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UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9320

PUBLIC VERSION

IN THE MATTER OF

REALCOMP II LTD.

**COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR PARTIAL STAY OF ORDER
PENDING APPEAL**

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Dated: December 16, 2009

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**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Jon Leibowitz, Chairman**
 Pamela Jones Harbour
 William E. Kovacic
 J. Thomas Rosch

| | | |
|--------------------|---|-----------------|
| In the Matter of |) | |
| |) | |
| REALCOMP II, LTD., |) | Docket No. 9320 |
| a corporation. |) | PUBLIC |
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**COMPLAINT COUNSEL’S OPPOSITION TO RESPONDENT’S MOTION FOR
PARTIAL STAY OF ORDER PENDING APPEAL**

Pursuant to Commission Rule 3.56, 16 C.F.R. § 3.56, Complaint Counsel submit this memorandum in opposition to Respondent’s Motion for Partial Stay of Order Pending Appeal.

I. INTRODUCTION

On October 30, 2009, a unanimous Commission concluded that Respondent, Realcomp II, Ltd. (“Respondent” or “Realcomp”), a multiple listing service (“MLS”) operating in Southeastern Michigan, violated Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, by maintaining and enforcing its “Website Policy” and “Search Function Policy” (“Policies”). The Commission reversed the Initial Decision dismissing the complaint, and entered a cease and desist order. The Commission found that the Realcomp Policies unreasonably restrain competition, a conclusion reached under each of three distinct variations of the antitrust rule of reason. A showing of competitive harm under any one methodology would alone be sufficient to justify a finding of liability.

On December 9, 2009, Respondent filed a Motion for Partial Stay Pending Appeal.

("Resp. Motion for Stay"). Respondent's motion for stay should be denied so that a competitive market can be restored without further delay.

II. THE APPLICABLE STANDARD

Prior to 1994, the Federal Trade Commission Act provided that Commission orders were always to be stayed pending appeal. *See California Dental Ass'n*, Dkt. No. 9259, 1996 FTC LEXIS 277, at *9 (May 22, 1996). In 1994, Congress eliminated the automatic stay, for the reason that this rule had encouraged respondents to file petitions for review "based on frivolous or other unmeritorious claims," for the purpose of delaying, often for years, compliance with the Federal Trade Commission Act. *Id.* at *8-9 (*quoting* S. Rep. No. 130, 103d Cong., 1st Sess., at 11 (1993)). Following repeal of the automatic stay, the Commission will stay its own order only when it has ruled on "an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Id.* at *9-10 (citation omitted).¹

This standard is codified in Commission Rule § 3.56(c), 16 C.F.R. § 3.56(c), which provides that the Commission should consider the following factors when determining whether to grant a stay: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties if a stay is granted; and (4) why the stay is in the public interest. *See also North Texas Specialty Physicians*, Dkt. No. 9312, 2006 FTC LEXIS 10, at *2 (Jan. 20, 2006); *Toys "R" Us, Inc.*, 126

¹ Section 5(g) of the Federal Trade Commission Act, 15 U.S.C. § 45(g)(2), provides that Commission adjudicative orders (except divestiture orders) take effect "upon the sixtieth day after" their date of service, unless "stayed, in whole or in part and subject to such conditions as may be appropriate, by . . . the Commission" or "an appropriate court of appeals." A party seeking a stay must first apply for such relief to the Commission. *Kentucky Household Goods Carriers Ass'n*, Dkt. No. 9278, 2005 FTC LEXIS 123 (Aug. 19, 2005); *California Dental Ass'n*, Dkt. No. 9259, 1996 FTC LEXIS 277, at *2 (May 22, 1996).

F.T.C. 695, 696 (1998).

Rule 3.56(c) further provides that a motion for a stay must contain “supporting affidavits or other sworn statements, and a copy of the relevant portions of the record.” *Id.* See also *Toys “R” Us, Inc.*, 126 F.T.C 695, 696 (Dec. 1, 1998).

III. REALCOMP’S REQUEST FOR A STAY SHOULD BE DENIED

In contravention of Rule 3.56(c), Respondent has failed to submit affidavits or other sworn statements to support its motion. This alone merits a denial of Realcomp’s motion. In addition, Realcomp fails to satisfy any and all of the four criteria relevant to the grant of a stay pending appeal.

A. REALCOMP IS NOT LIKELY TO SUCCEED ON APPEAL

Realcomp has not demonstrated a likelihood of success on appeal, or even that there are serious and substantial questions going to the merits of the Commission’s decision. Respondent merely re-packages the arguments that the Commission addressed in its October 30, 2009 opinion (“Opinion”). See *Toys “R” Us, Inc.*, 126 F.T.C 695, 697 (Dec. 1, 1998); *Detroit Auto Dealers*, 1995 FTC LEXIS 256 at *4 (Aug. 23, 1995) (renewal of arguments alone is insufficient to merit a stay).

First, Realcomp asserts that the Commission’s inherently suspect analysis is disputed and controversial. This precise contention was rejected in *North Texas Specialty Physicians*, Dkt. No. 9312, 2006 FTC LEXIS 10, at 3-4 (Jan. 20, 2006) (denying motion for stay pending appeal) (citations omitted):

[T]he legal analysis the Commission applied – the framework in *PolyGram Holding, Inc.*, and recently affirmed by the D.C. Circuit – merely follows the framework the Supreme Court established in *California Dental Ass’n v. FTC*, by synthesizing prior antitrust decisions Applying this analysis in this case is neither controversial nor difficult, and the Commission consequently does not

consider this case to be the type of “close case” that would justify a stay.

The Commission’s truncated legal analysis in *NTSP* was subsequently upheld by the Court of Appeals. *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008). The cases cited by Respondent (Resp. Motion for Stay at 6 n. 7) do not dispute the legitimacy of inherently suspect analysis; instead they confirm the Commission’s view that this framework is reserved for a restraint that, by its nature, is likely to result in competitive harm. The present case meets this standard.²

Second, Respondent claims that the record evidence of anticompetitive effects is insufficient because certain discount brokers have “prospered economically.” (Resp. Motion for Stay at 8). The Commission has previously explained why this contention is unpersuasive: “The fact that some discount brokers are managing to compete, is irrelevant and has no bearing on the exclusionary impact of Realcomp’s restrictive practices (*i.e.*, how much *more* effectively competitive the market would be in the absence of those policies).” (Opinion at 41 n. 42).

Third, Respondent charges that the testimony of Complaint Counsel’s economic expert, Dr. Williams, was not comprehensive; it did not answer every conceivable question. This too is without substance. Dr. Williams’ testimony, the available data, and various statistical analyses, all support the conclusion that Realcomp’s Policies caused a reduction in the share of Exclusive Agency (EA) listings. In other words, many Michigan consumers were compelled by a combination of suppliers of brokerage services to pay for brokerage services that these consumers did not desire or did not value. That Dr. Williams did not quantify that consumer

² Moreover, even if an inherently suspect analysis were considered a “difficult legal question,” the Commission also found liability under two other rule of reason approaches. (Opinion at 34-47).

harm is irrelevant, particularly where there is absolutely no showing of any offsetting consumer benefit.

This brings us to Respondent's attempt to resurrect its "efficiency" justifications, both of which the Commission properly disposed of in its Opinion. As the Commission correctly found, there is no "free-riding" on the Realcomp joint venture by an EA home seller. The EA home seller has access to the Realcomp MLS service only by contracting with a willing member broker that pays its dues like any other Realcomp member – for any EA listing, as for any standard listing, Realcomp gets its full dues revenue to run the MLS.³ (Opinion at 29-32). And the Commission correctly found that preventing a "bidding disadvantage" for prospective home buyers is not a legitimate justification under the antitrust laws. Under the Commission's Order, cooperating brokers that provide valuable services for a buyer in an EA transaction can still be paid a commission, by either the home buyer or the seller. But if a home buyer can be found without the need of a cooperating broker, then the seller, the listing broker and the buyer can all benefit by driving down the total commissions and keeping down the total cost of the real estate transaction. Cooperating brokers that do not provide a valuable service should face a bidding disadvantage – that is part of the competitive process. (Opinion at 32-34).

Respondent's least credible argument is that the ALJ's decision, dismissing the Complaint, by itself demonstrates that the issues for appeal are serious and substantial.

³ Respondent offers no support for its assertion that the Commission's remedy will somehow drive down Realcomp dues revenue from cooperating brokers. (Resp. Motion for Stay at 10). Brokers pay dues annually to Realcomp, not on a transaction-by-transaction basis, and most brokers over the course of a year serve both home buyers and sellers, giving them plenty of reason to continue as Realcomp members. And there is no reason to think that the Commission's remedy has caused a decline in dues revenues at the nine other MLSs that by consent decrees have already implemented the same relief. *See* fn. 5 below.

Realcomp cites no legal authority for this broad claim. As for the Initial Decision in this case, the Commission has determined “that many of the ALJ’s conclusions are inconsistent with governing law, established antitrust policy, or economic logic.” (Opinion at 4, n. 4). The errors of the ALJ do not establish that there are substantial grounds to question the Commission’s decision.

In sum, this is not a case with difficult legal questions or a complex factual record.

**B. REALCOMP AND ITS MEMBERS WILL NOT SUFFER
IRREPARABLE HARM FROM COMPLYING WITH THE ORDER**

“The Respondent bears the burden of demonstrating that denial of a stay will cause irreparable harm. Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. A party seeking a stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay.” *California Dental Ass’n*, 1996 FTC LEXIS 277 at *6-7; *See also Michigan Coalition of Radioactive Material Users v. Griepentrog*, 945 F.2d 150, 154 (6th Cir. 1991) (“Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough.”).

Realcomp asserts, without substantiation of any kind, that in the absence of a stay its members will lose sales opportunities and goodwill, and incur programming and system testing costs. Realcomp has submitted no affidavits or evidence verifying the existence of the alleged harm. Realcomp has submitted no affidavits or evidence quantifying the alleged harm. Realcomp has submitted no affidavits or evidence demonstrating an inability to avoid or mitigate the alleged harm. Given this failure to comply with Rule 3.56(c), the Commission should give

no weight to Realcomp's naked assertions.⁴

In any event, the notion that absent a stay, Realcomp will suffer irreparable harm is quite implausible. The Commission's Order in this case is substantially identical to the remedy imposed in Commission consent orders agreed to by nine other MLSs located across the United States. These consent orders redressed conduct similar to that engaged in by Realcomp.⁵ In addition, the National Association of Realtors, the industry leadership organization of which Realcomp and over 800 other MLSs are members⁶, modified its rules in October 2007, to prohibit the conduct engaged in by Realcomp and prohibited by the Order.⁷ This means that the vast majority of the hundreds of MLSs around the country have rules that are consistent with the substance of the Commission's Order. Realcomp will not suffer irreparable harm when hundreds of other MLSs already can and do conform their behavior to the provisions of the Order.

Realcomp's own statements demonstrate that its members will not be irreparably harmed

⁴ Cf. *North Texas Specialty Physicians*, at 5 ("NTSP has not quantified the unrecoverable costs and business losses it claims, nor does it elaborate on how the grant or refusal of a stay would affect its reputation.").

⁵ *In the Matter of MiRealSource Inc.*, Dkt. No. 9321, Decision and Order (Mar. 20, 2007); *In the Matter of Austin Bd. of Realtors*, Dkt. No. C-4167 (Final Approval, Aug. 29, 2006); *In the Matter of Information and Real Estate Services, LLC*, File No. 0610087 (2006); *In the Matter of Northern New England Real Estate Network, Inc.*, File No. 0510065 (2006); *In the Matter of Williamsburg Area Association of Realtors, Inc.*, File No. 0610268 (2006); *In the Matter of Realtors Association of Northeast Wisconsin, Inc.*, File No. 0610267 (2006); *In the Matter of Monmouth County Association of Realtors, Inc.*, File No. 0510217 (2006); *In the Matter of Multiple Listing Service, Inc.*, FTC File No. 061-0090 (2006); *In the Matter of West Penn Multi-List, Inc.*, File No. 0810167 (2009).

⁶ <http://www.realtor.org/law_and_policy/doj/mls_overview> (NAR stating that it has over 800 MLS members) (last visited Dec. 10, 2009).

⁷ Opinion at 11; See also CX 235; CX 236.

if a stay is denied. Realcomp argues that it “will incur programming and system testing costs.” (Resp. Motion for Stay at 12). However, Karen Kage, the CEO of Realcomp, testified that her own staff made the initial change to the IDX feed to exclude EA listings. (Kage IH at 57-58). Realcomp did not need to hire any personnel or purchase additional technology to include only Exclusive Right to Sell listings. *Id.* As for the alleged costs to Realcomp members for re-programming their own websites, this is not harmful or irreparable. Members who wish to re-program their sites to continue excluding EA listings will be free to do so, of course, but no such change is required by the Commission Order. Members can avoid re-programming costs by simply taking the full IDX feed, including EA listings, for their websites, a no-cost alternative that may well make their websites more complete and attractive for use by potential home buyers.

Lastly, Realcomp asserts that, absent a stay, it will be restrained in the exercise of commercial speech in violation of the First Amendment. (Resp. Motion for Stay at 13). It is well established, however, that anticompetitive exclusion from a medium of communication may be remedied with an antitrust order, notwithstanding incidental effects on commercial speech. *E.g., Lorain Journal Co. v. U.S.*, 342 U.S. 143, 155-156 (1951) (enjoining attempt by newspaper to monopolize advertising by refusing to publish advertisements for merchants who advertised through local radio station does not violate any guaranteed freedom of the press); *Associated Press v. U.S.*, 326 U.S. 1, 20 (1945) (“The First Amendment affords not the slightest support for the contention that a combination to restrain trade in news and views has any constitutional immunity.”); *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); *see also U.S. v. Realty Multi-List, Inc.*, 1982 WL 1878 (M.D. Ga. 1982) (On remand, implementing injunctive

relief requiring MLS to grant access to plaintiffs).⁸

Realcomp has not met its burden of showing that it will be irreparably harmed if the Order is in place pending appeal.

C. A STAY OF THE COMMISSION'S ORDER WILL HARM CONSUMERS AND THE PUBLIC INTEREST

Because Complaint Counsel represents the public interest in effective law enforcement, the Commission analyzes the third and fourth factors together. *See Novartis Corp.*, 128 F.T.C. 233, 236 (1999). Implementing the Commission's Order against Realcomp, without delay, will benefit consumers and promote the public interest.

The challenged Policies enable traditional full service real estate brokers to extract high commissions from home sellers for services that many home sellers do not want, do not require, or do not value. Realcomp's Policies restrain discount brokers from obtaining an input – full exposure on the approved websites – necessary for effective competition. (Opinion at 25). Realcomp's Policies restrict the ability of discount brokers to advertise their listings on the most important websites in Michigan. (Opinion at 28). Realcomp's Policies restrict the availability of information that consumers use to evaluate their housing choices. (Opinion at 28). Realcomp's Policies reduce the “pricing pressure” on the six-percent commissions typically charged by full-service brokers. (Opinion at 37). The Commission's Order remedies these competitive

⁸ In *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 558 (1980), the Supreme Court laid out a four prong test to determine whether a restriction on commercial speech violates the First Amendment: (1) Is the commercial speech lawful and not misleading?; (2) Does the government have a substantial interest in imposing the restriction?; (3) Does the regulation further that interest?; and (4) Is the restriction no more extensive than necessary to achieve the government's interest? Here, the Commission has a substantial interest in eliminating MLS restrictions that constrict consumer choice and raise consumer prices. The Commission's Order achieves that objective and is not overbroad.

problems. Paragraph II prohibits Realcomp from discriminating against nontraditional listings, including EA listings. Paragraph III of the Order requires Realcomp to amend its rules and regulations to conform to the Order.

Realcomp repeats the claim that discount brokers have “prospered economically” and were not “prevented entry into the market.” (Resp. Motion for Stay at 13-14). As noted above, this does not address the relevant inquiry. The Commission determined that consumers (not individual brokers) are being harmed. And consumers are being harmed relative to a competitive marketplace for brokerage services. *See* Opinion at 41 (“complete exclusion [of discount brokers] is not the standard of liability here”).

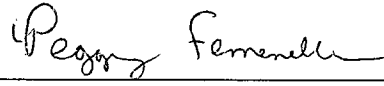
Since the time period at issue in the trial record, the pressure on Detroit area home sellers from declining home prices has increased.⁹ Requiring Realcomp to adhere immediately to the Commission’s Order will restore competitive conditions in the market for brokerage services and help Detroit area home sellers save money while purchasing the services that best fit their needs.

IV. CONCLUSION

The relevant factors do not support a stay pending appeal of the Commission’s decision in this case. Additional harm to consumers will likely result from the continued enforcement of Realcomp’s Policies.

⁹ S&P/Case-Shiller Home Price Indices, Press Release (Nov. 24, 2009), at 3, Table; *see* Detroit Free Press, “Detroit home prices rise 1.8% in September,” Nov. 24, 2009. The most recent monthly report on real estate prices from S&P/Case-Shiller, through September 2009, indicates that despite a recent monthly increase in Detroit area home prices of 1.8 percent (less than the national index increase of 3.7 in the same period), the home price values in the Detroit area declined by 19.2 percent over the prior year (compared to a national index decrease of 8.9 percent in the same period). The same source reports that though the Detroit area has seen some positive movement in recent months, the market is only at 73% of its 2000 value. This compares to regions such as Los Angeles, New York and Washington, which have maintained values of 70-80% above their 2000 averages in spite of the real estate market downturn. S&P/Case Shiller at 2.

Respectfully submitted,



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Dated: December 16, 2009

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CERTIFICATE OF SERVICE

This is to certify that on December 16, 2009, I caused a copy of Complaint Counsel's Opposition to Respondent's Motion for Partial Stay of Order Pending Appeal to be served upon the following people:

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