they seek relief.

171. The plaintiffs' claims for relief against "New Rule 174" are time-barred by laches and/or limitations.

172. The plaintiffs' antitrust claim is barred by state action immunity.

Respectfully submitted,

KEN PAXTON  
Attorney General of Texas

CHARLES E. ROY  
First Assistant Attorney General

JAMES E. DAVIS  
Deputy Attorney General for Civil Litigation

ANGELA V. COLMENERO  
Division Chief – General Litigation Division

/s/ James C. Todd  
JAMES C. TODD  
Texas Bar No. 20094700  
SEAN FLAMMER  
Texas Bar No. 24059754  
Assistant Attorneys General  
Office of the Attorney General  
General Litigation Division-019  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711-2548  
(512) 463-2120; (512) 320-0667 FAX  
Jim.Todd@texasattorneygeneral.gov  
Sean.Flammer@texasattorneygeneral.gov

ATTORNEYS FOR DEFENDANTS

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document has been filed electronically with the Court on this the 30th day of July, 2015, which will provide a copy to:

James Matthew Dow  
JACKSON WALKER L.L.P.  
100 Congress Avenue, Suite 1100  
Austin, Texas 78701  
(512) 236-2000 (Telephone)  
(512) 236-2002 (Facsimile)  
*ATTORNEYS FOR PLAINTIFFS*

George S. Cary  
Leah Brannon  
Drew Navikas  
CLEARY GOTTlieb STEEN  
& HAMILTON  
2000 Pennsylvania Avenue, NW  
Washington, DC 20006  
(202) 974-1500 (Telephone)  
(202) 974-1999 (Facsimile)  
*ATTORNEYS FOR PLAINTIFFS*

*/s/ James C. Todd*

\_\_\_\_\_

JAMES C. TODD

Assistant Attorney General