

ORIGINAL



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____ )	
)	
In the Matter of )	Docket No. 9320
)	
REALCOMP II LTD., )	Chief Administrative Law Judge
)	Stephen J. McGuire
Respondent. )	
_____ )	

**REALCOMP II LTD.'S ANSWER TO COMPLAINT**

Respondent Realcomp II Ltd., through its attorneys, Foster, Swift, Collins & Smith, P.C., pursuant to the Federal Trade Commission Rules of Practice ("FTC Rules"), 16 C.F.R. § 3.12, in answer to Petitioner's Complaint, states as follows:

**NATURE OF THE CASE**

This paragraph is a characterization of the Complaint to which no responsive pleading is required. To the extent that an answer is required, Respondent refers to its answer to the specific allegations of the Complaint as set forth below. Respondent denies as untrue that the policies at issue lack any pro-competitive justification. Respondent denies that the alleged Rules constitute an anti-competitive concerted refusal to deal. Respondent denies that the alleged Rules violate the anti-trust laws.

**RESPONDENT AND ITS MEMBERS**

PARAGRAPH 1. Respondent Realcomp II Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334. Respondent is owned by several realtor boards and associations. The members of Respondent are real estate brokers doing business in Southeastern Michigan.

**ANSWER 1.** In response to Paragraph 1 of the Complaint, Respondent admits the allegations set forth in the first two sentences of that paragraph. Respondent denies that its members are limited to real estate brokers doing business in Southeastern Michigan for the reason that its members include REALTORS® doing business outside of Southeastern Michigan.

PARAGRAPH 2. Respondent is organized for the purpose of serving its members' interests, including their economic interests, by promoting, fostering, and advancing the real estate brokerage services industry in Southeastern Michigan. One of the primary functions of Respondent is the operation of the Realcomp Multiple Listing Service.

**ANSWER 2.** In response to Paragraph 2 of the Complaint, Respondent admits the allegations contained in the first sentence. In response to the second sentence, Respondent states that operation of the Realcomp Multiple Listing Service is the primary function of Respondent as opposed to being one of the primary functions. In response to the remaining allegations contained in this paragraph, Respondent admits the same with the further response that the information on listings on a multiple listing service (MLS) is also used for appraisals.

PARAGRAPH 3. The Realcomp shareholder Boards are affiliated with the National Association of Realtors ("NAR"), thereby requiring Realcomp to abide by the NAR rules. Realcomp has more than 14,500 real estate professionals as members. All of the Realcomp members hold either an active real estate license or an active appraiser license and are active in the real estate profession.

**ANSWER 3.** In response to Paragraph 3 of the Complaint, Respondent admits that it is affiliated with the National Association of Realtors ("NAR"). Respondent denies that this thereby requires Realcomp to abide by the NAR Rules for the reason that Respondent's own governing documents speak to that requirement. In response to the remaining allegations contained in this paragraph, Respondent admits the same with the exception that Respondent does not have sufficient knowledge or information to form a belief as to the truth or falsity of the allegation that all of its members are active in the real estate profession.

PARAGRAPH 4. The large majority of residential real estate brokerage professional in Southeastern Michigan are members of Realcomp. These professionals compete with one another to provide residential real estate brokerage services to consumers.

**ANSWER 4.** In response to Paragraph 4 of the Complaint, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in the first sentence of that paragraph. Respondent admits the allegation contained in the second sentence to that paragraph.

PARAGRAPH 5. Realcomp services the territory within Southeastern Michigan, including Livingston County, Oakland County, Macomb County, St. Clair County and Wayne County. ("Realcomp Service Area").

**ANSWER 5.** In response to Paragraph 5 of the Complaint, Respondent admits the same.

**JURISDICTION**

PARAGRAPH 6. The acts and practices of Respondent, including the acts and practices alleged herein, have been or are in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and Respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

(A) Affect the purchase and sale of real estate by persons moving into and out of Southeastern Michigan; and

(B) Affect the transmission of real estate listing information to public real estate web sites that are intended for a national audience, including Realtor.com.

**ANSWER 6.** In response to Paragraph 6 of the Complaint, Respondent admits the same.

**THE CHALLENGED CONDUCT**

PARAGRAPH 7. Respondent has restrained competition in the provision of residential real estate brokerage services by combining or conspiring with its members or others, or by acting as a combination of its members or others, to hinder unreasonably the ability of real estate brokers in Southeastern Michigan to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing.

**ANSWER 7.** In response to Paragraph 7 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 8. An Exclusive Right to Sell Listing is a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. An Exclusive Right to Sell Listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services.

**ANSWER 8.** In response to Paragraph 8 of the Complaint, Respondent admits the allegations contained therein.

PARAGRAPH 9. An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency Listing. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

**ANSWER 9.** In response to paragraph 9 of the Complaint, Respondent admits the allegations contained therein.

PARAGRAPH 10. Exclusive Agency Listings are a means by which listing brokers can offer lower-cost, Unbundled Real Estate Services to consumers. Unbundled Real Estate Brokerage Services are lawful arrangements pursuant to which a listing broker will cause the property offered for sale to be listed on the MLS, but the listing broker will not provide some or all of the additional services offered by traditional real estate brokers, or will only offer such additional services as may be chosen from a menu of services for a fee.

**ANSWER 10.** In response to paragraph 10 of the Complaint, Respondent states that the term "unbundled real estate services" is not defined and is not a term commonly used in the industry and; therefore, Respondent states it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph; therefore, Respondent neither admits nor denies the same.

PARAGRAPH 11. Brokers offering Unbundled Real Estate Brokerage Services often provide home sellers with exposure of their listing through the MLS for a flat fee or reduced commission that is small compared to the full commission prices commonly charged by traditional brokers, often by entering into Exclusive Agency Listings that reserve to the home seller the right to sell the property without owing more to the listing broker

**ANSWER 11.** In response to paragraph 11 of the Complaint, Respondent states it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained therein; therefore, neither admits nor denies the same.

PARAGRAPH 12. To be listed in the MLS, a home seller must enter into a listing agreement with a listing real estate broker that is a member of the MLS. The compensation paid by the home seller to the listing broker is determined by negotiation between the home seller and the listing broker. Whatever type of listing agreement is entered into between the home seller and the listing real estate broker, the MLS rules require that the home seller must offer to pay a commission to a cooperating real estate broker, known as a selling broker, who successfully secures a buyer for the property. If the home seller fails to pay a commission to a selling broker who secures a buyer for the property, the selling broker may recover the commission due from the listing agent, under rules and procedures established by the MLS.

**ANSWER 12.** In response to paragraph 12 of the Complaint, Respondent admits the allegations contained in first three sentences of that paragraph. In response to the fourth and final sentence of paragraph 12, Respondent denies the same in the form and matter alleged for the reason that the commission is paid by the listing broker as opposed to by the seller and this is not under the rules and procedures established by the MLS.

PARAGRAPH 13. In 2001, Realcomp adopted and approved a rule that stated: "Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis" (the "Web Site Policy").

**ANSWER 13.** In response to paragraph 13 of the Complaint, Respondent admits the allegations contained therein.

PARAGRAPH 14. The Web Site Policy prevents information concerning certain lawful residential property listings provided to Realcomp, including "Exclusive Agency Listings," from being transmitted to real estate web sites, based on the contractual relationship between the home seller and the real estate agent the seller employs to promote the property.

**ANSWER 14.** In response to paragraph 14 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 15. The Web Site Policy specifically prevents information concerning Exclusive Agency Listings from being published on web sites otherwise approved by Realcomp to receive information concerning Realcomp MLS listings (collectively, "Approved Web Sites"). Such web sites include (1) the NAR-

operated "Realtor.com" web site; (2) the Realcomp-owned "Moveinmichigan.com" web site; and (3) Realcomp-member web sites.

**ANSWER 15.** In response to paragraph 15 of the Complaint, Respondent denies that "Realtor.com" is a NAR-operated website and denies the allegations contained therein as they pertain to Realcomp-member websites. Respondent admits the remainder of the allegations contained in this paragraph.

PARAGRAPH 16. In or about the fall of 2003, Respondent changed the Realcomp MLS search screen to default to Exclusive Right to Sell Listings ("Search Function Policy"). In order to view any other listing types, including Exclusive Agency Listings, Realcomp members have to select the additional listing types in the search screen.

**ANSWER 16.** In response to Paragraph 16 of the Complaint, Respondent admits the same. In further answer to this paragraph, Respondent states that the default described in this paragraph defaults not only to exclusive right to sell listings but also to unknown.

#### **REALCOMP HAS MARKET POWER**

PARAGRAPH 17. The provision of residential real estate brokerage services to sellers and buyers of real property in the Southeastern Michigan and/or the Realcomp Service Area is a relevant market.

**ANSWER 17.** In response to Paragraph 17 of the Complaint, Respondent states that the allegations contained therein are conclusions of law, not allegations of fact, and; therefore, neither admit nor deny the same.

PARAGRAPH 18. The publication and sharing of information relating to residential real estate listings for the purpose of brokering residential real estate transactions is a key input to the provision of real estate brokerage services, and represents a relevant input market. Publication of listings through the Realcomp MLS is generally considered by sellers, buyers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for property in the Realcomp Service Area.

**ANSWER 18.** In response to Paragraph 18 of the Complaint, Respondent admits the allegations contained in the first sentence of that paragraph with the exception of the allegation that this represents a relevant input market for the reason that this is a conclusion of law, not an allegation of fact and Respondent is without sufficient knowledge to form a belief as to whether this is a "key input." Respondent states that it is without sufficient knowledge or information to form a belief as

to the truth or falsity of the allegations contained in this paragraph; therefore, neither admits nor denies the same.

PARAGRAPH 19. Participation in Realcomp is a service that is necessary for the provision of effective residential real estate brokerage services to sellers and buyers of real property in the Realcomp Service Area. Participation significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services in the Realcomp Service Area.

**ANSWER 19.** In response to Paragraph 19 of the Complaint, Respondent denies as untrue the allegations contained in the first sentence of that paragraph. In response to the remaining allegations contained in that paragraph, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph; therefore, neither admits nor denies the same.

PARAGRAPH 20. Access to the Approved Web Sites is a service that is necessary for the provision of effective residential real estate brokerage services in the Realcomp Service Area. Home buyers regularly use the Approved Web Sites to assist in their search for homes. The Approved Web Sites are the web sites most commonly used by home buyers in their home search. Many home buyers find the home that they ultimately purchase by searching on one or more Approved Web Sites.

**ANSWER 20.** In response to Paragraph 20 of the Complaint, Respondent denies as untrue the allegations contained in the first sentence of that paragraph. In response to the allegations contained in the remaining allegations contained in that paragraph, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph; therefore, neither admits nor denies the same.

PARAGRAPH 21. The most efficient, and at least in some cases the only, means for Realcomp members to have their listed properties visible to the public on the Approved Web Sites is by having Realcomp transmit those listings.

**ANSWER 21.** In response to Paragraph 21 of the Complaint, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of these allegations and; therefore, neither admits nor denies the same.

PARAGRAPH 22. By virtue of industry-wide participation and control over the ability of real estate brokers to participate in the Realcomp MLS and the ability of home sellers to publicize their homes for sale on Approved Web Sites, Realcomp has market power in the Realcomp Service Area.

**ANSWER 22.** In response to Paragraph 22 of the Complaint, Respondent states that the allegations contained therein are conclusions of law, not allegations of law and; therefore, neither admits nor denies the same.

### **THE REALCOMP POLICIES HAVE NO EFFICIENCY BENEFIT**

PARAGRAPH 23. There are no cognizable and plausible efficiency justifications for the conduct that constitutes the violation alleged in this Complaint. Such conduct is not reasonably ancillary to the legitimate and beneficial objectives of the MLS.

**ANSWER 23.** In response to Paragraph 23 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

### **VIOLATION**

PARAGRAPH 24. In adopting the policies and engaging in the acts and practices described herein, Realcomp has combined or conspired with its members or others, or acted as a combination or conspiracy of its members or others, to restrain trade in the provision of residential real estate brokerage services within Southeastern Michigan and/or the Realcomp Service Area.

**ANSWER 24.** In response to Paragraph 24 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 25. The acts and practices of Realcomp described herein constitute an agreement that only listings based exclusively on traditional contract terms as dictated by Realcomp will be forwarded by the Realcomp MLS to be shown to the general public on Approved websites, and thereby eliminate certain forms of competition. The acts and practices have no cognizable and plausible efficiency justifications and are inherently suspect restraints of trade.

**ANSWER 25.** In response to Paragraph 25 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 26. The acts and practices of Realcomp described herein constitute a concerted refusal to deal by competitors, except on specified terms, with respect to services that are necessary for the provision of effective residential real estate brokerage services. As such, the acts and practices are inherently suspect restraints of trade that have no cognizable and plausible efficiency justifications.

**ANSWER 26.** In response to Paragraph 26 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 27. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of Realcomp and its members as described herein have been and are unreasonably to restrain competition among brokers, and to injure consumers, in the market for provision of residential real estate brokerage services within Southeastern Michigan and/or the Realcomp Service Area.

**ANSWER 27.** In response to Paragraph 27 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 28. The policies, acts, practices, and combinations or conspiracies described herein constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

**ANSWER 28.** In response to Paragraph 28 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

WHEREFORE, Respondent states that the Commission is not entitled to the relief requested.

#### **RESPONDENT REALCOMP II LTD.'S AFFIRMATIVE DEFENSES**

Respondent Realcomp II, Ltd., through its attorneys, Foster, Swift, Collins & Smith, P.C., hereby submits the following Affirmative Defenses, reserving the right to raise additional defenses if and when they are deemed appropriate as the case progresses.

1. The Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

2. The Complaint fails to comply with the requirements of Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), because the issuance of the Complaint and the relief sought are not in the public interest.

3. The challenged conduct at issue in the Complaint has significant pro-competitive efficiencies that outweigh any alleged anti-competitive effects.

4. Respondent lacks market power as a significant amount of sales in the described market are from persons or entities other than Respondent and there is competition in that market.

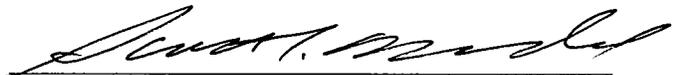
WHEREFORE, Respondent prays that a Judgment dismissing the Complaint with prejudice and awarding costs and such other relief as deemed just and proper.

Date: November 20, 2006

Respectfully Submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

By:



Steven H. Lasher (P28785)

Scott L. Mandel (P33453)

Kirsten M. McNelly (P56979)

**Certificate of Service**

I, Judith L. Gibson, hereby certify that on November 20, 2006, have caused a copy of the attached, Answer of Respondent, to be served upon the following:

Sean P. Gates, Esq.  
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Hon. Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW  
Washington, DC 20580

by hand delivery.



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Judith L. Gibson