UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TELADOC, INC., TELADOC PHYSICIANS, P.A., KYON HOOD, and EMMETTE A. CLARK,	§	
Plaintiffs,	§	
	§	Civil Action No. 1:15-cv-00343-RP
v.	§	
	§	JURY TRIAL DEMANDED
TEXAS MEDICAL BOARD, MICHAEL ARAMBULA, JULIE K. ATTEBURY, MANUEL G. GUAJARDO, JOHN R. GUERRA, J. SCOTT HOLLIDAY, MARGARET C. MCNEESE, ALLAN N. SHULKIN, ROBERT B. SIMONSON, WYNNE M. SNOOTS, PAULETTE B. SOUTHARD, KARL W. SWANN, SURENDA K. VARMA, STANLEY S. WANG, and GEORGE WILLEFORD III, individually and in their capacities as members of the Texas Medical Board,	§	
Defendants.	§	

PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION BEFORE JUNE 3, 2015 AND BRIEF IN SUPPORT

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Plaintiffs Teladoc, Inc. and Teladoc Physicians, P.A. (collectively, "Teladoc"), Kyon Hood, M.D., and Emmette Clark, M.D., submit this Application for a Temporary Restraining Order and Preliminary Injunction and Brief in Support. Counsel for Plaintiffs conferred with Counsel for Defendants on April 29, 2015, in a good-faith attempt to resolve the matter by agreement, but no agreement could be reached. Counsel for Defendants indicated that Defendants intend to oppose this application.

INTRODUCTION

On April 10, 2015, defendant members of the Texas Medical Board ("TMB") agreed to adopt revisions to Texas Administrative Code § 190.8(1)(L) ("New Rule 190.8"). New Rule 190.8 is expected to take effect on June 3, 2015. Contrary to the traditional standard of care in Texas, New Rule 190.8 requires that a physician perform an in-person physical examination before treating a patient, regardless of medical necessity. Unless this Court grants relief, the new rule will dramatically restrict the provision of telehealth services in Texas, raising prices and reducing access to healthcare for Texans. The new rule will also cause irreparable harm to Teladoc, putting Teladoc out of business in its home state. Physicians working with Teladoc, like Dr. Hood and Dr. Clark, will also suffer irreparable harm from the loss of their telehealth practices in Texas.

Teladoc is a telehealth company founded in Texas in 2002. Teladoc gives patients access to board-certified, state-licensed physicians by phone 24 hours per day, 365 days per year and, where permitted, by videoconference. Teladoc currently provides service in 48 states, and the number of states embracing telehealth has been growing rapidly. Teladoc's service is available to patients through their employers or other organizations that pay a subscription fee for their members to have access to Teladoc. Members may then register with Teladoc by creating

profiles that include their medical histories and backgrounds. When members need to consult with a physician, they have the option of requesting a Teladoc consultation. Typically, members who request a Teladoc consultation receive a call from a board-certified physician licensed in their state in about 8 minutes. Teladoc's patients report a 95% satisfaction rate, and studies show that Teladoc members have better health outcomes (less follow-up care needed) than patients with the same conditions who visit doctors' offices or emergency rooms.

Teladoc expands access to healthcare by making it affordable and convenient. A Teladoc consultation costs $40, compared to around $150 for an in-office visit, or around $2,000 for an emergency room visit. Roughly half of Teladoc consultations occur on nights and weekends, when availability of medical care is limited. Teladoc has expanded access to high-quality care, and has saved Texas patients and healthcare payors millions of dollars over the past decade.

Notwithstanding this stellar record of high quality care, the TMB adopted New Rule 190.8, which would prevent Teladoc from operating in Texas. The TMB has claimed that the new rule will promote patient safety, but this claim is unsupported and pretextual. For decades, Texas physicians have used the telephone to take turns providing "on-call" coverage, diagnosing and, where appropriate, treating other physicians' patients by phone when those patients need care outside of normal business hours. The TMB has never suggested that traditional, phone-based on-call arrangements threaten patient safety. Yet, when Teladoc demonstrated the cost effectiveness of delivering physician services to patients on a large scale with a cutting-edge telehealth platform, the competitive threat to established physicians became clear, and the TMB took action to try to prevent competition. The TMB's last two attacks on Teladoc were invalidated by the Texas state courts. New Rule 190.8 represents the latest and most aggressive attack by the TMB on telehealth to date. If permitted to take effect, the new rule would lead to

higher prices and reduced supply of physician services in Texas. The new rule is an anticompetitive restraint of trade and violates Section 1 of the Sherman Act, 15 U.S.C. § 1.

Just two months ago, the Supreme Court of the United States reaffirmed that licensing boards made up of members of the licensed profession, like the TMB here, are liable under the antitrust laws when they take anticompetitive actions without the active supervision of the State. *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U. S. ____ (2015), slip op. at 14 ("*Dental Exam'rs*"). As the Court further explained "State agencies controlled by active market participants" are at "risk of self-dealing," and recognizing this fact "does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals." *Id*. at 13. The Supreme Court's decision in *Dental Examiners* requiring that state action be actively supervised to receive antitrust immunity follows a long line of cases all emphasizing the narrow scope of antitrust immunity for state agencies. *See, e.g., FTC v. Phoebe Putney*, 133 S. Ct. 1003, 1010 (2013) ("'state action immunity is disfavored'") (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.").

No active State supervision occurred here. Because New Rule 190.8 is an agreement in restraint of trade, Plaintiffs have a substantial likelihood of prevailing on their antitrust claims. The rule is also unlawful under the dormant commerce clause because it has the practical effect of discriminating against out-of-state competitors and this, too, supports an injunction.

Plaintiffs will suffer irreparable harm if emergency relief is not granted: the new rule would end Teladoc's business in Texas, disrupting a new business on a dramatic upward

trajectory. This would cause incalculable damage in the form of lost revenue and business restructuring. Moreover, not only would monetary damages be inadequate, damages might be unavailable entirely if the TMB is granted immunity from damages, or if individual Board Members do not have the means to satisfy an award. An injunction is therefore the only form of relief that can prevent irreparable injury to Plaintiffs.

On balance, an injunction will not harm the TMB. Indeed, a state court recently rejected an attempt by the TMB to accomplish the same result as New Rule 190.8 through an "emergency" rulemaking proceeding, and specifically held that there is "[n]o imminent peril to public health, safety or welfare" posed by allowing Texas physicians to continue providing telehealth consultations to the people of Texas. Ex. 1, Navikas Decl. Ex. U (Temp. Inj. Order ¶ 2, *Teladoc, Inc. v. Tex. Med. Bd.*, No. D-1-GN-15-000238 (Tex. Dist. Ct., Travis Cnty. Feb. 6, 2015)). Finally, maintaining the status quo and permitting continued telehealth consultations is decidedly in the public interest: Texas ranks 45th in the nation in physicians per capita, and New Rule 190.8 would exacerbate the shortage of care in Texas by reducing access to physician services. For these reasons and those set forth below, Teladoc respectfully requests that this Court enjoin implementation of New Rule 190.8 and permit millions of Texans to continue to have access to telehealth services.

STATEMENT OF FACTS

Teladoc is one of the first and largest telehealth services in the United States. Ex. 2, Gorevic Decl. ¶ 3. Teladoc connects a network of approximately 700 board-certified, state-licensed physicians with approximately 11 million patients. *Id.*; Ex. 3, DePhillips Decl. ¶ 10. Teladoc operates in 48 states, and has provided more than 750,000 consultations to date,

including more than 298,000 in 2014 alone. Ex. 2, Gorevic Decl. ¶¶ 3, 14. Teladoc's board-certified, Texas-licensed physicians serve 2.4 million members in the State of Texas. *Id*. ¶ 6.

Teladoc works with employers (e.g., Bank of America, Costco, Pfizer, Shell, T-Mobile), health plans (e.g., Aetna, Highmark), and hospital systems (Memorial Hermann, Beth Israel) all of which have conducted thorough quality reviews of Teladoc's services and decided to provide their employees and members with access to the Teladoc network. *Id*. ¶ 4. Teladoc thus competes in two separate but interrelated markets: (1) it contracts with payors to provide physician services to patients covered by the payors' networks, competing with physicians for in-network status; and (2) it provides physician services to patients in competition with other Texas-licensed physicians. Compl. ¶¶ 58-59. Teladoc is attractive to payors and patients because it offers high quality care at significant cost savings. Ex. 8, Miller Decl. ¶¶ 19, 75 (discussing evidence, including third party studies). The average costs of visits to a physician or emergency room are $145 and $1957, respectively, compared to $40 for a Teladoc consultation. *Id.* ¶ 69.

Most Teladoc consultations are for minor but acute issues, but Teladoc physicians treat a wide array of different conditions. Ex. 3, DePhillips Decl. ¶¶ 30, 31 (discussing Teladoc's clinical guidelines).[1] Of course, not every condition can be treated through telehealth: Where a Teladoc physician determines that treatment through telehealth is not appropriate, he will refer the patient to a physician's office, dentist, or emergency room as appropriate. *Id*. ¶ 25. In practice, Teladoc physicians are able to resolve around 94% of all patient issues. *Id*.

[1] Teladoc physicians do not prescribe controlled substances (e.g., narcotics) or "lifestyle drugs" (e.g., Viagra, diet pills). Ex. 3, DePhillips Decl. ¶ 27.

Teladoc operated in Texas with the TMB's knowledge for several years. Compl. ¶ 95. But, when Teladoc began to expand dramatically around 2009 and 2010, including by signing up several large clients, the TMB began to take actions to try to prevent Teladoc from competing.[2]

Invalid "Interpretation" of Current Rule 190.8. In June 2011, the TMB attempted to enforce an invalid interpretation of existing Rule 190.8 to try to shut down Teladoc's service. Ex. 1, Navikas Decl. Ex. A (June 2011 Letter). Teladoc challenged this action. The Third Court of Appeals, Austin agreed with Teladoc, holding that the "TMB's pronouncements in its June 2011 letter are tantamount to amendments to the existing text . . . TMB's pronouncements hardly 'track' Rule 190.8 . . . rather, they depart from and effectively change that text." Op., *Teladoc, Inc. v. Tex. Med. Bd. & Nancy Leshikar*, No. 03-13-00211-CV, at 23 (Tex. Ct. App., 3d Dist.) (Dec. 31, 2014) (Op. by the Hon. Bob Pemberton).

Invalid Emergency Rulemaking. Undeterred, the TMB tried again to shut down Teladoc's business through an improper "emergency" rulemaking earlier this year. That action, too, was invalidated by a Texas state court, which held that "[n]o imminent peril to public health, safety or welfare . . . exists at the present time to justify adoption of the emergency rule and it is invalid." Ex. 1, Navikas Decl. Ex. U (Feb. 6, 2015 Order ¶ 2).

Invalid April 2015 Rulemaking. New Rule 190.8 is the latest improper attempt by the TMB to prevent competition from Teladoc. The rule would require Texas physicians to form a physician-patient relationship by "establishing a diagnosis through the use of . . . physical examination" regardless of the physician's judgment about whether such an examination is needed. Although Texas law requires that a proposed rule be sent to a subcommittee of the

[2] For example, in some of its early actions the TMB acted on at least one complaint by a doctor to investigate an individual Teladoc physician, Compl. ¶ 104, and, in October 2010, adopted a

legislature before being put to a vote, even this minimal step was not taken. *See* Tex. Gov't Code Ann. § 2001.032(a).

On April 10, 2015, fourteen members of the TMB, twelve of them active physicians, voted to adopt this new rule. Ex. 1, Navikas Decl. Ex. B (Transcript of April 10, 2015). One member of the TMB, a non-physician, voted against the rule. That member, Mr. Frank Denton, has expressed concern that restricting telehealth will make medical care less accessible, including for the elderly, the poor, and those in rural areas, asking "[s]o are those people better off not even talking to a doctor on the phone or speaking to a health care professional . . . ?" Ex. 1, Navikas Decl. Ex. C (Jan. 16, 2015 Tr. 46:14-17). As he further noted:

> I have yet to -- out of thousands and thousands of [telehealth] encounters we haven't heard of any harm that was done as a result of this method of delivery of -- of a health care system . . . . [I]f we pursue this path and adopt this rule as it's written, you are telling thousands and thousands of Texans that you don't have an option as to which delivery of health care that you get. And I think that is a mistake.

Ex. 1, Navikas Decl. Ex. B (Apr. 10, 2015 Tr. 16:13-17; 31:24-32:3). The TMB has indicated that it will send New Rule 190.8 for publication in the Texas Register such that the new rule would go into effect on June 3, 2015. *Id*., Ex. D (Texas Med. Bd. Press Release, Apr. 27, 2015).

ARGUMENT

A movant is entitled to a preliminary injunction upon showing "(1) a substantial likelihood of prevailing on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that may result from the injunction to the nonmovant; and (4) that the injunction will not undermine public interests." *Roho Inc. v. Marquis*, 902 F.2d 356, 358 (5th Cir. 1990). When a movant makes a strong

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rule change preventing Teladoc from offering video consultations. 35 Tex. Reg. 3390; 22 Tex. Admin. Code § 174. Teladoc still offers video consults in 44 states. Ex. 2, Gorevic Decl. ¶ 13.

showing of harm, "a showing of some likelihood of success on the merits will justify temporary injunctive relief." *Productos Carnic, S.A. v. Cent. Am. Beef*, 621 F.2d 683, 686 (5th Cir. 1980).

A. Plaintiffs Have A Substantial Likelihood of Success On The Merits

Plaintiffs have a substantial likelihood of prevailing on the merits, which is far more than the showing of "some likelihood" of success that is required given the harm at issue here.

1. New Rule 190.8 Violates The Sherman Act

A defendant's conduct violates Section 1 of the Sherman Act when the plaintiff shows: "(1) that the defendant engaged in some form of joint action and (2) that this joint action amounted to an unreasonable restraint of trade." *Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 293 (5th Cir. 1988). Plaintiffs easily satisfy the elements of this claim.

a) Defendants Engaged In Joint Action

When a licensing board acts, its members are engaged in joint action within the scope of the Sherman Act. As the Supreme Court re-emphasized in *Dental Examiners*, the Sherman Act reaches joint conduct by licensing boards and States may not "abandon markets to the unsupervised control of active market participants." Slip op. at 18. Here, Defendants include a majority of active, licensed physicians. *See* Ex. 1, Navikas Decl. Exs. E-O (verification of medical licenses of Defendant physicians). And Defendants took joint action by adopting New Rule 190.8. *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 768 (1984).

b) New Rule 190.8 Is Anticompetitive

Anticompetitive conduct is conduct that increases price and reduces output. *Associated Radio Serv. Co. v. Page Airways, Inc.*, 624 F.2d 1342, 1353 n.20 (5th Cir. 1980) (noting that these are the quintessential anticompetitive effects prohibited by the Sherman Act). Here, New Rule 190.8 would harm consumers in these ways and more: It would lead to higher prices,

reduced choice, reduced access, reduced innovation, and reduced overall supply of physician services. The new rule is blatantly anticompetitive.

Increased prices. New Rule 190.8 would force consumers to pay higher prices for physicians' services through greater out-of-pocket expenses, higher insurance premiums, or both. The in-person visits mandated by the new rule are more expensive than Teladoc consultations, so consumers without insurance, or with a deductible to meet, will be forced to pay more for their care. And, to the extent that health insurance bears the increased costs, the higher expenses will lead to higher premiums, reduced coverage, or both. *Palmyra Park Hosp., Inc. v. Phoebe Putney Mem'l Hosp.*, 604 F.3d 1291, 1305 (11th Cir. 2010) ("Higher premiums and decreased choices [are] two evils within the ambit of the antitrust laws."). For example, to the extent that patients need medical care outside of normal business hours and are diverted to emergency rooms for minor but acute issues, this will cost nearly 50 times more than a Teladoc consultation and will add to emergency room backlogs. Ex. 8, Miller Decl. ¶ 69 n.40.

Loss of Choice. Consumers will also suffer because they will lose choice. As Mr. Denton put it, New Rule 190.8 says to Texans "you don't have an option as to which delivery of health care that you get." Ex. 1, Navikas Decl. Ex. B (Apr. 10 Tr. 32:1-2). Many consumers prefer telehealth. Some prefer talking with a doctor in the privacy of their own home rather than traveling to an office. Some prefer not to spend 45 minutes in a waiting room because the doctor is running late, and be exposed to a room full of germs. Ex. 7, Smythe Decl. ¶ 25; Ex. 3, DePhillips Decl. ¶ 51; Ex. 5, Hood Decl. ¶ 14. Others prefer telehealth because they can receive treatment faster and less expensively. Whatever the reason for their preference, "impair[ing] the ability of the market to advance social welfare by ensuring the provision of desired goods and services" harms consumers. *Ind. Fed'n of Dentists*, 476 U.S. at 459.

Loss of Access. Consumers will also suffer because requiring an initial in-person visit will in many cases delay or prevent patients from obtaining treatment. Ex. 7, Smythe Decl. ¶ 24; Ex. 3, DePhillips Decl. ¶ 42. As noted above, some patients cannot afford in-person doctor visits. Some cannot take time off from work or arrange for childcare. Some live in rural areas and cannot travel to a doctor's office. Some may have health issues outside of normal business hours, or may be told that their doctor has no availability to see them for weeks. Particularly if a patient does not believe that his condition is serious enough to warrant a trip to the emergency room, he may choose to forgo treatment altogether, with potentially devastating consequences. Ex. 10, Stowell Decl. Ex. B ("This is an unsolicited statement concerning how Teladoc saved my life. . . . The [Teladoc] doctor asked me a bunch of questions and quickly identified that I was experiencing the beginning stages of a heart attack. He was very clear with me that I had to immediately go to the emergency room. I would definitely not have done this if I did not call Teladoc because I did not understand the severity of the situation."); Ex. 7, Smythe Decl. ¶ 24 (discussing medical consequences of restricting telehealth); Ex. 3, DePhillips Decl. ¶¶ 33-35.

Loss of Innovation. New Rule 190.8 will also reduce innovation in healthcare delivery. This would be a very unfortunate consequence, just as the rest of the nation is increasingly embracing telehealth. Teladoc operates in 48 states, soon to be 49 with the addition of Idaho, which recently took legislative action to promote telehealth. Ex. 3, DePhillips Decl. ¶ 9. The Federation of State Medical Boards has also embraced telehealth and adopted a model policy promoting it. Ex. 7, Smythe Decl. ¶ 38. The U.S. healthcare system is under unprecedented strains, and dramatic improvements in technology (e.g., smartphones with high-resolution cameras, the iPhone otoscope) are making remote treatment more effective than ever. Ex. 7, Smythe Decl. ¶ 35. New Rule 190.8 is at odds with these trends, and will prevent the people of

Texas from enjoying the benefits of many innovations. Ex. 7, Smythe Decl. ¶¶ 39, 41; *United States v. Visa*, 344 F.3d 229, 241 (2d Cir. 2003) (affirming that "competition has been harmed by the defendants' exclusionary rules" where "product innovation and output has been stunted").

Reduced Output. Telehealth increases the overall supply of physician services. Ex. 8, Miller Decl. ¶ 45. The flexibility of telehealth means that physicians who might otherwise retire, stay home with children, or opt out of the work force for other reasons choose instead to continue providing their services to patients. Many physicians are attracted to a model that allows them to provide healthcare services on a simple and flexible basis. To take just a few examples, telehealth allows Dr. Clark to continue to practice medicine on a flexible schedule in his semi-retirement. Ex. 6, Clark Decl. ¶¶ 15-16. And even physicians who keep their day jobs, like Dr. Hood, can use the flexibility of telehealth to supplement their income and provide additional patient services at night or on the weekends. *See, e.g.*, Ex. 5, Hood Decl. ¶ 8. Many physicians find themselves attracted to telehealth because it allows them to focus on what they love – helping patients. *Id.*; Ex. 6, Clark Decl. ¶ 16. By empowering highly-qualified doctors to expand their productivity, telemedicine increases the output of physician services. This, in turn, lowers prices, benefitting consumers. Ex. 8, Miller Decl. ¶ 28. Conversely, New Rule 190.8, by severely restricting telehealth, reduces the total supply of physician services in Texas.

For all of these reasons, New Rule 190.8 is anticompetitive.

c) Defendants Cannot Meet Their Heavy Burden Of Showing That New Rule 190.8 Is Reasonably Necessary And Narrowly Tailored

Once a plaintiff shows that challenged conduct is anticompetitive, this places a "heavy burden" on a defendant to establish "an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *Nat'l Collegiate Athletic Ass'n v. Bd.*

of Regents of Univ. of Okla., 468 U.S. 85, 113 (1984). To establish the defense, "the requirements of the rules themselves must be reasonably necessary to the accomplishment of [] legitimate goals and narrowly tailored to that end." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1375 (5th Cir. 1980).

Defendants cannot come close to satisfying that burden here. New Rule 190.8 is not reasonably necessary to accomplish any legitimate objective. Defendants have suggested the rule protects patient safety, but this stated justification is actively undermined by the record and by other actions of the TMB. *See Ind. Fed'n of Dentists*, 476 U.S. at 463 (rejecting argument that anticompetitive conduct was needed to prevent consumers from making their own decisions as "'nothing less than a frontal assault on the basic policy of the Sherman Act.'") (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978)).

During the notice and comment process regarding New Rule 190.8, there were more than 200 written submissions, only 3 of which supported the proposed rule, two of those by the Texas Medical Association – a trade association of doctors with the objective of promoting doctors' interests. Ex. 1, Navikas Decl. Exs. P-Q (TMA Comment Letters). The record contained no empirical evidence, no studies, no surveys, and indeed no reliable evidence whatsoever showing negative outcomes from telehealth. The evidence certainly did not show outcomes so negative they would outweigh the benefits of expanded access to care through telehealth. The only arguments against telehealth were theoretical assertions of a need for availability of local in-person follow-up care, and a related but unexplained presumption that providing care through telehealth would somehow reduce a patient's existing local options for care.[3] Indeed, not only

[3] *See, e.g.*, Ex. 1, Navikas Decl. Ex. P (TMA Letter) (urging that New Rule 190.8 be amended to clarify doctors may provide "on-call" services once they have reached "oral or written"

did the record lack empirical evidence of safety concerns from telehealth, it lacked even a single anecdote of actual harm. Ex. 1, Navikas Decl. Ex. B (Apr. 10 Tr. 16:11-17) (statement by Mr. Denton noting "out of thousands and thousands of [telehealth] encounters we haven't heard of any harm that was done as a result of this method of delivery");[4] Ex. 1, Navikas Decl. Ex. C.[5]

New Rule 190.8's categorical physical exam requirement is not reasonably necessary or narrowly tailored for many reasons, each of them fatal to Defendants' claimed justification.

Not Reasonably Necessary In Light Of Existing Rules Requiring Physical Examination Where Needed To Meet Standard Of Care. New Rule 190.8 adds a requirement of a physical examination regardless of medical need. This is in no way reasonably necessary or narrowly tailored. In fact, a more narrowly tailored rule is already on the books: Where the

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agreements that ensure "local availability of follow-up in-person evaluation," but that this local availability should not be permitted to come from any "free-standing facility" or hospital).

[4] During the hearing, only hypotheticals were offered to cast aspersions on telehealth. For example, one doctor hypothesized that a patient could have had an allergic reaction to an antibiotic prescribed through a telehealth consultation, but conceded that the patient "was not harmed" and that, in any event, risks of allergic reaction could not be prevented with an in-person examination. As the doctor himself put it, "You know, you take your chances." Ex. 1, Navikas Decl. Ex. R (Apr. 9, 2015 Tr.at 117:4-119:25).

[5] In the TMB's "emergency" rulemaking there was likewise no evidence of harm from telehealth. The Board's "best" evidence was two unsubstantiated anecdotes: First, Dr. Shulkin claimed a woman who thought she had a urinary tract infection turned out to have meningitis. Ex. 1, Navikas Decl. Ex. C (Jan. 16, 2015 Tr. 43:2-15). But this proves nothing about the need for an in-person exam in all cases, or even in that case. There is no claim of misdiagnosis through telehealth. Indeed, the anecdote shows the need for telehealth, which makes it easy for patients to seek professional help even for seemingly minor issues. Ex. 3, DePhillips Decl. ¶ 18; Ex. 10, Stowell Decl. Ex. A (letter from mother whose son was diagnosed with multiple sclerosis as a direct result of Teladoc physician identifying possible uncommon cause of seemingly minor symptoms). Second, the TMB's Executive Director, claimed there a telehealth doctor once prescribed an insufficient volume of an antibiotic. Ex. 1, Navikas Decl. Ex. C (Jan. 16 Tr. 23:20-24:9). She admitted this was an unproven allegation under investigation, and offered no reason to believe the same error would not have been made during an in-person visit. Doctors are not infallible and random accounts of one alleged mistake by one doctor prescribing an insufficient antibiotic dosage provides no support for regulating the entire practice of medicine by telehealth out of existence. In contrast to this unsubstantiated and unpersuasive example, the evidence all suggests that telehealth is safe and effective. Ex. 7, Smythe Decl. ¶¶ 28, 30 (citing evidence).

standard of care requires a physical examination, the TMB's existing rules already provide for disciplinary action against physicians who provide treatment without that examination. 22 Tex. Admin. Code § 190.8(1)(A) ("Failure to practice in an acceptable professional manner consistent with public health and welfare within the meaning of the Act includes, but is not limited to . . . failure to treat a patient according to the generally accepted standard of care."). As noted above, Teladoc physicians regularly direct patients to an emergency room or doctor's office when treatment cannot safely and appropriately be provided through a telehealth consultation. Ex. 3, DePhillips Decl. ¶ 25. Adopting a categorical requirement of an in-person examination is not necessary to protect patient safety.

Not Reasonably Necessary In Light Of Long History Of Safe, Phone-Based "On-Call" Arrangements. The purported safety justification for New Rule 190.8 fails for the independent reason that Texas physicians have a long tradition of safely providing "on-call" services, treating patients of other physicians by telephone when appropriate, even when they have not conducted an in-person physical examination. *See, e.g.*, Ex. 1, Navikas Decl. Ex. P (Letter from the Texas Medical Association, D. Wilcox to R. Chapin (Feb. 6, 2015)) (requesting that proposed New Rule 190.8 be amended "[t]o ensure that physicians who are not involved in telemedicine, but who are in a call arrangement with colleagues to provide for after-hours medical care" be permitted to continue participating in such on-call arrangements) (emphasis added). The TMB has never claimed that traditional on-call arrangements endanger patient safety. In fact, the executive director of the TMB, Mari Robinson, has testified that the use of on-call agreements to provide cross coverage over the phone is acceptable. Ex. 1, Navikas Decl. Ex. S (Robinson Dep. 20:5-20:22, Dec. 6, 2011). The quality of care provided through a telehealth service like Teladoc's is indisputably superior to that provided through traditional on-

call arrangements for many reasons including because a Teladoc physician has training in telehealth, has actually reviewed the patient's medical files, can (when appropriate) access high resolution photographs in a HIPAA-compliant manner, has the benefit of technological safeguards like drug interaction software, creates a contemporaneous electronic record of the consult, and is subject to a rigorous quality control review. Ex. 7, Smythe Decl. ¶ 30; Ex. 3, DePhillips Decl. ¶¶ 21-23, 26, 46-47; Ex. 4, Howard Decl. ¶¶ 12, 14-17; Ex. 5, Hood Decl. ¶¶ 21-25; Ex. 6, Clark Decl. ¶¶ 9-10.

In an effort to prevent competition from telehealth services, however, New Rule 190.8 has now banned traditional phone-based on-call arrangements. This is striking given the long history of safe and effective on-call arrangements in Texas.[6]

Not Reasonably Necessary In Light Of Rules Permitting Physician Assistants To Treat Patients Without A Physical Examination. The purported justification for New Rule 190.8 is further undermined by the fact that the TMB's other rules continue to permit phone-based treatment – including prescription-writing – by physician assistants, even for patients the assistant has never met. Tex. Occ. Code Ann. § 157.002(c); 22 Tex. Admin. Code § 185.30. Specifically, a physician assistant may use "delegated authority" to listen to a patient's description of symptoms over the phone and issue a prescription without consulting with the doctor – even if the assistant himself has never examined the patient. A physician can thus physically examine patients once, and then delegate phone-based prescription writing to up to seven different nurses who have never met the relevant patients. *See* 22 Tex. Admin. Code

[6] Notably, the TMB's press releases regarding New Rule 190.8 tried to obscure this dramatic change in existing practice by noting that, under another rule governing "telemedicine" consultations using video connections, certain on-call arrangements are still permitted. But traditional on-call is overwhelmingly telephone-based, *see* Ex. 7, Smythe Decl. ¶¶ 17, 19, and New Rule 190.8's prevention of this established model is significant and wholly unexplained.

§ 185.30; Tex. Occ. Code Ann. § 157.0512(c). The fact that New Rule 190.8 leaves the prescription pen in the hands of nurses and takes it away from board-certified physicians provides further evidence that the stated safety justification for categorically requiring physicians to conduct in-person examinations is pretextual. Because Defendants cannot show that New Rule 190.8 is reasonably necessary or narrowly tailored to meet any legitimate purpose, they cannot meet their heavy burden of overcoming the anticompetitive effect of the rule.

2. Defendants Are Not Immune From Antitrust Suit

State licensing boards controlled by active market participants, like the TMB, are immune from antitrust scrutiny only if they satisfy both parts of the two-part test first laid out in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980). This test requires that: (1) the state has actively supervised the implementation of the restriction; and (2) the restriction follows a clearly-articulated state policy authorizing the anticompetitive conduct. *Dental Exam'rs*, slip op. at 9, 14. The TMB fails both parts of this test.

a) The Texas Legislature Did Not Actively Supervise The Adoption Of New Rule 190.8

The State did not actively supervise Defendants' adoption of New Rule 190.8. Active supervision requires specific mechanisms that "provide 'realistic assurance' that a non-sovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" *Dental Exam'rs*, slip op. at 17-18 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988)). This means the legislature "must review the substance of the anticompetitive decision, not merely the procedures followed to produce it." *Id.* at 18. "[T]he 'mere potential for state supervision is not an adequate substitute for a decision by the State.'" *Id.* Put another way, "[t]he active supervision requirement demands, inter alia, that 'state officials have and exercise

power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.'" *Id.* at 9 (citing *Patrick*, 486 U.S. at 101); *Ticor*, 504 U.S. at 634.

This unquestionably did not take place with respect to New Rule 190.8. There was no actual review – much less endorsement – of the substance of the rule by any sovereign actor with the power to veto or modify the rule before it was adopted. Defendants fail the active supervision test and their conduct is not immune from antitrust scrutiny.

b) New Rule 190.8 Does Not Serve A Clearly-Articulated State Interest

Nor is there a "clearly articulated" state policy to adopt anticompetitive restrictions like New Rule 190.8. The Medical Practices Act authorizes the TMB to pass licensing requirements for the practice of medicine to protect "the public interest." Tex. Occ. Code Ann. § 151.003(1). For all of the same reasons that New Rule 190.8 harms competition, it also actively harms the public interest. It thus falls outside the scope of the policy articulated by the legislature. *See Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 235 (5th Cir. 1999) ("[I]t is not the foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct.").

3. New Rule 190.8 Violates The Dormant Commerce Clause

New Rule 190.8 is also unlawful because it is an (unsupervised) state action that discriminates against out-of-state competition. Like numerous state laws that have been invalidated, New Rule 190.8: (1) requires out-of-state competitors to establish an in-state presence in order to compete; and (2) has disparate harmful effects on out-of-state competitors. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 386, 394 (1994) (invalidating ordinance requiring "solid waste to be processed at a designated transfer station before leaving

the municipality" because effect of ordinance was to protect in-state business from out-of-state competition); *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 351 (1977).

Approximately 16.5% of Teladoc consultations for Texas patients are performed by Texas-licensed physicians located outside the state. Ex. 9, Murphy Decl. ¶ 16. Dr. Hood, for example, is licensed to practice in Texas but based in Virginia, and regularly treats Texas patients, particularly during flu season when call volume is highest. Ex. 5, Hood Decl. ¶ 12.

"State laws that discriminate against interstate commerce face 'a virtually *per se* rule of invalidity.'" *Granholm v. Heald*, 544 U.S. 460, 476 (2005). In *Granholm*, the Court invalidated a New York licensing scheme that had the effect of preventing direct to consumer shipments of wine by out-of-state wineries because those wineries did not use grapes from New York, and did not have an in-state physical presence. As the Court noted, "States cannot require an out-of-state firm 'to become a resident in order to compete on equal terms.'" *Id.* at 475.

Categorical Physical Examination Is Discriminatory. By requiring a physical examination regardless of the physician's medical judgment regarding whether one is necessary, New Rule 190.8 discriminates against out of state physicians. The rule effectively means that a Texas-licensed physician can treat Texas patients only if he establishes a physical presence in Texas. *Toomer v. Witsell*, 334 U.S. 385, 403-06 (1948) (invalidating state law that required owners of shrimp boats licensed by the State to unload and pack their catch in that State). New Rule 190.8 effectively prohibits out-of-state physicians from providing telehealth consultations for Texas patients. Ex. 5, Hood Decl. ¶ 27. As in *Hunt*, the new rule is unlawful because it would raise costs for out-of-state competitors who are less likely to have a physical presence in the state. 432 U.S. at 351. New Rule 190.8 would also improperly regulate interstate commerce through its "practical effect and design." *Carbone*, 511 U.S. at 394. It is *per se* invalid.

Categorical Physical Examination Requirement Is Clearly Excessive. Even if a state action does not discriminate, it still must satisfy the less rigorous scrutiny applied by the Court in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). In *Pike*, the Court struck down an Arizona law that imposed burdens on interstate commerce that were "clearly excessive in relation to the putative local benefits." *Id.* at 142. Here, New Rule 190.8 raises prices and reduces the supply of physician services to the detriment of Texas patients. It also harms out-of-state providers like Dr. Hood and national companies like Teladoc and its national clients. Conversely, there are no local benefits from the new rule's categorical physical examination requirement. Where the standard of care requires a physical examination, the TMB's existing rules already require an exam. 22 Tex. Admin. Code § 190.8(1)(A). The putative local benefits of New Rule 190.8 are further undermined by the long history of on-call medical care in Texas, including prescription writing by both covering physicians and physicians' assistants. The only benefit of New Rule 190.8 accrues to traditional Texas physicians with office-based practices, who will have less competition as a result of the new rule. The dormant commerce clause is designed to protect against precisely this sort of invidious state regulation. *Bibb v. Navajo Freight Lines, Inc*., 359 U.S. 520, 553-25 (1959) (state law requiring curved mudguards on trucks invalid because straight mudguards were legal in 45 states and the state's stated safety justifications were pretextual); *S.C. State Highway Dep't v. Barnwell Bros*., 303 U.S. 177, 184 n.2 (1938). Because New Rule 190.8 violates the dormant commerce clause, it warrants injunctive relief. *C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 770 F. Supp. 848, 854-55 (S.D.N.Y. 1991) (granting preliminary injunction based on dormant commerce clause claim).

B. Plaintiffs Will Be Irreparably Harmed If An Injunction Is Not Granted

"An irreparable injury is one that cannot be undone by monetary damages or one for which monetary damages would be especially difficult to calculate." *Heil Trailer Int'l Co. v. Kula*, 542 F. App'x 329, 335 (5th Cir. 2013); *Janvey v. Alguire*, 647 F.3d 585, 600 (5th Cir. 2011). New Rule 190.8 will put Plaintiffs out of business in Texas, and have spill-over effects beyond the Texas border. Ex. 9, Murphy Decl. ¶¶ 31(b)-(c), 32(b)-(c), 41. Plaintiffs have made a strong showing of injury here. As the Honorable John Dietz determined during the TMB's 2011 attempt to shut down Teladoc's service by enforcing an invalid interpretation of existing Rule 190.8, Teladoc "will suffer immediate and irreparable harm because the proposed enforcement of the Rule will have an immediate and severe impact on Teladoc's ability to do business in Texas." Ex. 1, Navikas Decl. Ex. T (Temp. Restraining Order at 1-2, (July 19, 2011)). The same is true today.

1. The Rule Would Cause Plaintiffs Irreparable Injury

New Rule 190.8 will end Teladoc Inc.'s business in Texas. Ex. 2, Gorevic Decl. ¶ 13. This will cause substantial losses in revenue from Texas clients and members, and from non-Texas-based clients and members that also do business in Texas, and might stop working with Teladoc entirely if New Rule 190.8 takes effect. Ex. 2, Gorevic Decl. ¶¶ 13, 18-22; Ex. 9, Murphy Decl. ¶¶ 31(b)-(c), 32(b)-(c). Multi-state employers demand seamless coverage in all states. Ex. 2, Gorevic Decl. ¶ 17. The loss of Texas operations would damage Teladoc's goodwill with existing clients and future clients. *Id*. ¶ 16. In fact, several of Teladoc's clients have already opted not to renew their agreements with Teladoc, and others have put negotiations on hold or inquired about early termination, upon learning that the TMB voted to adopt New

Rule 190.8. Ex. 9, Murphy Decl. ¶ 31(c). This, too, constitutes irreparable harm. *Austin Bd. of Realtors v. E-Realty, Inc.*, 2000 WL 34239114, at *5 (W.D. Tex. Mar. 30, 2000).

Teladoc's losses would be difficult to calculate because the telehealth industry is at an inflection point. Ex. 2, Gorevic Decl. ¶ 20; Ex. 9, Murphy Decl. ¶¶ 38-44. Technological advances and growing consumer acceptance are driving exponential growth in the adoption and utilization of telehealth services like Teladoc. Disrupting Teladoc's business in Texas at this point in its trajectory will certainly cause injury that will be exceedingly difficult to quantify. Ex. 9, Murphy Decl. ¶¶ 38-44. Teladoc's growth has been so dramatic that its past revenues bear little relation to its likely future success. Teladoc has experienced explosive revenue growth, earning $6.4 million in 2011, $10.1 million in 2012, $20 million in 2013, and $44 million in 2014. *See* Ex. 2, Gorevic Decl. ¶ 14. Teladoc's growth is likely to accelerate with its IPO. But quantifying exactly how much business Teladoc could have won but for New Rule 190.8 would be very difficult. Ex. 9, Murphy Decl. ¶¶ 10, 33-35, 43-44; *Hardin v. Hous. Chronicle*, 426 F. Supp. 1114, 1117 (S.D. Tex. 1977), *aff'd*, 572 F.2d 1106 (5th Cir. 1978) (harm is irreparable if damages are difficult to measure).

Teladoc's losses would also be irreparable because the new rule would damage its reputation for quality care, which is of central importance, and is not readily restored. *Austin Bd. of Realtors*, 2000 WL 34239114, at *5 ("Injury to reputation or goodwill is not easily measurable in monetary terms and can constitute irreparable injury."); *Allied Mktg. Grp., Inc. v. CDL Mktg., Inc.*, 878 F.2d 806, 810 n.1 (5th Cir. 1989)).

Teladoc, Inc. will also suffer defections of members and providers as a result of the rule, and "the impossibility of calculating the value of this loss of goodwill amounts to irreparable injury." *Fla. Businessmen for Free Enter. v. City of Hollywood*, 648 F.2d 956, 958 n.3 (5th Cir.

1981); *Humana, Inc. v. Avram A. Jacobson, M.D., P.A.*, 804 F.2d 1390, 1394 (5th Cir. 1986) (affirming finding of irreparable harm where "[l]oss of Medicare funding would directly deprive Humana of more than 50% of its business . . . . [and] cause many of the physicians who direct their patients to Humana to treat their patients at other hospitals."). At least one physician has already stopped providing consultations in Texas expressly because of uncertainty regarding the TMB's "stand on telemedicine." Ex. 3, DePhillips Decl. Ex. C (Apr. 28, 2015 email).

In addition, like most young companies, Teladoc is operating at a loss and needs financing to fund operations and continue its rapid expansion. New Rule 190.8, if it goes into effect, would raise Teladoc's cost of capital and prevent it from expanding during a critical growth stage. The rule would have significant impact on Teladoc's valuation in its highly anticipated IPO. For this reason, too, it would be difficult to estimate the harm to Teladoc.

Finally, if New Rule 190.8 takes effect, Teladoc Physicians, P.A. would lose its entire telehealth practice in Texas, and its only customer, Teladoc, Inc. *See* Compl. ¶ 146. Teladoc Physicians, P.A. will suffer defections of its Texas-licensed physician providers, and this valuable relationship, which allows Teladoc Physicians, P.A. to maintain a widespread network of doctors available to patients 24/7, may never be restored, even if telehealth operations resume in Texas. Finally, the new rule would also cause irreparable injury to Drs. Hood and Clark, who would lose their income from Texas consultations. Because of the rapid growth of telehealth, it is difficult to quantify the magnitude of this harm.

2. Plaintiffs Also Face Irreparable Injury Due To The Uncertainty Regarding Payment Of Any Damages Award

Moreover, even if damages could be calculated and could in theory fully address the harm inflicted on all Plaintiffs, "[t]he ability to calculate damages does not make that remedy adequate if the Plaintiffs cannot collect the award." *PIU Mgmt., LLC v. Inflatable Zone Inc.*,

2010 WL 681914, at *7 (S.D. Tex. Feb. 25, 2010). Here, Plaintiffs' trebled damages would run into at least the tens of millions of dollars and likely outstrip the individual defendants' ability to pay. Ex. 9, Murphy Decl. ¶¶ 31-36. For this reason, too, Plaintiffs face irreparable injury in the absence of injunctive relief. *See Aspen Tech., Inc. v. M3 Tech., Inc.*, 569 F. App'x 259, 273 (5th Cir. 2014) (finding irreparable harm in light of "substantial probability that [plaintiff] would be unable to collect a judgment against [defendant]").

C. The Balance Of The Equities Strongly Favors Plaintiffs And A Preliminary Injunction Is In The Public Interest

For all of the reasons stated above, taking away the option of telehealth from millions of Texas patients would raise prices and reduce access to medical care, to the detriment of the people of Texas. Texas already ranks 45th among the states in availability of physicians per capita, and limiting access to care would only exacerbate this problem. Conversely, allowing Texans to continue to use telehealth if they wish will cause no harm to Defendants. As the state court recently noted, telehealth presents "[n]o imminent peril to public health, safety or welfare." Ex. 1, Navikas Decl. Ex. U (Feb. 6, 2015 Order ¶ 2). The balance of the harms thus weighs in favor of an injunction. *Thomas v. Johnston*, 557 F. Supp. 879, 918-19 (W.D. Tex. 1983).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter a temporary restraining order or preliminary injunction before the proposed effective date of June 3, 2015 to enjoin New Rule 190.8 from taking effect to maintain the status quo pending the final resolution of the claims brought by Plaintiffs in their contemporaneously filed Complaint.

Dated: April 29, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 29th day of April, 2015, a true and correct copy of the foregoing instrument was electronically filed by the Court's ECF system, and a true and correct copy was delivered by email and fax to Ted Ross with the Office of the Texas Attorney General Administrative Division.

/s/ James M. Dow
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