

ORIGINAL

PUBLIC

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



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In the Matter of

Docket No. 9320

REALCOMP II LTD.,

Chief Administrative Law Judge

Respondent.

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Stephen J. McGuire

**RESPONDENT REALCOMP II, LTD'S PRETRIAL BRIEF**

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## INTRODUCTION

This case seeks to redress a harm that does not exist. Consumers have not been injured by Respondent's practices at issue. Rather than focusing on consumers, this matter essentially rests on a group of brokers called "Exclusive Agents." But the harm this group claims to have suffered is of questionable validity – these agents largely admit that their businesses are doing well – and in any event is not attributable to Respondent's policies. Moreover, Complaint Counsel seeks relief that at most would marginally benefit one group of consumers at the expense of another. Because Complaint Counsel cannot prove injury to consumers, and cannot establish that the requested relief would improve consumer welfare, the claims against Respondent must fail.

## SUMMARY OF FACTS

Respondent Realcomp II Ltd. ("Respondent" or "Realcomp") is a Michigan corporation that is owned by certain realtor boards and associations. (Complaint and Answer at ¶ 1.)<sup>1</sup> Realcomp serves its members in Southeastern Michigan, including Livingston, Oakland, Macomb, St. Clair and Wayne Counties ("Realcomp Service Area"). (*Id.* at ¶ 5.) Realcomp's primary function is operating the Realcomp Multiple Listing Service ("Realcomp MLS") for the benefit of its members. (Answer at ¶ 2.)

To be listed in the Realcomp MLS, a home seller must enter into a listing agreement with a real estate broker (the "listing broker") that is a member of the Realcomp MLS. The compensation paid by the home seller to the listing broker is determined by negotiation between the home seller and the listing broker. Whatever type of listing agreement is entered into between the home seller and the listing real estate broker, the Realcomp MLS rules require that the home

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<sup>1</sup> The "Complaint" refers to the Complaint that was issued in this case, dated October 10, 2006. The "Answer" refers to Realcomp's Answer to that Complaint, dated November 20, 2006.

seller must offer to pay a commission to a cooperating real estate broker, known as a selling broker, who successfully secures a buyer for the property. (Complaint and Answer at ¶ 12.)

Selling brokers bring the buyer of residential real estate to the transaction. The Realcomp MLS is a vehicle for selling brokers to obtain information about properties listed in the Realcomp Service Area. These listings represent opportunities for the selling brokers to obtain commissions. In other words, the Realcomp MLS is a mechanism by which listing brokers make blanket unilateral offers of compensation to selling brokers. The Realcomp MLS is not accessible by, and is not a source of information for, consumers.

For purposes of this matter, the parties have agreed to the following definitions:

An Exclusive Right to Sell Listing ["ERTS"] is a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. An Exclusive Right to Sell Listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services.

An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency["EA"] Listing. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

(Complaint and Answer at ¶¶ 8, 9, emphasis added.)<sup>2</sup>

A seller who has entered into an Exclusive Agency Listing has an economic incentive to find a buyer without the assistance of either the listing or a selling broker. In such a case, the

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<sup>2</sup> Exclusive right to sell listings are sometimes called "full service" listings. Exclusive agency listings are sometimes called "limited service" listings.

seller may avoid paying a commission altogether. In this respect, the seller of a property subject to an Exclusive Agency Listing is in competition with both the listing broker and prospective selling brokers. (*See Sweeney Dep. at 70:12-72:22.*)

As a service to its members, Realcomp transmits Realcomp MLS listing information to certain websites (including Realtor.com) selected by Realcomp to receive that information (collectively, "Approved Web Sites"). (Complaint and Answer at ¶ 15.) Realcomp makes these submissions voluntarily and not pursuant to any legal obligation. Thus, Realcomp is under no obligation to transmit any listing information to any public website at any time.

In 2001, Realcomp adopted and approved a rule that stated: "Listing information downloaded and/or otherwise displayed pursuant to IDX [Internet Data Exchange] shall be limited to properties listed on an exclusive right to sell basis" (the "Web Site Policy"). (Complaint and Answer at ¶ 13.)<sup>3</sup> Under the Web Site Policy, information concerning Exclusive Agency Listings is not transmitted by Realcomp to the Approved Websites. The Complaint asserts (Complaint at ¶ 14) that the Web Site Policy prevents information from being transmitted to public real estate websites, which Realcomp denies as untrue (Answer at ¶14) because the information can be, and is, transmitted to various public real estate websites (including Realtor.com) by other means.

In or about the fall of 2003, Realcomp changed the Realcomp MLS search screen to default to Exclusive Right to Sell Listings ("Search Function Policy"). This means that Exclusive Agency listings are not included in the initial search database unless a Realcomp member selects additional listing types in the search screen. (Complaint and Answer at ¶ 16.) Realcomp members may change the search database to include EA listings for any particular

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<sup>3</sup> This Rule did not become effective until the end of 2003. (April 3, 2007 Report of Complaint Counsel's Expert, Darrell Williams at 32, fn 77.)

search, or, alternatively, may change the default search settings so that Exclusive Agency listings are always included in the database. Either option is easily accomplished and neither is prohibited by Realcomp. (*See Taylor Dep. at 123:12-22*).

Realcomp does not deny membership to brokers who choose to offer Exclusive Agency Listings to their clients. (*See Mincy Dep. at 18:7-19*.)

Realcomp has very recently changed its Rules, repealing the Search Function Policy and to change the definition of ERTS Broker, so that minimum services are no longer required (RX 160). As such, these matters, to the extent they are raised by Complaint Counsel, are moot and should not be considered as part of this case. *People v. Colorado Springs Bd of Realtors, Inc.*, 692 P.2d 1055, 1064 (Colo. 1984).

## ARGUMENT

### I. INTRODUCTION.

The Complaint alleges that the Web Site Policy and the Search Function Policy restrain and eliminate competition in the provision of residential real estate brokerage services (Complaint at ¶¶ 24, 25) by discriminating in favor of traditional (i.e., ERTS) listing contracts and against "limited service" contracts (including EA). The Complaint further asserts that "Participation in Realcomp is a service that is necessary for the provision of effective residential real estate brokerage services to sellers and buyers of real property in the Realcomp service area" and "Access to the Approved Web Sites is a service that is necessary for the provision of effective residential real estate brokerage services in the Realcomp service area." (Complaint at ¶¶ 19, 20.)

Although these assertions would appear to state an "essential facility" claim against Realcomp, Complaint Counsel subsequently has stated on the record that the challenged conduct "reflects concerted action among horizontal competitors," in the nature of a "group boycott"

under § 1 of the Sherman Act (May 4, 2007 Opposition at 6-7) and that "the essential facilities doctrine does not apply." (May 4, 2007 Opposition at 8.)

But the challenged conduct is not a classic boycott. Complaint Counsel does not allege that Realcomp's policies prevent non-member brokers from competing with members, or that Realcomp members have collectively refused to do business with specific suppliers or customers. The gravamen of the Complaint is that the challenged Realcomp policies affect some Realcomp members in different ways than others. "Moreover, the users of a MLS are not truly competitors. The ultimate purpose of the information exchange is the formation of a subagency relationship between the listing broker and the cooperating broker. *Derish v. San Mateo-Burlington Bd. of Realtors*, 136 Cal. App. 3d 534, 538-39; 186 Cal. Rptr. 390 (1982) (citations omitted). This curious characterization of these policies as a group boycott raises significant questions as to the plausibility of the alleged competitive harm.

**A. The Rule of Reason Analysis Applies to These Allegations.**

Only conduct that is "manifestly anticompetitive" is appropriate for *per se* condemnation under the antitrust laws. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988). The alleged boycott in this case does not involve the enforcement of a price agreement, territorial allocation, coercive conduct toward suppliers or customers, or denial of access to an essential facility. Rather, the alleged harm to competition here is speculative in the sense that adverse effects on consumers are not readily foreseeable. Indeed, Complaint Counsel seeks to weave a causal relationship between the type of information transmitted by Realcomp to the Internet and actual increases in prices paid by consumers for real estate. This does not define a context for a *per se* analysis. See *Northwest Wholesale Stationers v. Pacific Stationary and Printing Co.*, 472 U.S. 284, 298; 105 S. Ct. 2613; 86 L.Ed 2d 202 (1985) (holding that the *per se* rule applies only where the challenged practice facially appears to be one that always or almost always would tend

to restrain competition and decrease output); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59; 106 S. Ct. 2009; 90 L. Ed. 2d 445 (1986) ("we have been slow to condemn rules adopted by professional associations as unreasonable per se . . . , and, in general, to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious . . ."); *California Dental Ass'n v. FTC*, 526 U.S. 756, 771; 119 S. Ct. 1604; 143 L. Ed. 2d 935 (1999) (remanding for full rule of reason consideration where the challenged advertising restrictions "might plausibly be thought to have a net procompetitive affect, or possibly no effect at all on competition"). *See also, People v. Colorado Springs Bd. of Realtors, Inc.*, 692 P.2d 1055, 1063, 1068-69 (1984) (holding that where arrangement limiting access to MLS service was not shown to be designed to destroy abilities of competitors to compete or that it in fact restricted the ability of potential sellers and purchasers of homes to enjoy competitive markets, the State failed to carry its burden of proving a per se violation, and remanding for a Rule of Reason analysis).

This case thus is governed by the Rule of Reason. The Commission itself has stated, "Rule of reason analysis focuses on the state of competition with, as opposed to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement." U.S. Dept. of Justice and Federal Trade Comm., *Antitrust Guidelines for Collaborations Among Competitors*, § 3.3 (April 2000). This inquiry is considered to comprise the "four classical, subsidiary antitrust questions" that are part of a "traditional rule of reason analysis":

- (1) What is the specific restraint at issue?
- (2) What are its likely anticompetitive effects?
- (3) Are there offsetting procompetitive

justifications? (4) Do the parties have sufficient market power to make a difference?

*California Dental Ass'n. v. FTC*, 526 U.S. 756, 782 (1999) (Breyer, J., dissenting).

This inquiry is mirrored in 15 U.S.C. § 45(n), which provides:

The Commission shall have no authority under this section ... to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

Thus, even assuming that there is an injury, it is not necessarily "unfair" under the law. Instead there must be an "injury to consumers" that satisfies a three-part test. As the Commission has recognized: "First of all, the injury must be substantial. The Commission is not concerned with trivial or merely speculative harms . . . . Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces . . . . Finally, the injury must be one that consumers could not reasonably have avoided." (FTC Policy Statement on Fairness dated December 17, 1980, which was later codified by 15 U.S.C. §45(n).) As explained below, Complaint Counsel cannot satisfy this required test.

## **II. COMPLAINT COUNSEL CANNOT CARRY THEIR BURDEN OF PROOF.**

### **A. Complaint Counsel Cannot Prove that Realcomp Has Market Power in a Market Relevant to the Allegations in this Case.**

Proof of market power in a relevant market is, in the ordinary case, considered an essential element of an antitrust challenge to concerted action under the Rule of Reason. *See, e.g., Los Angeles Memorial Coliseum v. Nat'l Football League*, 726 F.2d 1381, 1392 (9th Cir 1984) (delineation of relevant market essential because antitrust policy divorced from market considerations would lack objective benchmarks). Whether or not the defendants have market power in a properly defined market will determine whether the challenged conduct actually

threatens competition (*i.e.*, "makes a difference"). *California Dental Ass'n, supra*, at 782. Market power is understood to mean the ability to injure consumers by curtailing output or raising price. Without market power, there is no probability of injury to consumers and, consequently, no antitrust violation. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 568 (7th Cir. 1986) (Easterbrook, J., dissenting); *see also, SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994) ("Proof of market power, then, for many courts is a critical first step, or 'screen,' or 'filter,' which is often dispositive of the case.") (citation omitted); *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) (absent market power, any restraint resulting from defendants' conduct is unlikely to implicate Section 1); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996) (challenge to television broadcast restraints imposed by league on its member teams required proof that league had market power in a relevant market); *Lie v. St. Joseph Hosp. of Mt. Clemens, Mich.*, 964 F.2d 567 (6th Cir. 1992) (analysis of potential adverse effects on competition involves inquiry into market definition and market power).

The Complaint in this matter alleges a relevant market comprising "[t]he provision of residential real estate brokerage services to sellers and buyers of real property in the Southeastern Michigan and/or the Realcomp Service Area" (Complaint at ¶ 17, emphasis added), and then posits that Realcomp has market power in the alleged market. "By virtue of industry-wide participation and control over the ability of real estate brokers to participate in the Realcomp MLS and the ability of home sellers to publicize their homes for sale on Approved Web Sites, Realcomp has market power in the Realcomp Service Area." (Complaint at ¶ 22.)

The Complaint further alleges that the "publication and sharing of information relating to residential real estate listings for the purpose of brokering residential real estate transactions is a

