

ORIGINAL

PUBLIC VERSION

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION



In the Matter of

Docket No. 9320

REALCOMP II LTD.,

Chief Administrative Law Judge
Stephen J. McGuire

Respondent.

RESPONDENT REALCOMP II LTD.'S UNOPPOSED MOTION FOR *IN CAMERA*
STATUS OF TESTIMONY OF KAREN KAGE AND DOCUMENTS
PRODUCED BY REALCOMP II LTD. AS WELL AS DOCUMENTS PRODUCED BY
REALCOMP BOARD MEMBERS

Pursuant to Section 3.45 of the Federal Trade Commission's Rules of Practice, Respondent Realcomp II Ltd. ("Realcomp") hereby moves for *in camera* treatment of certain testimony and documents. Those documents, including documents produced by Realcomp (including CX 9, 10, 11, 12, 22-25, 48, 54, 56, 59, 88, 91, 97, 245, 264, 265, and 282, Exhibits 1-19 hereto) and portions of the deposition testimony of Karen Kage, including testimony on pages 120-127, 157-160, 167-177, and 181-184 of Ms. Kage's February 20, 2007 deposition transcript (Exhibit 20), contain Realcomp's highly confidential¹ business information and should be kept from public disclosure. Disclosure would irreparably injure Realcomp and hinder its standing in the marketplace.

¹ In order to avoid additional confusion, no differentiation is made between "confidential" and "restricted confidential" information herein although such a distinction exists pursuant to the Protective Order. This is because both categories of confidential material deserve *in camera* treatment and whether information is designated as merely "confidential" or "restricted confidential" is not relevant to this tribunal's analysis.

In addition, documents produced by various Realcomp board members also contain highly confidential business information relevant to the various deponents' businesses and standing in the marketplace. These documents, too, should be exempt from public disclosure.²

As described more fully below, the testimony and documents contain current, highly-sensitive, non-public information that would cause Realcomp and the various board members serious competitive injury if published in this proceeding. Respondent and Complaint Counsel have discussed the documents which form the basis of the motion and Complaint Counsel is unopposed to the *in camera* treatment of these documents.

A. Legal Standard for *In Camera* Treatment

The documents and testimony warrant *in camera* treatment as provided by Commission Rule of Practice 3.45(b). 16 C.F.R. § 3.45(b). Under 16 C.F.R. § 3.45(b), requests for *in camera* treatment are to show that public disclosure of the document in question “will result in a clearly defined, serious injury to the person or corporation whose records are involved.” *H.P. Hood & Sons, Inc.* 58 F.T.C. 1184, 1188 (1961). That showing can be made by establishing that the documents in question are “sufficiently secret and sufficiently material” to the requestor’s business “that disclosure would result in serious competitive injury.” *In re General Foods Corp.*, 95 F.T.C. 352, 355 (1980). In this context, “the courts have generally

² Information was provided from board members both via deposition and written exhibit. Specifically, the confidential documents and testimony include certain portions of the depositions of Douglas Hardy, Robert Gleason, Douglas Whitehouse, Gerald Burke, and Robert Taylor. Confidential exhibits include CX 284, 285, 286, 298, 299, 301, 310, 311, 323, 324, 325, 329, 331, 332, 333, 334, 378, and 379, Exhibits 21-25 herein).

attempted to protect confidential business information from unnecessary airing.” *Hood, supra*, at 1188.

A showing of “serious injury” can be made by “establishing that the documentary evidence is ‘sufficiently secret and sufficiently material to the applicant’s business that disclosure would result in serious competitive injury,’ and then balancing that factor against the importance of the information in explaining the rationale of Commission decisions.” *Order On Respondent’s Motions for In Camera Treatment*, FTC No. 9305, at 3 (October 7, 2004) (citations omitted).

B. The Testimony and Documents Should Have *In Camera* Treatment

This litigation is not aimed at destroying Realcomp’s standing in the marketplace or competitive business advantage. However, the testimony and documents discussed below contain, at a minimum, sensitive business information which, in the hands of Realcomp’s competitors, would greatly diminish Realcomp’s standing in the marketplace and cause competitive harm to Realcomp. As such, they should be treated *in camera* and remain free from public disclosure. The individual documents and testimony are discussed in turn, below.

A. Realcomp Testimony and Exhibits

1. [REDACTED]

[REDACTED]

2. [REDACTED]

3. [REDACTED]

4. [REDACTED]

5. [REDACTED]

6. [REDACTED]

7. [REDACTED]

8. [REDACTED]

[REDACTED]

9. **[REDACTED]**

10. **[REDACTED]**

11. **[REDACTED]**

12. **Karen Kage Testimony: February 20, 2007 Deposition**

Exhibit 20 contains portions of the deposition testimony of Realcomp representative Karen Kage. The confidential portion of this testimony concerns **[REDACTED]**

[REDACTED]

B. Board Member Testimony and Exhibits

Various non-party Realcomp board members were deposed in this matter. Some of those board members confided proprietary business information which should not be disclosed publicly. Each of the members noted below has asked that the information that they provided as part of this proceeding be kept confidential as so designated when the testimony was elicited or documents were produced.

Non-parties deserve “special solicitude” when requesting in camera treatment for confidential business information. *In the Matter of Kaiser Aluminum & Chemical Corporation*, 103 F.T.C. 500, 500 (1984) (order directing in camera treatment for sales statistics over five years old). Reasonable periods of in camera treatment encourage non-parties to cooperate with future discovery requests in adjudicative proceedings. These non-parties have cooperated with the discovery demands in this case. Their confidential testimony should be afforded every protection that this tribunal has to offer.

1. Douglas Hardy

The information contained as Exhibit 21 includes testimony and exhibits produced by Realcomp Board member Douglas Hardy. Mr. Hardy respectfully requests that this information be kept confidential and treated *in camera*, as discussed below.

a. Deposition Testimony

Complaint counsel elicited various information from Mr. Hardy at deposition, including testimony relating to exhibits designated as CX 284-286, and CX 298 and 299. These exhibits, included as exhibits 21(A) through (E), include a [REDACTED]. Deposition pages 34-38, 57-62, 63-73, 81-82, and 133-138³ [REDACTED].

The testimony concerns confidential business dealings and should not be publicly disclosed.

2. Robert Gleason

The information contained as Exhibit 22 includes testimony and exhibits produced by Realcomp Board member Robert Gleason. Mr. Gleason respectfully requests that this information be kept confidential and treated *in camera*, as discussed below.

a. Deposition Testimony

Mr. Gleason's deposition, taken February 23, 2007, contains certain confidential portions of testimony as designated on pages 37-39 and 70-81 of the deposition transcript. Mr. Gleason's testimony discusses CX 329 and 331 and 333, which should likewise remain confidential. Those documents are [REDACTED].

³ Page numbers appear to be misidentified at the beginning of the deposition transcript.

3. Douglas Whitehouse

The information contained as Exhibit 23 includes testimony and exhibits produced by Realcomp Board member Douglas Whitehouse. Mr. Whitehouse respectfully requests that this information be kept confidential and treated *in camera*, as discussed below.

Certain portions of Mr. Whitehouse's deposition testimony has been marked as confidential. Those include pages 15-18, 59-82, and 98-103. These deposition references concern information relating to CX 301, 310, 311, 323, 324, and 325. Each of these items is confidential because they relate to Mr. Whitehouse's [REDACTED]. The information would jeopardize Mr. Whitehouse and his firm in the marketplace were it disclosed to competitors and the public.

4. Gerald Burke

The information contained as Exhibit 24 includes the deposition testimony of Realcomp Board member Gerald Burke. Mr. Burke respectfully requests that this information be kept confidential and treated *in camera*.

The confidential testimony, contained at pages 25-31 and 48-49, includes a discussion of [REDACTED]. There is a discussion of [REDACTED]. Further, there is a [REDACTED]. Again, this is a discussion of [REDACTED] and should not be released to the public at large.

5. Robert Taylor

The information contained as Exhibit 25 includes testimony and exhibits produced by Realcomp Board member Robert Taylor. Mr. Taylor respectfully requests that this information be kept confidential and treated *in camera*, as discussed below.

a. Deposition Testimony, [REDACTED]

Mr. Taylor's deposition was taken on March 14, 2007. A copy of his deposition transcript is attached as Exhibit 23. Certain portions of that transcript were designated as restricted confidential, including testimony contained on pages 51-67. Mr. Taylor has requested that this testimony, which includes a discussion [REDACTED], be given *in camera* treatment herein. The documents, CX 378 and 379, which are referenced and explained in Mr. Taylor's testimony are attached as Exhibit 25(A) and (B). Mr. Taylor likewise requests that these documents be treated as confidential. The documents and testimony concern [REDACTED] and public disclosure is not warranted and would hinder his standing in the business community.

III. CONCLUSION AND RELIEF REQUESTED

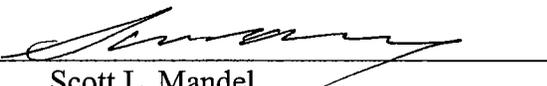
For the foregoing reasons, Realcomp respectfully requests that the information in the documents discussed herein be given *in camera* treatment, kept confidential, and not placed on the public record of this proceeding. This information meets the criteria set forth in FTC precedent as qualifying for in camera treatment and, therefore, should be afforded such protection. In the event that the Commission intends to disclose in camera Realcomp information in a final decision, Realcomp respectfully requests that the Commission notify counsel for Realcomp prior to such disclosure.

Dated: May 29, 2007

Respectfully Submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

By:



Scott L. Mandel

Kirsten M. McNelly

Originally filed 5-25-07.

CERTIFICATE OF SERVICE

This is to certify that on May 29, 2007, I caused a copy of the attached public version of Respondent Realcomp II Ltd.'s Unopposed Motion for *In Camera* Status of Testimony of Karen Kage and Documents Produced by Realcomp II Ltd. as Well as Documents Produced by Realcomp Board Members, to be served upon the following persons by Electronic Transmission and overnight courier:

Sean P. Gates, Esq.
601 New Jersey Ave., N.W.
Rm. NJ-6219
Washington, DC 20001

And two copies of same hand delivered by overnight courier to:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580



Lorri A. Rosier

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FEDERAL TRADE COMMISSION

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EXHIBITS

TO

RESPONDENT REALCOMP II LTD.'S
UNOPPOSED MOTION FOR *IN CAMERA* STATUS OF
TESTIMONY OF KAREN KAGE AND DOCUMENTS PRODUCED
BY REALCOMP II LTD. AS WELL AS DOCUMENTS
PRODUCED BY REALCOMP BOARD MEMBERS

EXHIBITS 1 TO 25 REDACTED

UNITED STATES OF AMERICA
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Chief Administrative Law Judge

Stephen J. McGuire

Respondent.

[PROPOSED] ORDER REGARDING IN CAMERA TREATMENT OF DOCUMENTS

On May 24, 2007, Realcomp II Ltd. ("Realcomp") filed a motion for *in camera* treatment of confidential business information contained in various testimony and documents that have been produced in this matter and have been identified as potential trial exhibits.

IT IS HEREBY ORDERED that Realcomp's Motion is GRANTED. The documents and testimony identified and set forth in Realcomp's Motion will be subject to *in camera* treatment under 16 C.F.R. §3.45 and will be kept confidential and not placed on the public record of this proceeding for a period of five (5) years. Specifically, these documents and testimony include:

Realcomp Exhibits: CX 9, 10, 11, 12, 22-25, 48, 54, 56, 59, 88, 91, 97, 245, 264, 265, and 282, and confidential and restricted confidential deposition testimony of Karen Kage included on pages 120-127, 157-160, 167-177, and 181-184 of Ms. Kage's February 20, 2007 deposition transcript.

Realcomp Board Member Testimony and Exhibits: previously marked confidential and restricted confidential portions of the Robert Taylor, Douglas Hardy, Robert Gleason, Douglas Whitehouse, and Gerald Burke depositions, as well as CX 284, 285, 286, 298, 299, 301, 310, 311, 323, 324, 325, 329, 331, 333, and 378.

IT IS FURTHER ORDERED that only authorized Federal Trade Commission ("Commission") personnel, and court personnel concerned with judicial review may have access to the above-referenced information, provided that I, the Commission, and reviewing courts may disclose such *in camera* information to the extent necessary for the proper disposition of the proceeding.

ORDERED.

Chief Administrative Law Judge
Stephen J. McGuire