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

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

DEFENDANTS' REPLY TO PLAINTIFFS' SUPPLEMENTAL RESPONSE

In reply to the Plaintiffs' Supplemental Response to Defendants' Amended Motion to Dismiss (ECF doc. 76), the defendants respectfully submit the following. (Note that the instrument that is "supplemented" by doc. 76 is similarly titled: "Plaintiffs' Supplemental Opposition to Defendants' Motion to Dismiss the Amended Complaint" (doc. 73-1)).

A. The Non-Authoritative Federal Trade Commission Staff's Advisory Guidelines do not Contradict the Defendants' Arguments in This Case.

1. FTC staff guidelines can be helpful but are not authoritative.

The plaintiffs assert that the recent *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants* ("Staff Guidelines") (doc. 75.1) "directly contradicts Defendants' arguments in several important respects." Doc. 76 at 2-3. No doubt, state officials will find the suggestions in the document worthy of careful study as a matter of policy. However, these guidelines do not, as a matter of law, determine the defendants' entitlement to *Parker* immunity in this case. At the same time, in important respects, they do support the defendants' arguments.

Because this document "was not promulgated through traditional notice-and-comment rulemaking or any similar deliberative process and does not identify any clear methodology by which it reached its conclusion," it is not entitled to the "*Chevron* deference" that is accorded to an agency's interpretation of a statute it enforces. *Freeman v. Quicken Loans, Inc.*, 626 F.3d 799, 806 (5th Cir. 2010) (citing *Christensen v. Harris County,* 529 U.S. 576, 587 (2000) (discussing *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 843 (1984))), *aff'd*, 132 S. Ct. 2034 (2012). *See also Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 392 (5th Cir. 2014) ("enforcement guidelines . . . do not warrant *Chevron*-style deference"). In particular, "the Fifth Circuit has denied *Chevron* deference to . . . FTC interpretive rules . . ." *Freeman*, 626 F.3d at 805-06 (citing *Walton v. Rose Mobile Homes,* 298 F.3d 470 (5th Cir. 2002)). The Staff Guidelines themselves explain:

> This document sets out the views of the Staff of the Bureau of Competition. The Federal Trade Commission is not bound by this Staff guidance and reserves the right to rescind it at a later date. In addition, FTC Staff reserves the right to reconsider the views expressed herein, and to modify, rescind, or revoke this Staff guidance if such action would be in the public interest.
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> This document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.

Staff Guidelines at 1 n.*, 3. Indeed, the document is not even the agency staff's interpretation of the Sherman Act, but is, rather, an interpretation of a Supreme Court decision that expressly declines to prescribe a uniform formula for state action immunity. *See also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 70 n. 19 (2007) (noting

the FTC staff's own recognition that "an informal staff opinion [is] not binding on the Commission").

2. Unsupported conclusory assertions do not warrant even minimal deference.

Under the "weaker form of deference" due advisory documents of this type, the FTC staff's interpretations "are entitled to respect . . . but only to the extent that those interpretations have the power to persuade." *Luminant Generation Co. v. U.S. E.P.A.*, 675 F.3d 917, 928 (5th Cir. 2012) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Bolen v. Dengel*, 340 F.3d 300, 310 (5th Cir. 2003) (internal quotation marks omitted) (citing *Skidmore*). "Even under *Skidmore* deference," a pronouncement that is "perfunctory and conclusory" and "provides no concrete reasoning for its conclusion" is given no weight. *Freeman*, 626 F.3d at 806.

A number of the statements in the Staff Guidelines fall into this category. The staff provides no authority or reasoning for the conclusions that (1) "[i]t is no defense to antitrust scrutiny . . . that the board members themselves are not directly or personally affected by the challenged restraint"; (2) it makes no difference that a member "is appointed to the state . . . board by the governor"; and (3) "active supervision must precede implementation of the allegedly anticompetitive restraint." Staff Guidelines at 7, 10, 11. Consequently, these opinions can play no part in the resolution of the issues in this suit.

Although the Staff Guidelines pay lip service to the concept of "flexible and context-dependent" inquiry, the foregoing pronouncements reflect the very "one-size-fits-all approach to active supervision" that the staff professes to eschew. *Id.* at 3

("fact-specific and context-dependent"), 10. For the reasons discussed in doc. 64 at 23-26 and doc. 74 at 1-6, the actual interests of the board members and the process by which they are selected should be among the "circumstances" and "contexts" considered in the "flexible" analysis.

3. The staff guidelines do not foreclose judicial review as active state supervision.

Despite recognizing at the outset that "States craft regulatory policy through a variety of actors, including . . . courts" (*id.* at 1), the Staff Guidelines completely fail to address judicial review as a vehicle for active state supervision. The staff's only reference to *Patrick* is for a proposition that in no way categorically excludes judicial review. *Id.* at 13 (citing *Patrick v. Burget*, 486 U.S. 94, 101 (1988)).

Nevertheless, judicial review of agency rules under TEX. GOV'T CODE § 2001.038 satisfies the criteria summarized in the Staff Guidelines at 10. Even the requirement that "[r]ecommended regulations become effective only following the approval of the [supervising authority]" (*id.* at 11) can be met, by a Texas court's equity power to grant a temporary injunction before a rule takes effect.

The Legislature can reasonably choose to limit review to those proposed agency rules that interested parties[1] object to as infringements of legal rights. Consistent with the Staff Guidelines, the reviewing court "obtain[s] the information necessary

[1] Standing under § 2001.038 is broader than Article III standing. *Fin. Comm'n of Tex. v. Norwood*, 418 S.W.3d 566, 592 (Tex. 2013) ("a plaintiff without an existing actual injury caused by a rule may demonstrate a justiciable injury sufficient for jurisdiction by showing that the rule in reasonable probability will be applied to him in the future and its application will impair a particular, specific right") (discussing *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 797 (Tex. App.—Austin 1982, writ ref'd n.r.e.) (interpreting predecessor to § 2001.038)).

for a proper evaluation of the action recommended by the regulatory board,"[2] including review of "the materials assembled by the regulatory board"; "evaluate[s] the substantive merits of the recommended action and assesse[s] whether the recommended action comports with the standards established by the state legislature"; and "issue[s] a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such decision." *Id.* at 10; *see* the discussion in doc. 64 at 12-14 and doc. 74 at 9-19.

Moreover, judicial review under TEX. GOV'T CODE § 2001.171 *et seq.* satisfies the suggestions outlined in the Staff Guidelines at 12 for disciplinary actions. *See* doc. 64 at 14-16 and doc. 74 at 20-22. To accept the plaintiffs' interpretation of the FTC staff's advice, the court must conclude that a state licensing board can be immunized only if the state creates a new agency or a new layer of bureaucracy. Neither the Supreme Court nor the Federal Trade Commission has required that result under federal antitrust law.

B. The Texas Medical Board's Brief to the Texas Supreme Court on Different Legal Issues is not Inconsistent With the Defendants' Arguments in This Case.

The plaintiffs assert that isolated statements in the TMB's brief to the Texas Supreme Court in the parallel state litigation are inconsistent with the defendants' position in this case. Doc. 76 at 3-4 (citing doc. 75.2 at 8-12, 18). The legal discussion

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[2] However, the defendants dispute the assertion that the state supervising authority must "investigate[] market conditions." "Market conditions" would be relevant to the question of whether a policy is anti-competitive but immaterial to the issue of whether the defendant board is acting in accordance with a bona fide state policy that happens to be anti-competitive. As the staff recognizes, "a state legislature may . . . limit competition to achieve public objectives." *Id.* at 4. Nevertheless, as previously shown, sunset review of a licensing board does examine "the impact of [board] regulation, including the extent to which the program stimulates or restricts competition and affects consumer choice and the cost of services." Doc. 64 at 18 (quoting TEX. GOV'T CODE § 325.008(a)(3)).

in the state court brief differs from that in the defendants' briefing in this case in emphasis rather than in substance. The difference is appropriate because the issues are different in the two cases. The Supreme Court brief and the briefing in this case stress complementary, but not contradictory, aspects of roughly the same body of law.

In the state court litigation, the overriding issue is, and has been all along, whether a cease and desist letter by the TMB general counsel, reflecting the agency's understanding of one of its rules, constituted the promulgation of a new rule which should have gone through the statutorily prescribed rule-making process. The brief to the Texas Supreme Court argues that it was not a new rule. By contrast, the lawsuit before this court challenges the amended rules that the TMB duly adopted through the APA process, following the court of appeals decision in the state case, to more clearly reflect the interpretation communicated in the cease and desist letter.

The TMB's Supreme Court brief states in relevant part, correctly, that "a court has the power to review an administrative order . . . where a statute provides the right . . ." Doc. 75.2 at 10-11 (numeral and internal quotation marks omitted) (citing *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 599 (Tex. 2001)). Because TEX. GOV'T CODE § 2001.038 expressly provides a right to judicial review of agency rules, this holding is entirely consistent with the discussion in doc. 64 at 12-14 and doc. 74 at 9-19.[3]

The brief also states that "the judiciary declines to resolve policy issues committed by law to another governmental branch." Doc. 75.2 at 11-12 (citing *Neeley*

[3] Note that, by contrast, *Little-Tex* dealt with a matter as to which "the Legislature has expressly precluded judicial review . . ." *Little-Tex Insulation Co.*, 39 S.W.3d at 599.

v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 778 (Tex. 2005)). However, it is not the task of either judicial review under § 2001.038 or of active state supervision to resolve policy issues in the sense of deciding what rule would best effectuate state policy. Instead, the role of the court and of active state supervision is only to determine whether the rule at issue is consistent ("in harmony") with state statutory policy. Nevertheless, as the Texas Supreme Court recognized in the cited passage from *Neeley*, "The judiciary is well-accustomed to applying substantive standards the crux of which is reasonableness." *Neeley*, 176 S.W.3d at 778.

But regardless, the proof is in the pudding. The cases discussed in doc. 64 at 12-14 and doc. 74 at 9-19 unmistakably show Texas courts examining the substance of agency rules to determine whether they accord with the general objectives (policy) of the statutes under which they were adopted.

CONCLUSION

Nothing in or with the Supplemental Response stands in the way of dismissal of all claims against the defendants.

Respectfully submitted,

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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 27th day of October, 2015, which will provide a copy to:

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