

BACKGROUND

This petition for review concerns certain policies of Realcomp – which operates a Multiple-Listing Service (MLS) in Southeastern Michigan – that were designed to, and did, disadvantage real estate brokers who challenged Realcomp’s traditional, commission-based business model by unbundling their brokerage services and offering them to consumers at often discounted and even flat-fee prices. Realcomp’s policies placed those discount brokers at a significant competitive disadvantage by denying them critical services that were available to full service brokers – even though both types of brokers paid the same fee for Realcomp membership.

Realcomp’s “Website Policy” denied those unbundled and often discounted real estate listings (otherwise known as Exclusive Agency (“EA”) listings) access to certain vital Internet websites used by consumers to search for homes – including NAR’s “Realtor.com”, Realcomp’s own “MoveInMichigan.com,” and the websites of Realcomp members who incorporate listings via Realcomp’s Internet Data Exchange (IDX). Realcomp’s “Search Function Policy” excluded those EA listings from the default setting on the MLS search function, so that brokers looking for homes that meet certain criteria (price, neighborhood, size, etc.) would get a listing of only those homes offered by full service, commission-based brokers, *unless* the searching broker actively changed the default settings to affirmatively search for

discount listings as well. Finally, to effectuate those policies, Realcomp adopted a Minimum Services Requirement which limited the use of the term “Exclusive Right to Sell (ERTS) listing” on its MLS to listings that are based on a minimum bundle of brokerage services. Any listing based on anything less than that full bundle of services could not be designated as an ERTS listing on Realcomp’s MLS, and, thus, would be subject to both the Website Policy and the Search Function Policy.

The Commission filed its administrative complaint against Realcomp on October 10, 2006, charging that Realcomp’s conduct in adopting and enforcing those policies unlawfully restrained trade and competition in the provision of residential real estate brokerage services in Southeastern Michigan, thus violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. Opinion of the Commission (October 30, 2009) (“Op.”), at 3-4. The case was tried before an Administrative Law Judge (ALJ) who found that the nature of the Website Policy and Minimum Services Requirement was likely anticompetitive, and that Realcomp had substantial market power in the relevant markets. Op. 13. Nonetheless, the ALJ concluded that there was an insufficient showing of actual anticompetitive effects from those policies to warrant liability under the FTC Act. He, therefore, dismissed the complaint. *Id.*

The Commission unanimously reversed. It concluded that Realcomp’s conduct should be condemned as an unreasonable restraint of trade under any one of three

distinct variations of the rule of reason framework. It found that Realcomp's policies likely would result in adverse competitive effects in the relevant markets. Op. 22-28. The Commission also found, as did the ALJ, that Realcomp enjoyed substantial power in two product markets in Southeastern Michigan: the market for residential real estate brokerage services, and the market for multiple listing services, which is a pivotal input into the brokerage services market. Op. 34-37. But, contrary to the ALJ's conclusion, the Commission found that the record contained substantial evidence of significant anticompetitive effects resulting from Realcomp's policies. Op. 43-47.

Lastly, the Commission examined Realcomp's two proffered procompetitive justifications and concluded that neither had any merit, and in fact both appeared to be merely post-hoc rationalizations for the challenged policies. Op. 29. The Commission explained that no "free riding" problem existed here, Op. 29-32, and that the so-called "bidding disadvantage" was not a cognizable justification under the antitrust laws, Op. 32-34. Thus, the Commission concluded that Realcomp's policies violated Section 5 of the FTC Act, and issued a cease and desist order.

On December 8, 2009, Realcomp moved the Commission for a partial stay of the final order, pending this Court's disposition of its petition for review. The Commission denied that petition. *See* Order Denying Respondent's Motion for

Partial Stay of Final Order Pending Appeal, FTC Docket No. 9320 (January 7, 2010) (“Order”), attached hereto as Exhibit 1, at 1. The Commission first concluded that Realcomp had failed to establish the existence of serious and substantial issues on appeal, much less an actual likelihood of success. It rejected Realcomp’s contentions that this standard was satisfied simply because the Commission overruled aspects of the ALJ’s ruling, or that one of the alternative theories on which the Commission based its ruling was, according to Realcomp, based on a disputed legal standard. Equally important, the Commission noted that Realcomp’s argument for irreparable harm in the absence of a stay was not supported by any factual evidence, and was instead based entirely on naked assertions. Order, at 4. Indeed, Realcomp’s claims of burdensome costs were contradicted by the record statements of its own affiant, who had testified that the changes to Realcomp’s system were easy to perform in-house. *Id.* Finally, the Commission pointed out that Realcomp failed to address the substantial harm to consumers which the Commission found had resulted from the challenged policies. *Id.*

On January 28, 2009, Realcomp filed this motion.¹

¹ We note that Realcomp waited three weeks after the Commission rejected its counterpart request for a stay to file this motion, leaving the Court no time to rule on its request for a stay before the terms of the Commission’s cease and desist order become operational. *See* Fed. R. App. P. 18(a)(2)(C); Realcomp Mo., at 1.

ARGUMENT

Courts of appeals may stay an administrative agency's order pending resolution of a petition for review pursuant to Fed. R. App. P. 18. *See State of Ohio ex rel. Celebrezze v. Nuclear Regulatory Commission*, 812 F.2d 288, 290 (6th Cir. 1987). To determine whether such a stay is warranted, this Court considers the same four factors considered in evaluating a request for preliminary injunction. *Id.* (citing *Frisch's Restaurant, Inc. v. Shoney's Inc.*, 759 F.2d 1261 (6th Cir. 1985); *In re DeLorean Motor Co.*, 755 F.2d 1223 (6th Cir. 1985); *Mason County Medical Ass'n v. Knebel*, 563 F.2d 256 (6th Cir. 1977)). Those are: (1) whether the movant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether the movant has shown irreparable injury; (3) whether the injunction or stay could harm third parties; and (4) whether the public interest would be served by issuing the injunction or stay. *Frisch's Restaurant*, 759 F.2d at 1263; *see also Tumblebus Inc. v. Cranmer*, 399 F.3d 754, 760 (6th Cir. 2005); *Leary v. Daeschner*, 228 F.3d 729, 736 (6th Cir. 2000).

Realcomp asks this Court to stay the Commission's final order pending appeal, but it fails to demonstrate that it has met any of the necessary prerequisites to such relief. In fact, Realcomp's allegations of harm lack any factual support, and its motion must, therefore, be denied as a matter of law.

1. Realcomp’s Showing of Likelihood of Success Is Decidedly Against Well Established Legal Precedent and Substantial Record Evidence

To satisfy its burden on the likelihood of success on the merits, Realcomp makes a two-part argument: that its conduct cannot be evaluated under anything but the most searching rule of reason analysis, and that under such a standard, its conduct cannot be adjudged to have had actual anticompetitive effects in the relevant markets. Realcomp Mo., at 6-16. Realcomp’s argument, however, is at odds with well established legal precedent, and contrary to the Commission’s factual findings, which, with substantial evidence to support them, are dispositive. 15 U.S.C. § 45(c) (“The findings of the Commission as to the facts, if supported by evidence, shall be conclusive”); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 454 (1986); *In re Detroit Auto Dealers Ass’n*, 955 F.2d 457, 461 (6th Cir. 1992).

As a threshold matter, it bears “reiterat[ing] that the demonstration of a mere ‘possibility’ of success on the merits is not sufficient, and renders the test meaningless.” *Celebrezze*, 812 F.2d at 290 (citing *Mason County*, 563 F.2d at 261 n.4; *DeLorean*, 755 F.2d at 1228-29). The movant must ordinarily show “a strong or substantial likelihood of success,” and because the “probability of success that must be shown is inversely proportional to the degree of irreparable harm” to the movant absent the stay, “at a minimum the movant must show ‘serious questions going to the

merits and irreparable harm which decidedly outweighs any potential harm to the defendant if a [stay] is issued.’” *Id.* (citing *DeLorean*, 755 F.2d at 1229; quoting *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)) (alteration original). Realcomp’s showing falls far short of these standards.

As noted above, the Commission analyzed Realcomp’s conduct under three related but distinct frameworks under the rule of reason rubric, *see* Op. 16-20, and concluded that Realcomp’s policies should be condemned as unreasonable restraints of trade under any one of the three analytical frameworks. First, the Commission analyzed the Realcomp policies under an abbreviated rule of reason analysis, following recent Commission rulings that have been upheld by courts of appeals. *See Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff’d*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005); *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). The Commission concluded that Realcomp’s policies can be characterized as “inherently suspect,” because they ““give rise to an intuitively obvious inference of anticompetitive effect.”” Op. 21 (quoting *California Dental*, 526 U.S. at 781). The Commission reasoned that Realcomp, a joint venture of horizontal competitors, reacted to significant market changes that threatened its traditional, commission-based business model for providing real estate brokerage

services by adopting the subject policies. The effect of those policies – in “restricting the ability of the limited-service, lower-cost brokers to have the same level of exposure on the increasingly popular Internet websites as the full-service brokers” – was to penalize lower-priced competitors by restricting the availability of competitively significant information about their offerings to consumers. Op. 25-26 (citing as examples of antitrust condemnation of such conduct *Indiana Federation of Dentists*, 476 U.S. at 459-64; *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692-93 (1978); *Denny’s Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217, 1219-20 (7th Cir. 1993); *Detroit Auto Dealers*, 955 F.2d at 472).

Realcomp argues that the Commission’s application of the “inherently suspect” standard was “incorrect as a matter of law,” because Realcomp’s “Website Policy is not a price restraint.” Realcomp Mo., at 8-9. But the ALJ himself had found, and the Commission agreed, that brokers offering unbundled services (such as those using EA listing agreements) offered a low-cost alternative to consumers, thus exerting “price pressure” on the full service brokerage commissions, IDF 69, 99; Op. 12, and that the limited service brokers competed not only by unbundling their services, but also by unbundling the commission structure itself, thus enabling home sellers who choose to use these brokers in order to buy only a subset of the full range of brokerage

services to save significantly on the price of a commission, IDF 75-78; Op. 12. Thus, the Website Policy clearly had a significant impact on the price of brokerage services.

Realcomp also argues that the Commission's application of the "inherently suspect" framework is erroneous because other courts have found that standard inappropriate under the circumstances of those cases. Realcomp Mo., at 9-11. That other restraints do not lend themselves to this analytical framework, however, is no reason to reject it here. The Commission, as discussed above, explained in detail why the nature of Realcomp's policies are such that they tend to harm competition. Op. 22-28. The ALJ, too, found that to be the case, at least with regard to Realcomp's Website Policy and Minimum Services Requirement. ID 97, 128. As the Commission pointed out, Realcomp's policies restricted the access of limited service brokers to a vital input – exposure of EA listings on the approved public websites – that is necessary for them to compete effectively because of the increasing role of Internet advertising in real estate sales. When Realcomp's policies are viewed in their proper context, therefore, the Commission's conclusion that they were inherently suspect is amply supported by precedent. Op. 24-27 (discussing the close resemblance of established precedent to the circumstances here).

The Commission did not limit its analysis, however, to the "inherently suspect" framework. It also considered Realcomp's conduct using a more fulsome variation

of the rule of reason, and found substantial indirect as well as direct evidence of anticompetitive effects. Op. 34-47. Applying a line of precedents that infer anticompetitive effect from market power combined with the tendency of restraints to impair competition,² the Commission adopted the ALJ findings that (a) the nature of the Website Policy and Minimum Services Requirement is such that they tended to restrict competition,³ and (b) that Realcomp possessed substantial market power in the relevant markets. Op. 36. In particular, the Commission found that the record contained substantial evidence, documented in the ALJ's own findings, regarding the mechanisms by which the Realcomp policies have adversely affected the workings of the market. They significantly restricted consumer access to limited service listings on public websites, and effectively limited the reach of those listings on the MLS itself, at least until the Search Function Policy was repealed, thereby reducing the "pricing pressure" on the six-percent commissions typically charged by full

² See, e.g., *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998); *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993); *Thompson v. Metropolitan MultiList, Inc.*, 934 F.2d 1566 (11th Cir. 1991); *United States v. Realty Mult-List, Inc.*, 629 F.2d 1351, 1371-72 (5th Cir. 1980).

³ The Commission disagreed with the ALJ regarding the competitive impact of the Search Function Policy. See Op. 38-40.

service brokers. Op. 37.⁴ The Commission concluded that those findings sufficed to support an inference of actual or likely adverse competitive effects in this case, and that the ALJ's contrary conclusion constituted legal error. Op. 37.

Realcomp's motion fails to properly address this portion of the Commission's analysis. Instead, it cites to purportedly contradictory ALJ findings that many of the limited service brokers have prospered economically despite the enforcement of the Realcomp policies. Realcomp's argument, however, misses the mark: rivals need not be driven out of business for the policies to be unlawfully restrictive. *See Northwest Wholesale Stationers v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 295 n.6 (1985) (combination of competitors with market power need not exclude rival from their association in order to unreasonably restrain trade; condemnation may be based on refusal to deal with rival on equal terms). The record evidence, based in part on Realcomp's own data regarding the usage of its MLS system by different brokers, showed that its policies have in fact stifled competition, and, in light of the increasing significance of Internet advertising in the real estate market, placed limited service brokers at a severe competitive disadvantage. *See* Op. 38-40 (discussing decreased usage of EA listings on the Realcomp MLS after its policies went into effect).

⁴ Realcomp did not contest the ALJ findings of its substantial market power in the relevant markets. Op. 35.

Lastly, the Commission also considered the direct econometric record evidence of the policies' anticompetitive effects, and concluded that this evidence corroborates the other record evidence on the policies' impact, and that the ALJ's rejection of this evidence was based on an inadequate understanding of its import. Op. 47. Citing to the ALJ's initial decision without much discussion, Realcomp argues that the Commission disregarded "extensive record evidence casting serious doubt" on the econometric evidence (which Realcomp mischaracterizes as indirect evidence). Realcomp Mo., at 13. The Commission's Opinion shows otherwise.

Complaint Counsel's economic expert, Dr. Darrell Williams, conducted three different types of econometric analyses to determine how Realcomp's policies affected competition. First, his time-series analysis – which compared the share of EA listings in the Realcomp MLS before and after the policies went into effect – showed that the monthly average share of EA listings fell from about 1.5 percent before the policies took effect to about 0.75 percent afterward. IDF 487. The ALJ characterized that drop as "not significant," ID 61, but in doing so, the Commission noted, the ALJ confused the reduction in absolute percentage points with the change in market share, which showed EA listings losing *half* their toehold in the market. Op. 45. Second, a benchmark study – which compared the share of EA listings in the MLSs of Metropolitan Statistical Areas (MSAs) with and without listing restrictions

similar to Realcomp's – showed that the weighted average share of EA listings is higher in MSAs without such restrictions than the MSAs with such restrictions. IDF 514. The ALJ faulted Dr. Williams's selection criteria for the control-MSAs and restriction-MSAs, reasoning that if he had correctly identified the factors that determine the share of EA listings, then one would expect the shares of EA listings in the control-MSAs to be very similar. IDF 526. The Commission rejected this reasoning, pointing out that, even if the variables used as selection criteria were perfect predictors of the share of EA listings, this would not mean that the EA share figures in each MSA would be the same because the values of those variables are not equal for each MSA, as Realcomp's expert himself acknowledged. Op. 45.

Third, Dr. Williams conducted several regression analyses to determine the correlation between Realcomp's policies and the share of EA listings in its MLS, and reached a similar conclusion to the ones from the other studies: that the share of EA listings in the Realcomp MLS would be higher, and the use of the traditional, full service ERTS listings would be lower, in the absence of the Realcomp policies. IDF 552. The ALJ rejected Dr. Williams's conclusion because the regression analyses – despite controlling for twenty-five relevant variables, IDF 550 – failed to include several other variables, including zip code-level data and MSA-level data. The Commission noted that this critique is not supported by the underlying regression

model or data. The relevant information was in fact captured with the county-level data, making the additional variables, while relevant, not independent. Indeed, the county-level data is more varied and arguably provides more detailed information. Thus, controlling for those additional variables would simply have introduced inefficiencies in the regression model (by reducing the reliability of the model without gaining any more helpful information), leading to inaccurate and meaningless results. Op. 44.

Finally, Realcomp's motion faults the Commission for rejecting its purported procompetitive justifications – that its policies addressed “free riding” and “bidding disadvantage” problems – arguing that that was based on a mischaracterization of the economics of the MLS. In its Opinion, the Commission explained in detail why (a) under the circumstances of this case, there is no “free riding” problem for Realcomp to address via its restrictive policies, Op. 29-32; and (b) eliminating the so-called “bidding disadvantage” is not a cognizable justification under the antitrust laws because it does not enhance output or reduce prices, but rather serves to prevent the cost of selling a home from dropping below the prevailing commission rate, a goal that is antithetical to the purposes of the antitrust laws, Op. 32-34. Realcomp's policies seek to protect brokers' commissions by suppressing alternative business models, and by hindering the exchange of information which Realcomp's creation

was supposed to facilitate. As the Commission concluded, “the antitrust laws * * * were enacted for the protection of competition, not competitors’.” Op. 33 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). It also bears noting that Realcomp’s justifications do not appear in the discussions of its board when adopting the policies, and were only invoked after the Commission issued its complaint. Op. 29 n.23.

2. Realcomp’s Showing of Irreparable Harm Is Insufficient as a Matter of Law

Realcomp’s failure to meet the stringent standards for a stay pending appeal is further apparent in its inadequate showing of irreparable harm. “In evaluating the harm which will occur both if the stay is issued and if it is not,” this Court looks “to three factors: (1) the substantiality of the injury alleged, (2) the likelihood of its occurrence, and (3) the adequacy of the proof provided.” *Id.* (citing *Cuomo v. United States Nuclear Regulatory Commission*, 772 F.2d 972, 977 (D.C. Cir. 1985)). “[E]conomic loss,” however, “does not constitute irreparable harm, in and of itself.” *Id.* (citing *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985)). Moreover, “the harm alleged must be both certain and great, rather than speculative or theoretical,” and the movant “must provide some evidence that the harm has occurred in the past and is likely to occur again.” *Id.* (citing *Wisconsin Gas*, 758 F.2d

at 674). Finally, a movant seeking a stay pending appeal “must address each of the factors regardless of its strength, and provide [the Court] with facts and affidavits supporting these assertions.” *Id.* Realcomp’s motion does not come close to satisfying these standards.

Realcomp’s motion identifies a variety of purportedly irreparable harms that will occur absent a stay: marketplace confusion, loss of goodwill, loss of reputation and business opportunities, additional programming and system testing costs, and separate harm to individual broker members of Realcomp. The only factual support for those assertions is the affidavit of Realcomp’s Chief Executive Officer, Karen Kage. But that affidavit merely repeats those naked assertions with no factual support whatsoever, from the record or otherwise, rendering Realcomp’s purported harm entirely speculative. This deficiency alone is fatal to Realcomp’s motion.

Realcomp’s claims of harm, moreover, do not withstand scrutiny. Its assertion that confusion among its members and in the marketplace will result if it were to put in place then undo the changes required by the Commission’s Order is undermined by the record evidence. The Commission’s Cease and Desist Order, in essence, merely requires Realcomp to comply with the standards that are applied elsewhere in the industry, including by the National Association of Realtors. In fact, Realcomp’s

policies also violate NAR's rules, which bar unequal treatment of EA listings, and by which Realcomp's own bylaws require Realcomp to abide. *See* IDF 171-174, 399.

Likewise, Realcomp's assertions of economic harm are without merit. Not only is such economic harm not irreparable as a matter of law, *Celebrezze*, 812 F.2d at 290, but Realcomp's own affiant had testified that the changes made to Realcomp's system in order to effectuate Realcomp's anticompetitive policies, which would now have to be reversed, were easy to perform in-house, with no need for any outside help. CX 36 (Kage IH), at 57-58. Finally, Realcomp's assertions of harm resulting from "free riding" consumers have been amply rebutted in the Commission's Opinion: in fact there is no free riding problem in this case. *See* Op. 29-32.

Realcomp's motion thus establishes neither the substantiality of its alleged injury nor the likelihood of its occurrence, and the proof Realcomp provides is utterly inadequate. Its harm showing is, therefore, insufficient as a matter of law. *Celebrezze*, 812 F.2d at 290.

3. The Established Harm to Consumers and the Public Interest Require Denial of Realcomp's Motion

Because the Commission is a law enforcement agency charged with, among other duties, enforcing the antitrust laws, its interests are no more and no less than those of the American consumer. Accordingly, the third and fourth elements of the

test for a stay pending appeal, *i.e.* the harm to third parties and the public interest, can be considered together. The Commission concluded in its decision on the merits that Realcomp's policies have caused significant harm to consumers in Southeastern Michigan, by having a substantially restrictive effect on competition for real estate brokerage services there. That harm will continue until Realcomp's conduct conforms to the standards set out in the Commission's Order, which incidentally are the prevailing standards in the industry, and are in fact required by the industry's national association, NAR. *See* IDF 399 (NAR's Antitrust Compliance Policy bars local MLS operators from "prohibit[ing] or discourag[ing] participants from taking exclusive agency listings.").

Realcomp's argument that no consumer harm can exist because some limited service or discount brokers have prospered economically is spurious. *See* Realcomp Mo., at 18. Not all rivals have to exit the market before certain conduct is harmful to competition and to consumers, and the record here in fact contains ample evidence, direct and indirect, of the substantial harm caused by Realcomp's restrictive policies. *See* Op. 35-47. Finally, Realcomp's argument regarding the time elapsed before the Commission's decision does not advance its cause; that time inured to the benefit of Realcomp and cannot, equitably, be the basis for extending the life of its anticompetitive policies.

CONCLUSION

For the reasons set forth above, Realcomp's motion for a stay pending appeal should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I certify that all participants in the case are CM/ECF users and that service will be, therefore, accomplished by the CM/ECF system.

/s/ Imad Abyad