

No. 09-4596

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Feb 09, 2010
LEONARD GREEN, Clerk

REALCOMP II, LTD.,)	
)	
Petitioner,)	
)	
v.)	<u>ORDER</u>
)	
FEDERAL TRADE COMMISSION,)	
)	
Respondent.)	

Before: KENNEDY, BOGGS, and COLE, Circuit Judges.

Realcomp II, Ltd., a Michigan association of real estate brokers, petitions for review of an opinion and a cease-and-desist order issued by the Federal Trade Commission (“FTC”). The FTC concluded that three of Realcomp’s policies as to certain types of listing agreements in its multiple-listing service constituted unlawful restraints of trade in violation of the Sherman Act and the Federal Trade Commission Act, 15 U.S.C. §§ 1, 45. The FTC ordered Realcomp to “amend its rules and regulations” and further to inform each member of the changes. Following issuance of the order, the FTC denied Realcomp’s motion for a stay. Realcomp now moves this court for a partial stay pending this court’s review, noting that it already has suspended two of the policies at issue. The FTC responds in opposition to the motion.

The factors governing the stay of an agency’s final order pending judicial review are the same as those considered in evaluating a request for injunctive relief. *Ohio ex rel. Celebrezze v. Nuclear Regulatory Comm’n*, 812 F.2d 288, 290 (6th Cir. 1987). Those factors are “(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood

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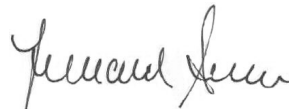
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that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay.” *Id.* With respect to success on the merits, “the language courts have used to describe the ‘success factor’ has varied, and we have previously found that the variance can best be reconciled by recognizing that the four considerations are factors to be balanced and not prerequisites to be met.” *Id.* (citing *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985); see also *Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991) (“To justify the granting of a stay, however, a movant need not always establish a high probability of success on the merits.”); but see *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009) (stay applicant must show more than a “possibility” of success on the merits)).

In review of an FTC decision, “[t]he findings of the Commission as to the facts, if supported by evidence, shall be conclusive.” *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454 (1986) (quoting 15 U.S.C. § 45(c)). With respect to legal issues, the FTC’s determinations are entitled to some deference, but ultimately such issues are “for the courts to resolve.” *Id.* Realcomp challenges both factual determinations and legal holdings. Upon balancing those arguments as stated in Realcomp’s motion, the FTC’s decision, and especially the assertions with respect to irreparable harm, we decline to enter a stay.

Therefore, the motion for a partial stay is **DENIED**.

ENTERED BY ORDER OF THE COURT



Leonard Green
Clerk