



hired as the exclusive agent of the home owner to find an interested buyer, “lists” the property on the MLS, and may provide a variety of services to the seller, including marketing the home, negotiating offers on the property, and assisting sellers with the “closing” of the transaction. Opposition at 2 (citing RX 154 at 8-9). Cooperating Brokers work with prospective buyers interested in purchasing a home, search the MLS on behalf of those buyers, and may provide a range of other services such as accompanying buyers during property visits and negotiating a contract with the seller. Opposition at 2 (citing RX 154 at 9, 27). Complaint Counsel further explains that cooperating brokers may be compensated by the buyer, but they are most often compensated by the Listing Broker as payment for finding a buyer who purchases the home. Opposition at 2 (citing CX 100 at RC 1339, 1346-47; CX 373 at NARFTC 0002046).

The parties agree to the following terminology:

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.

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 the 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. Complaint and Answer, ¶¶ 8,9.

Complaint Counsel challenges two Realcomp policies: the “Website Policy” and the “Search Function Policy.” Complaint Counsel states, as part of its MLS operations, Realcomp provides a free feed of listing information to an array of real estate websites, including Realtor.com and Realcomp’s own MLS public website, MoveinMichigan.com. Opposition at 4 (citing CX 222 at 8). Complaint Counsel further explains, Realcomp also provides a feed of MLS listing information to its broker and agent member websites, such as Remax.com or Century21Today.com, through a mechanism known as Internet Data Exchange (“IDX”). Opposition at 4 (citing CX 222 at 8).

Among other allegations, the Complaint charges that in 2001, Realcomp adopted and approved a rule that stated: “Listing information downloaded and/or otherwise displayed pursuant to IDX [Internet Data Exchange] shall be limited to properties listed on an exclusive right to sell basis” (the “Website Policy”). Complaint and Answer ¶ 13. Under the Website Policy, information concerning Exclusive Agency Listings is not transmitted by Realcomp to

certain websites (including Realtor.com) otherwise approved to receive information concerning Realcomp MLS listings (collectively, "Approved Websites"). Complaint and Answer ¶ 15. The Complaint also charges that in 2003, Realcomp changed the Realcomp MLS search screen to default to Exclusive Right to Sell Listings ("Search Function Policy"). As a result, Exclusive Agency listings are not included in the initial search database unless a Realcomp member selects additional listing types in the search screen. Complaint and Answer ¶ 16. Realcomp asserts that it does not prohibit this option. Motion at 3 (citing Deposition of Robert Taylor, p. 123, Exhibit B).

### III. POSITIONS OF THE PARTIES

Respondent argues that a seller who has entered into an Exclusive Agency Listing has an economic incentive to find a buyer without the assistance of either the listing or a selling broker, and, in this respect, is in competition with the listing broker and potential selling brokers. Motion at 2. Respondent's motion for summary decision charges that the Complaint is erroneously premised "on the theory that Realcomp is an 'essential facility' and that Realcomp members have a duty to aid their competitors." Motion at 4. Respondent argues that this theory is not cognizable as a matter of law. Motion at 4 (*citing Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 410 (2004) (holding that Verizon's alleged insufficient assistance in the provision of service to rivals is not a recognized claim under [the Supreme] Court's existing refusal-to-deal-precedents).

In support of its argument, Respondent asserts that participation in Realcomp is not necessary for the provision of effective residential real estate brokerage services to sellers and buyers of real property in the Realcomp service area because the information can be, and is transmitted to various public real estate websites by other means (including Realtor.com). Motion at 2, 3. Respondent further asserts that it is not a public utility and that, like any MLS, it is a service provided by, at the expense of, and for its members premised on cooperation between its members and compensation for its members. Motion at 8. In the alternative to dismissal, Respondent requests a ruling that specifies every remaining, alleged basis for relief and the controlling standards for any grant of relief. Motion at 1.

In its opposition, Complaint Counsel asserts the challenged conduct reflects agreements among horizontal competitors. Opposition at 5. As such, Complaint Counsel argues that because the essential facilities doctrine applies solely to single-firm monopolization or attempted monopolization claims, it has no application to the facts of this case. Opposition at 8.

The Complaint also alleges that Realcomp possesses market power in that "[p]articipation 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" and "[a]ccess 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." Complaint, ¶¶ 19, 20. As such, Complaint Counsel asserts that whether Respondent has market power presents a

genuine issue of material fact which precludes summary decision in its favor. Opposition at 5. With respect to Respondent's request for alternative relief, Complaint Counsel argues it should be denied. Opposition at 16-17.

#### IV. APPLICABLE STANDARD

Respondent's pleading seeks "dismissal of the complaint for failure to state a claim upon which relief can be granted." To the extent that it is appropriate to consider this motion as a motion to dismiss, such motion is judged by whether "a review of the complaint clearly shows that the allegations, if proved, are sufficient to make out a violation of Section 5." *In re TK-7 Corp.*, 1989 FTC LEXIS 32, \*3 (1989). For purposes of a motion to dismiss, "the factual allegations of the complaint are presumed to be true and all reasonable inferences are to be made in favor of complaint counsel." *TK-7 Corp.*, 1989 FTC LEXIS 32, \*3 (citing *Miree v. DeKalb County*, 433 U.S. 25, 27 n.2 (1977); *Jenkins v. McKeitchen*, 395 U.S. 411, 421-22 (1969)). If the motion to dismiss raises material issues of fact which are in dispute, dismissal is not appropriate. *In re Herbert R. Gibson, Sr.*, 1976 FTC LEXIS 378, \*1 (1976); *In re Jewell Companies, Inc.*, 81 F.T.C. 1034, 1035-36 (1972) (denying motion to dismiss where there was a substantial dispute on questions of fact). See also *In re College Football Assoc.*, 1990 FTC LEXIS 485, \*4 (1990) (Where facts are needed to make determination on a "close question," the motion to dismiss will be denied.).

As noted above, Respondent also states specifically that it "moves for summary decision, pursuant to 16 C.F.R. § 3.24." Commission Rule of Practice 3.24(a)(2) provides that summary decision "shall be rendered . . . if the pleadings and any depositions, answers to interrogatories, admissions on file, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a matter of law." 16 C.F.R. § 3.24(a)(2). Commission Rule 3.24(a)(3) provides that once a motion for summary decision is made and adequately supported, "a party opposing the motion may not rest upon the mere allegations or denials of his pleading; his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue of fact for trial." 16 C.F.R. § 3.24(a)(3). These provisions are virtually identical to the provisions governing summary judgment in the federal courts under Rule 56 of the Federal Rules of Civil Procedure; the Commission applies its summary decision rule consistent with case law construing Fed. R. Civ. P. 56. *In re Kroger Co.*, 98 F.T.C. 639, 726 (1981); *In re Hearst Corp.*, 80 F.T.C. 1011, 1014 (1972).

The mere existence of a factual dispute will not in and of itself defeat an otherwise properly supported motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). However, "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The party moving for summary judgment bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Green v. Dalton*, 164 F.3d 671, 675 (D.C. Cir. 1999) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

Once the moving party has properly supported its motion for summary judgment, the nonmoving party must “do more than simply show there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. The nonmoving party may not rest on mere allegations or denials of its pleading but must “come forward with ‘specific facts showing that there is a genuine issue for trial.’” *Id.* at 587 (quoting Fed. R. Civ. P. 56(e)). *See also Liberty Lobby*, 477 U.S. at 256. The inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. *Matsushita*, 475 U.S. at 587.

## **V. RESPONDENT’S MOTION RAISES GENUINE ISSUES OF MATERIAL FACT**

Upon review of Respondent’s motion and the opposition, it is abundantly clear that there are numerous genuine issues of material fact in dispute. As such, Respondent has not demonstrated it is entitled to judgment as a matter of law. Having so concluded, it is of no value, at least at this juncture of the proceeding, to address the applicability of the “essential facilities doctrine” as enunciated in *Trinko, supra*.

The pleadings reveal that there are numerous areas of factual dispute which need be addressed at trial. The following are but a few of the relevant factual issues questions that must be resolved:

1) Whether 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;

2) Whether Respondent can hinder or exclude competitors in the market for real estate brokerage within its service area;

3) Whether Exclusive Agency brokers are able to continue to do business selling residential real estate in the Realcomp Service Area;

4) Whether Realcomp’s Website Policy prevents information from being transmitted to various public real estate websites;

5) Whether the Website Policy and the Search Function Policy restrain competition in the provision of residential real estate brokerage services by discriminating in favor of Exclusive Right to Sell listing contracts and against “limited service” contracts.

To resolve these and other factual disputes relevant to this matter, requires a review of the evidence at an evidentiary hearing.

Accordingly, Respondent, the moving party, is not entitled to summary decision as a

matter of law. Further, because there are material issues of fact in dispute, dismissal under the motion to dismiss standard is also not appropriate. Respondent's motion is, therefore, **DENIED**.

Respondent's alternative request is also **DENIED**. Complaint Counsel filed a well-pled complaint with detailed factual and legal allegations. Realcomp has been provided with both a meaningful notice of the alleged misconduct and an adequate opportunity to respond.

ORDERED:

  
Stephen J. McGuire  
Chief Administrative Law Judge

Date: May 21, 2007