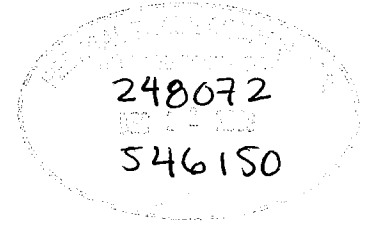


ORIGINAL

PUBLIC

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

REPLY OF RESPONDENT REALCOMP II, LTD.
TO COMPLAINT COUNSEL'S OPPOSITION TO MOTION
FOR PARTIAL STAY OF ORDER PENDING APPEAL

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INTRODUCTION

In its Motion for Partial Stay of Order Pending Appeal (“Motion for Stay”), respondent Realcomp II, Ltd. (“Realcomp”) seeks a partial stay of the Commission’s October 30, 2009, Final Order (“Order”), pursuant to 16 C.F.R. § 3.56, until the final disposition of its appeals in federal courts. Complaint Counsel and Realcomp agree on the factors governing a decision whether to grant the 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 likely to result from the requested stay; and (4) why the stay is in the public interest. *See* Motion for Stay at 2-3 (citing 16 C.F.R. § 3.56(c); *Washington Metro. Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844-845 (D.C. Cir. 1977); *In re California Dental Association*, 1996 FTC LEXIS 277, at *2-3 (May 22, 1996)); Complaint Counsel’s Opposition (“CC Opp.”) at 2. Realcomp addressed each of those standards in its Motion for Stay. Complaint Counsel’s Opposition raises no valid basis to conclude that Realcomp has not satisfied those standards.

ARGUMENT

I. Realcomp Has Established a Material Likelihood of Success on Appeal

To demonstrate a likelihood of success on the merits, it is sufficient for the movant to show that its appeal involves serious and substantial questions going to the merits of the decision. *Six Clinics Holding Corp., II v. Cafcomp Systems*, 119 F.3d 393, 402 (6th Cir.1997). The crux of Complaint Counsel’s objection to Realcomp’s argument concerning its likelihood of success on appeal is that Realcomp “merely re-packages the arguments that the Commission addressed in its ... Opinion.” CC Opp. at 3. This is not an authoritative, let alone persuasive, basis for objection.

Indeed, the Commission has made similar observations about motions for stay in other matters. Complaint Counsel cites, for example, *In re Toys “R” Us, Inc.*, 126 F.T.C. 695 (1998), in

which the Commission observed that the respondent's "primary arguments in favor of their likelihood of success on the merits merely revisit arguments that the Commission has already considered and rejected ..." *Id.* at 697. Of course, the Commission went on to *grant* the stay (in part) in that matter, *Id.* at 701, so Complaint Counsel's observation is hardly dispositive. *See also In re Novartis Corporation, et. al.*, 128 F.T.C. 233, 233-344, 236-37 (1999), in which the Commission similarly observed that Novartis' arguments in favor of its likelihood of success on the merits were based on arguments that the Commission rejected in its opinion, but nonetheless granted a partial stay of its order.

Presumably, in the absence of a material change in the law or facts (in which case a motion for reconsideration would be preferred over a motion for stay) any respondent's likelihood of success on the merits will be found in the case presented to the Commission. Thus, the Commission has recognized that it need not harbor doubt about the correctness of its opinion to acknowledge that a respondent's case presents serious and substantial questions for appeal. *In re California Dental Association*, 1996 FTC LEXIS 277 at *9.

Realcomp will challenge the Commission's application of a "quick look" rule of reason analysis to the facts of this case, and there is an abundant body of case law and commentary suggesting that Realcomp's objections are well grounded. Motion for Stay at 5-7. Further, we will argue that the Commission's reliance on indirect evidence and discredited expert testimony, and rejection of contrary direct evidence, is insufficient to demonstrate "that within the relevant market, the defendants' actions have had substantial adverse effects on competition, such as increases in price, or decreases in output or quality. ..." *United States v. Visa USA Inc.*, 344 F.3d 229, 238 (2d Cir. 2003).

In this regard, Complaint Counsel objects to our assertion that the conflict between the findings and conclusions of the Commission and those of Chief Administrative Law Judge McGuire in this matter itself is strong evidence that Realcomp can demonstrate a likelihood of success on appeal. Complaint Counsel argues that we have no authority for this assertion. But in fact that is the only credible interpretation of *Universal Camera* in this context, for if the opinion of an administrative law judge, as the original fact-finder in an agency proceeding, counted for little or nothing at all, the Supreme Court would not have gone to such lengths to assure that the courts of appeals considered such opinions upon petitions for review.¹ Nor would numerous courts of appeals have concluded that the existence of conflicting opinions between an ALJ and an agency are a signal for closer scrutiny. *See* Motion for Stay at 4.

II. Realcomp Will Suffer Irreparable Harm in the Absence of a Stay

For purposes of ascertaining the harm that would result in the absence of a stay, the Commission must presume that its decision was incorrect. *Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, C.J., in chambers) (listing as one criterion for stay pending appeal “a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed”).

Complaint Counsel attacks the lack of substantiation of Realcomp's assertions of irreparable harm. CC Opp. at 6-7. However, as set forth in the Motion for Stay, Realcomp's assertions are substantially grounded in the record in this case. Realcomp asserts (and has presented evidence in this case) that the challenged Website Policy enhances the value of the MLS by eliminating free

¹ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951).

riding by home sellers who compete with Realcomp members and by eliminating a bidding disadvantage for home buyers who are represented by a cooperating broker.² Complaint Counsel disputes the validity of Realcomp's arguments, but that is truly a question for appeal. If Realcomp is correct in its view, complying with the Order will result in harm to Realcomp members that cannot be quantified and will not be recoverable in the form of monetary damages or otherwise, and will diminish the reputation of the Realcomp MLS. Such losses constitute irreparable harm.³

Attached as Exhibit A is the affidavit of Karen Kage, the Executive Director of Realcomp, attesting to the existence of these losses if the Order is not stayed. Ms. Kage further observes that, in particular, smaller brokers will not have the means or opportunity to avoid being placed at a significant competitive disadvantage in what is already a particularly challenging and vulnerable economic time for realtors in southeastern Michigan.⁴

III. Staying the Order Will Harm Neither the Public Interest Nor Other Parties

Complaint Counsel's argument that the public interest requires denial of the stay merely recites the Commission's findings that the challenged policies restricted competition and the requirements of the Order. CC Opp. at 9-10. We agree that the Commission so found, but

² Respondent's Proposed Findings of Fact and Conclusions of Law (July 31, 2007) ¶¶ 28, 172, 183, 188, 244, 246-48; Initial Decision Findings of Fact (Dec. 10, 2007) ¶¶ 608-11, 629-32; Initial Decision (Dec. 10, 2007) at 121, 124-25.

³ See *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19-20 (1st Cir. 1996) (vendor selling items primarily on wedding registries would be irreparably damaged from "lost sales of other registry items, alienation of future registrants, and harm to its reputation"); *Collier v. Airtite, Inc.*, 1988 WL 96363 *1 (N.D. Ill. Sept. 15, 1988) (irreparable harm exists where "there is no way to calculate the number of prospective customers who may select an alternative [product]"). It is axiomatic that there is no recompense for losses incurred in complying with a governmental order that is later invalidated. *Finer Foods, Inc. v. U.S. Dept. of Agriculture*, 274 F.3d 1137, 1140 (7th Cir. 2001).

⁴ Complaint Counsel's assertion that the visitation of similar relief upon other MLS's through consent orders demonstrates the absence of irreparable harm is mere *ipse dixit*. There is no evidence in the record here that harm has not resulted to those other organizations from acceding to the Commission's requested relief, or that the relief has not made those MLS's less efficient, and Complaint Counsel presents none.

significantly, the ALJ found to the contrary – that the evidence failed to establish that the challenged Realcomp Policies had any adverse effect on competition. Respondent has demonstrated strong likelihood of success on the merits of its appeal. Thus, Complaint Counsel's conclusory statement that, because the Commission ruled against Realcomp, the public interest cannot afford a stay of the Order in this case pending a well-grounded appeal is simply a misplaced thumb on the scale of the competing equities.

This is all the more the case in light of the significant length of time taken by the Commission to render a decision in this matter. Complaint Counsel asserts that immediate compliance is necessary because “[s]ince the time period at issue in the trial record, the pressure on Detroit are home sellers from declining home prices has increased.” CC Opp. at 10. But respondent bears no responsibility for the length of time at issue and, given that Complaint Counsel cites public sources for this proposition, we must presume that the Commission was aware of those pressures during the two years, eleven months, and ten days that this case was pending. This lapse of time undermines Complaint Counsel's argument that an immediate cessation of the challenged Realcomp Policies is suddenly necessary to avert public or private harm.

CONCLUSION

For the reasons set forth above and in its Motion for Stay, Respondent Realcomp II, Ltd. requests that the Commission stay its order of October 10, 2009, other than paragraph 5 of Part II thereof, during the pendency of appeals in the federal courts.

Respectfully submitted,



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**Counsel for Respondent
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December 21, 2009

Exhibit A

(attached)

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
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a corporation

Docket No. 9320

AFFIDAVIT OF KAREN KAGE

Karen Kage, being first duly sworn, says that if called to testify as a witness, she can do so competently based on upon her personal knowledge to the following:

1. I am the Chief Executive Officer of Realcomp II, Ltd. ("Realcomp").
2. If the Commission's October 30, 2009, Order ("Order") is not partially stayed pending appeal as requested by Realcomp in its Motion for Partial Stay of Order Pending Appeal, Realcomp and its members will suffer irreparable harm in the following ways:

(a) Confusion will be created among Realcomp members and in the marketplace if Realcomp institutes the changes required by the Order when those changes are ultimately reversed if Realcomp is successful on its appeal to the Sixth Circuit Court of Appeals. Among other things, if Realcomp is required to publish Exclusive Agency "EA" listings to public websites and then is permitted to restrict that publication, uncertainty will exist for

brokers and customers concerning the publication status of EA listings and their expectations will be frustrated.

(b) Instituting the changes required by the Order will subject Realcomp and its members to the harmful effects of free riding by persons who are not members and who seek to utilize the promotional means paid for by Realcomp members to sell their homes without paying the associated costs. In the event Realcomp prevails on appeal, Realcomp's members will have been subjected to harm in the form of lost sales opportunities that cannot be quantified and will not be recoverable. This also will result in loss of goodwill by Realcomp among its members.

(c) Implementing the changes required by the Order will impose the greatest harm to the Realcomp members who are least equipped to respond to those changes, the smaller brokers. The southeastern Michigan real estate market remains economically depressed. Larger brokers nonetheless may have the means to make changes in their own information technology systems to avoid the effects of the Commission's mandated changes in Realcomp's policies, i.e., so that they individually are not placed at the competitive disadvantage of promoting the listings of persons who are free riding to avoid paying commissions to Realcomp members. However, smaller brokers will not have the same means or opportunity to make those changes thereby placing themselves at a significant competitive disadvantage in what is already a particularly challenging and vulnerable economic time for realtors in southeastern Michigan.

(d) The effects of imposing the Order will deprive Realcomp members of doing business in the manner that they deem necessary to avoid the problem of free riding.

Public

Karen Kage
Karen Kage

Subscribed and sworn to before me this
21 day of December, 2009

Gloria Baykian

Notary Public, State of Michigan
Oakland County, Michigan

My Commission Expires: Nov. 29, 2012

Acting in County of Oakland

793025_1.DOC

GLORIA BAYKIAN
NOTARY PUBLIC, STATE OF MI
COUNTY OF OAKLAND
MY COMMISSION EXPIRES Nov 29, 2012
ACTING IN COUNTY OF Oakland

Certificate of Service

I hereby certify that on this ^{22nd}~~21st~~ day of December, 2009, I caused an original and twelve paper copies of the foregoing Reply of Respondent Realcomp II, Ltd. to Complaint Counsel's Opposition to Motion for Partial Stay of Order Pending Appeal to be served by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
Via Office of the Secretary, Room H-135
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

and

Donald S. Clark, Esq., Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

and one copy of the foregoing Reply of Respondent Realcomp II, Ltd. to Complaint Counsel's Opposition to Motion for Partial Stay of Order Pending Appeal to be served by electronic transmission and overnight courier to:

Peggy Bayer Femenalla
Federal Trade Commission
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Rm. NJ-6219
Washington, DC 20001