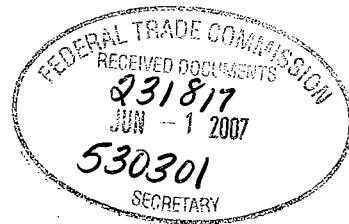


ORIGINAL

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**



In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

PUBLIC

**COMPLAINT COUNSEL'S UNOPPOSED MOTION FOR LEAVE TO FILE REPLY
TO RESPONDENT'S ANSWER TO COMPLAINT COUNSEL'S MOTION IN LIMINE
REQUESTING AN ORDER TO PRECLUDE LAY OPINION TESTIMONY
REGARDING CERTAIN HYPOTHETICAL LEGAL ISSUES**

On May 18, 2007, Complaint Counsel filed a Motion *in limine* Requesting An Order To Preclude Lay Opinion Testimony Regarding Hypothetical Legal Issues. Complaint Counsel now respectfully requests, pursuant to Rule 3.22(c) of the Commission's Rules of Practice, leave to file a short reply to Realcomp's answer, which was filed on May 30, 2007. In its response, Respondent asserts that Robert Taylor has actual, personal knowledge of certain arbitration proceedings, which are the type at issue in Complaint Counsel's Motion *in limine*. In making this assertion, Respondent provides a lengthy quote from the deposition of Mr. Taylor but fails to provide the follow up testimony in which Mr. Taylor corrects his previous testimony and disavows personal knowledge of any arbitration that would be relevant. The proposed reply is limited to providing the Court with Mr. Taylor's full deposition testimony on this point and a short explanation of how the full and accurate testimony supports the grant of the relief requested in Complaint Counsel's Motion *in limine*.

Complaint Counsel therefore requests that it be granted leave to reply to Realcomp's

answer. Complaint Counsel's proposed reply brief is attached.

Complaint Counsel met and conferred with Respondent Realcomp regarding this motion and explained the basis for the motion. Realcomp does not oppose this motion.

Respectfully submitted,



Peggy Femenella

Sean Gates
Peggy Bayer Femenella
Joel Christie
Linda Holleran
Christopher Renner

Counsel Supporting the Complaint

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Dated: June 1, 2007

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

**In the Matter of
REALCOMP II LTD.,
a corporation.**

Docket No. 9320

PUBLIC

**REPLY TO RESPONDENT'S ANSWER TO COMPLAINT COUNSEL'S MOTION IN
LIMINE REQUESTING AN ORDER TO PRECLUDE LAY OPINION TESTIMONY
REGARDING CERTAIN HYPOTHETICAL LEGAL ISSUES**

On May 30, 2007 Respondent filed an answer to Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Witness Testimony Regarding Certain Hypothetical Legal Issues. In Complaint Counsel's motion *in limine*, Complaint Counsel moved to preclude Robert Taylor (and others) from testifying as to lay opinions regarding the hypothetical application of contract law to certain disputes between brokers, *viz.*, "the possible outcome of a procuring cause dispute under an Exclusive Agency contract" (as opposed to an Exclusive Right to Sell Contract) in which the listing broker is not paid by the seller. Complaint Counsel's motion is premised, in part, on Mr. Taylor's lack of relevant personal knowledge.

In its response,¹ however, Respondent asserts that "Mr. Taylor has personal experience with procuring cause and the 'Alleged Hypothetical.'" Answering Brief at 6. Respondent then provides a lengthy quote from the deposition of Mr. Taylor in which he claims that he was personally involved in relevant arbitration hearings involving Exclusive Agency contracts. (Answering Brief at 6-7.) Realcomp's brief, however, fails to provide the follow up testimony in

¹ Respondent Realcomp II, Ltd.'s Answer Opposing Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Witness Testimony Regarding Certain Hypothetical Legal Issues ("Answering Brief").

which Mr. Taylor corrects this previous testimony and disavows personal involvement in any relevant arbitration involving Exclusive Agency contracts.

In its Answering Brief, Respondent quotes the following testimony from Mr. Taylor:

Q. Do you know whether or not—well, do you know what was the underlying listing type that was involved in those half dozen arbitrations?

A. Yes.

Q. Were they exclusive right-to-sell listings or were they some other type?

A. Exclusive Agency.

(Taylor Dep. at 103:13 - 103:19; Answering Brief at 7).

Just a few pages later in his testimony, however, Mr. Taylor stated that he made a mistake and that *none* of these arbitrations involved Exclusive Agency listings:

Q. And were they dealing with EA listings that were on the Realcomp MLS or some other MLS?

A. I'm not -- I have to backtrack for a second. I'm recalling the one that's specific in my mind. I'm not certain it was an exclusive agency listing.

(Taylor Dep. at 104:20 - 104:24).

Q. Okay. And you said there were a half dozen or so of these instances that you just told me the circumstances of one of them. Do you remember the circumstances of any of the other ones?

A. In some of them properties were relisted at lower commissions than the original commission. We were only allowed to arbitrate the commission that was paid.

Q. Okay.

A. Those were probably exclusive right-to-sell listings as well.

(Taylor Dep. at 106:19 - 107:4).

Q. And just to be clear, these arbitrations, at least the ones you remember, involved exclusive right-to-sell contracts?

A. Yes.

Q. Okay.

A. Yes, my apologies for intimating they were exclusive agency.

(Taylor Dep. at 111:12 - 111:18).

This testimony clearly supports Complaint Counsel's Motion *in limine* and demonstrates Mr. Taylor's lack of personal knowledge regarding relevant arbitrations involving Exclusive Agency listings.

Respectfully submitted,



Sean Gates
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Dated: June 1, 2007

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

PUBLIC

[PROPOSED] ORDER

Upon consideration of Complaint Counsel's Unopposed Motion for Leave to File Reply to Respondent's Answer to Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues,

IT IS HEREBY ORDERED that Complaint Counsel's Motion is GRANTED.

The Reply to Respondent's Answer to Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues that is attached to Complaint Counsel's motion is deemed filed.

Stephen J. McGuire
Chief Administrative Law Judge

Date:

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

PUBLIC

DECLARATION OF PEGGY BAYER FEMENELLA

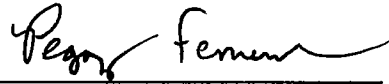
I, Peggy Bayer Femenella, make the following statement:

1. I am an Attorney in the Bureau of Competition of the Federal Trade Commission. I serve as Complaint Counsel in this matter.
2. Pursuant to Paragraph 5 of the Scheduling Order, I conferred with Steve Lasher, counsel for Realcomp on May 31, 2007. Realcomp does not oppose our Motion for Leave to Reply.
3. Pursuant to Pursuant to Rule 3.24(a)(2) and 3.24(a)(3) of the Commission's Rules of Practice, 16 C.F.R. §§3.24(a)(2) and 3.24(a)(3), I submit this declaration solely to bring before the deposition transcript relevant to this Motion for Leave to Reply.
4. The deposition transcript submitted to the Court in the Appendix to the Motion for Leave to Reply is a true and correct copy of the following:

CX Number	Document Title	Document Date
Tab 1	Deposition Transcript excerpts of Robert Taylor	3/14/07

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on June 1, 2007.

A handwritten signature in cursive script, reading "Peggy Bayer Femenella". The signature is written in black ink and is positioned above a horizontal line.

Peggy Bayer Femenella

INDEX TO EXAMINATIONS

Witness	Page
ROBERT TAYLOR	
EXAMINATION	
BY MR. GATES:	5

INDEX TO EXHIBITS

Exhibit	Page
(Exhibits and previously marked exhibits attached to transcript.)	
DEPOSITION EXHIBIT NUMBER CX 376	33
DEPOSITION EXHIBIT NUMBER CX 377	50
DEPOSITION EXHIBIT NUMBER CX 378	51
DEPOSITION EXHIBIT NUMBER CX 379	55
DEPOSITION EXHIBIT NUMBER CX 380	70
DEPOSITION EXHIBIT NUMBER CX 381	72
DEPOSITION EXHIBIT NUMBER CX 382	73
DEPOSITION EXHIBIT NUMBER CX 383	74
DEPOSITION EXHIBIT NUMBER CX 384	75
DEPOSITION EXHIBIT NUMBER CX 385	76
DEPOSITION EXHIBIT NUMBER CX 386	125

1 Q. So for 32 years you've served on an arbitration panel
2 for procuring cause issues?

3 A. I've served on arbitration hearings for 32 years.
4 Some were procuring cause, some were not.

5 Q. And how often has this issue of whether or not you can
6 be a procuring cause if the commission wasn't paid
7 come up?

8 A. Maybe half a dozen times.

9 Q. Over the course of 32 years?

10 A. More recently.

11 Q. Okay. Over what period of time?

12 A. Maybe the last five or 10.

13 Q. Do you know whether or not -- well, do you know what
14 was the underlying listing type that was involved in
15 those half dozen arbitrations?

16 A. Yes.

17 Q. Were they exclusive right-to-sell listings or were
18 they some other type?

19 A. Exclusive agency.

20 Q. Any documents that we could go to find and verify
21 that?

22 A. No.

23 Q. And that's because the records of arbitration hearings
24 are destroyed after they're done?

25 A. Are they?

1 Q. I'm asking you.

2 A. I don't know.

3 Q. Why do you say there's no documents that we could go
4 to verify what you just said?

5 A. Well, I don't have any.

6 Q. Do you know whether any exist?

7 A. No.

8 Q. So if we subpoenaed MCAR and asked them for all their
9 arbitration documents, if they exist we would find
10 these six instances; correct?

11 A. No.

12 Q. Why not?

13 A. Because they weren't at MCAR.

14 Q. Where were they then?

15 A. I'm trying to recall. Interboard arbitration. I
16 don't even recall who the participants were.

17 Q. Were they -- when you say they're interboard
18 arbitrations, so that's within two different boards?

19 A. Yes.

20 Q. And were they dealing with EA listings that were on
21 the Realcomp MLS or some other MLS?

22 A. I'm not -- I have to backtrack for a second. I'm
23 recalling the one that's specific in my mind. I'm not
24 certain it was an exclusive agency listing.

25 Q. Okay. Do you know what type of listing it was or you

1 A. Yes.

2 Q. Was there an offer of compensation?

3 A. No.

4 Q. Okay. So the problem there was that there wasn't any
5 offer of compensation?

6 A. It was the buyer had seen the house when it was listed
7 with the previous broker. Buyer made the offer after
8 the listing had expired. It was listed with another
9 broker at the time. It didn't work out.

10 Q. Okay.

11 A. Nobody got paid.

12 Q. That was a unique circumstance because of this
13 expiration of the listing and this new broker came on?

14 A. Yes.

15 Q. And you don't know whether there was an offer of
16 compensation offered on the MLS by that second listing
17 agent?

18 A. It's been a while.

19 Q. Okay. And you said there were a half dozen or so of
20 these instances that you just told me the
21 circumstances of one of them.

22 Do you remember the circumstances of any of
23 the other ones?

24 A. In some of them properties were relisted at lower
25 commissions than the original commission. We were

1 only allowed to arbitrate the commission that was
2 paid.

3 Q. Okay.

4 A. Those were probably exclusive right-to-sell listings
5 as well.

6 Q. Okay. So they were -- this is an instance in which
7 the listing broker -- or was it a second broker that
8 relisted it?

9 A. I don't remember.

10 Q. Okay. So the property was relisted at a different
11 commission rate?

12 A. Yes.

13 Q. A lower commission rate?

14 A. Yes.

15 Q. And the buyer -- the buyer's agent had shown the home
16 under the first listing?

17 A. Yes.

18 Q. Okay. And then the home actually sold under the
19 second listing?

20 A. Correct.

21 Q. Okay. Do you know whether or not the second listing
22 had an offer of compensation in it?

23 A. Yes.

24 Q. Okay. Was that less than the first?

25 A. Yes.

1 works, I would go to the guidelines of the National
2 Association of Realtors?

3 A. I would think.

4 Q. That would be the source?

5 A. It would seem to me.

6 Q. And that would be the authority and the guide that you
7 would -- you would have to follow?

8 A. That's my understanding.

9 Q. And that's what you tried to follow in these
10 particular arbitrations?

11 A. Yes.

12 Q. And just to be clear, these arbitrations, at least the
13 ones you remember, involved exclusive right-to-sell
14 contracts?

15 A. Yes.

16 Q. Okay.

17 A. Yes, my apologies for intimating they were exclusive
18 agency.

19 Q. All this arbitration stuff is confusing.

20 A. To us inside as well as outside the industry.

21 Q. Okay. So on the Realcomp board of governors it's your
22 role then to protect the interests of your members;
23 right?

24 A. It's my job to do what's in the best interest of the
25 corporation.

CERTIFICATE OF SERVICE

This is to certify that on June 1, 2007, I caused a copy of the attached Complaint Counsel's Motion for Leave to File Complaint Counsel's Unopposed Motion for Leave to File Reply to Respondent's Answer to Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues, Proposed Order, and Reply to Respondent's Answer to Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues to be served upon the following person:

by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

This is to certify that on June 1, 2007, I caused a copy of the attached Complaint Counsel's Motion for Leave to File Complaint Counsel's Unopposed Motion for Leave to File Reply to Respondent's Answer to Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues, Proposed Order, and Reply to Respondent's Answer to Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues to be served upon the following person:

by electronic transmission and overnight courier to:

Scott Mandel, Esq.
Foster, Swift, Collins & Smith P.C.
313 South Washington Square
Lansing, MI 48933-2193


Stephanie Langley