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.,** **a corporation.**	**Docket No. 9320**

ORDER DENYING RESPONDENT'S MOTION FOR PARTIAL STAY OF FINAL ORDER PENDING APPEAL

The Commission issued its Opinion and Final Order in this matter on October 30, 2009. The Opinion of the Commission and the Final Order were served on Respondent Realcomp II, Ltd. (Realcomp) and its counsel on November 9, 2009. Respondent's compliance is required no later than 60 days after service. 15 U.S.C. § 45(g)(2).

Pursuant to Rule 3.56 of the Commission's Rules of Practice, 16 C.F.R. § 3.56, Respondent moved on December 8, 2009, for a partial stay of the Final Order, until the final disposition of Realcomp's appeals in the federal courts. It has failed, however, to justify such relief. All four factors set forth in the rule weigh against granting the motion. Respondent has shown neither a likelihood of success on appeal nor that it will suffer irreparable harm absent a stay. Moreover, it has not dealt at all with considerations of the public interest or injury to other parties. Accordingly, we deny the motion.

Background

Respondent, Realcomp, is a multiple listing service (MLS) operating in Southeastern Michigan. Most of Realcomp's members are full-service brokers who charged a flat commission for their services. As consumers increasingly used the Internet to search for new homes, new business models for providing real estate brokerage services presented competitive threats to the traditional, commission-based way of doing business. Brokers could offer unbundled and discounted services that promised greater flexibility and efficiency in meeting consumer demand for real estate brokerage services. Realcomp reacted to this new market environment by adopting internal policies that favored full-service listings and thwarted the impact of discount brokers. While sending full-service listings to certain public websites, Realcomp prohibited the distribution of discount real estate listings to those sites. Realcomp also limited the exposure of these discount listings on the closed Realcomp MLS database. As a result, consumers searching those public websites would see only listings of full-service brokers, not those offered by discount brokers.

In our decision of October 30, 2009, we analyzed the legality of those Realcomp policies under traditional antitrust principles, using both an abbreviated and a more elaborate form of the Rule of Reason. After considering the record evidence presented by Realcomp and complaint counsel, we concluded that the Realcomp policies constitute unreasonable restraints on competition and cannot be justified by any countervailing procompetitive consideration, and therefore violate Section 1 of the Sherman Act and Section 5 of the FTC Act, 15 U.S.C. §§ 1, 45. Accordingly, we issued a Final Order requiring Realcomp to cease and desist from adopting or enforcing any policy, rule, practice, or agreement that interferes with the ability of its broker members to enter into unbundled or discount real estate listing agreements, or any other form of non-traditional listings for the provision of real estate brokerage services. In particular, the order prohibits Realcomp from discriminating against discount broker listings in the transmission of information to public websites and in the search procedures of Realcomp's internal database.

Before us now is Realcomp's motion to stay that order pending appeal.

Applicable Standard

Section 5(g) of the Federal Trade Commission Act provides that Commission cease and desist orders (except divestiture orders) take effect "upon the sixtieth day after such order is served," 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 of the United States." 15 U.S.C. § 45(g)(2); *see also* 16 C.F.R. § 3.56(a). Congress adopted this language in 1994 – replacing former language that permitted FTC respondents automatically to secure delay of Commission orders by seeking judicial review – in order to guard against harm to the public during the pendency of non-meritorious appeals, and to bring practice regarding Commission orders in line with that applicable to orders of federal courts and other administrative agencies. *See* S. Rep. No. 103-130, 103rd Cong., 2d Sess. 11, *reprinted in* 1994 U.S.C.C.A.N. 1776, 1786 (1994).

A party seeking a stay must first apply for such relief to the Commission, 15 U.S.C. § 45(g)(2)(B)(ii), as Respondent has done. Pursuant to Rule 3.56(c) of the Commission's Rules of Practice, an application for a stay must address the following four factors: (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. 16 C.F.R. § 3.56(c); *see, e.g.*, *In the Matter of Toys "R" Us, Inc.*, 126 F.T.C. 695, 696 (1998). We consider these factors below.

Analysis

Respondent Realcomp contends that establishing a likelihood of success on appeal for purposes of a Rule 3.56(c) stay does not require a showing that success is more likely than not; rather, it is sufficient for a movant to show that its appeal involves serious and substantial questions going to the merits of the decision. Mo. at 3-4. It notes correctly, moreover, that the Commission need not question its earlier judgment on the merits in order for it to grant a stay under Rule 3.56(c). *See In re California Dental Ass'n*, 1996 FTC LEXIS 277, at *9 ("it can scarcely be maintained that the Commission must harbor doubt about its decision in order to grant the stay"). But Respondent's

mere disagreement with our decision does not establish serious and substantial questions going to the merits. Here, Realcomp has not identified a factual or legal issue that establishes a likelihood of success on appeal.

First, we reject Realcomp's unsupported position that our rejection of the conclusions of the Administrative Law Judge means that serious and substantial issues exist on appeal. We have considered the ALJ's contrary conclusions in deciding Realcomp's motion, but that decision does not establish that there are substantial issues on appeal. While contrary findings of facts that are based on an ALJ's particular advantage in observing the demeanor of live witnesses at trial may sometimes warrant closer scrutiny on appeal, *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951), this is not the case here. As we explained in our merits Opinion, the ALJ's decision to dismiss the complaint against Realcomp was contrary to well-established legal precedent and sound competition policy, and at odds with basic economic learning. *See* Op. 4 n.4. Indeed, the ALJ's own factual findings on market power and the nature of the restraint establish a violation. *Id*. at 37 and n. 34. As we explained in our opinion, many of the other statements that the ALJ characterized as factual findings were not. *Id*. at 4 n. 4.

Nor is there any merit to Realcomp's argument that our decision relied on a disputed legal standard. The analytical framework we described in *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), was not only affirmed on appeal, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), and endorsed by the other courts of appeal that passed on the issue, *see North Texas Specialty Physicians*, 140 F.T.C. 715 (2005), *aff'd, North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1313 (2009); *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring), but, as we explained in our Opinion, is also rooted in the Supreme Court precedent dealing with the propriety of employing an abbreviated mode of antitrust analysis for certain conduct. *See* Op. 16-19. The cases Realcomp cited may have rejected the application of an abbreviated Rule of Reason on the facts set forth therein, but they did not reject the legal framework itself.

Moreover, our decision did not rely solely on that framework; we also found that (a) Realcomp had market power, (b) its rules discriminating against discount brokers were, by their nature, anticompetitive, and (c)there was evidence of the rules' adverse effects on competition. There is nothing novel or controversial in finding a violation of Section 5 under those circumstances.

Finally, Realcomp's argument that our decision was not supported by the evidence is without merit. Our decision not only considered the entire record and analyzed – and rejected – the same evidentiary arguments Realcomp now attempts to revive, but was based in significant parts on the very ALJ findings that Realcomp argues should be accorded more weight. Particularly when considered in light of the applicable standard of review, *see* 15 U.S.C. § 45(c) ("[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive"); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986) (reviewing courts may not "make [their] own appraisal of the [evidence], picking and choosing * * * among uncertain and conflicting inferences"), Realcomp's challenge to our factual findings adds little to its likelihood of success on appeal.

Turning to the equities on Respondent's side, we note first that Realcomp's motion did not include any supporting affidavits or other sworn statements to document the irreparable harm it alleges, as required by our rules. *See* 16 C.F.R. § 3.56(c). Realcomp attempted to cure this deficiency by appending to its reply a conclusory statement of its Chief Executive Officer, Karen Kage. However, "[s]imple 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. Realcomp's showing of irreparable harm falls short of this standard. Realcomp asserts that confusion among its members and the marketplace will result if it were to put in place the changes required by our Order and then undo them if the Order is set aside. Mo. 12. Kage's affidavit merely repeats Realcomp's naked assertion, with no factual support. We therefore reject such reasoning. In fact, the Order cannot cause substantial irreparable harm because, in essence, it only requires Realcomp to comply with standards that are applied elsewhere in the industry, including by the National Association of Realtors.

We also reject Realcomp's assertion that it will suffer irreparable harm without a stay because it will have to incur programming and system testing costs to comply with our Order. Mo. 12. Realcomp neither quantifies those costs, nor provides any support for this alleged injury. Realcomp's own affiant, in fact, had testified that the changes made to Realcomp's system in order to effectuate Realcomp's anticompetitive policies, which under our Order would have to be reversed, were easy to perform in house, with no need for any outside help. CX 36 (Kage IH), at 57-58. In her affidavit accompanying Realcomp's reply, Karen Kage also claims that instituting the changes required by our Order will result in harm to Realcomp members from "free riding" consumers. Kage Aff., at 2; *see* Mo. 12 ("Realcomp's resources will be used to advertise properties from which Realcomp members will derive no opportunity to compete for sales or commissions."). We dealt with this argument in our Opinion, explaining that in fact there is no free riding problem in this case. *See* Op. 29-32. In fact, as a practical matter, implementing the order will require Realcomp to transmit discount listings from its database to public websites on the same terms as full-service listings; we do not think this creates permanent irreparable harm.

Realcomp's last argument in favor of a stay – that without it, its First Amendment rights to free speech would be restrained – is also without merit. Mo. 13. It is long established that the First Amendment does not excuse anticompetitive conduct, and that steps ordered to remedy such conduct are appropriate notwithstanding any incidental effects on commercial speech. *See, e.g., Lorain Journal Co. v. United States*, 342 U.S. 143, 155-156 (1951); *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

Finally, considering the equities on the other side, by taking together the third and fourth elements of the test for a stay pending appeal, we found in our decision on the merits that Realcomp's anticompetitive policies have resulted in substantial harm to consumers. That remains the case now, and even more so in light of the state of the real estate market in Southeastern Michigan to which Realcomp alludes. Reply 4. We also note in passing that the time that passed between the oral argument and the Commission's decision inured to the benefit of Realcomp and cannot be cited as a basis for future irreparable harm to Realcomp.

Conclusion

We find that Realcomp has not met its burden for a partial stay of the Final Order pending appeal. Accordingly,

IT IS ORDERED THAT the Motion of Respondent Realcomp II, Ltd. For Partial Stay of Order Pending Appeal is **DENIED**.

By the Commission.

Donald S. Clark
Secretary

ISSUED: January 7, 2010