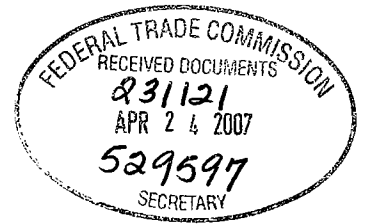


ORIGINAL

PUBLIC RECORD

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**



In the Matter of)

REALCOMP II LTD.,)

Respondent.)

Docket No. 9320

Chief Administrative Law Judge
Stephen J. McGuire

**RESPONDENT REALCOMP II, LTD'S
MOTION AND POINTS OF AUTHORITY FOR DISMISSAL**

Dated: April 20, 2007

Respondent Realcomp II Ltd. ("Respondent" or "Realcomp") hereby moves for summary decision, pursuant to 16 C.F.R. § 3.24, seeking dismissal of the complaint for failure to state a claim upon which relief can be granted. Alternatively, in the event this Court determines that the complaint should not be dismissed in its entirety, Realcomp requests a ruling that specifies: (1) every remaining, alleged basis for relief; and (2) the controlling standard(s) for any grant of relief.

In support of its motion, Realcomp states:

1. Realcomp is a Michigan corporation that is owned by several realtor boards and associations (complaint and answer, ¶ 1).¹ Realcomp serves its members in Southeastern Michigan, including Livingston, Oakland, Macomb, St. Clair and Wayne Counties ("Realcomp Service Area") (Id, ¶ 5). Realcomp's primary function is operating the Realcomp Multiple Listing Service ("Realcomp MLS") (answer, ¶ 2).

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 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, ¶ 12).

3. The parties agree to the following terminology:

"An **Exclusive Right to Sell Listing** 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

¹ 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.

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 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, ¶¶ 8, 9, emphasis added).²

4. A seller that 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 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 the listing broker and potential selling brokers. (See deposition of Kelly Sweeney, pp 70-72, Exhibit A.)

5. 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, ¶ 13). Under the Web Site Policy, information concerning Exclusive Agency Listings is not transmitted by Realcomp to certain websites (including Realtor.com) otherwise approved to receive information concerning Realcomp MLS listings (collectively, "Approved Web Sites") (complaint and answer, ¶ 15). The complaint further asserts (¶ 14) that the Web Site Policy prevents information from being transmitted to various public real estate websites, which Realcomp denies as untrue (answer, ¶14) because the information can be, and is, transmitted to various public real estate web sites by other means (including, Realtor.com).

² Exclusive right to sell listings are sometimes called "full service" listings. Exclusive agency listings are sometimes called "limited service" listings.

6. 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, ¶ 16). Realcomp members may change the default search settings (such that Exclusive Agency listings are always included), which is described as being to make this change, and Realcomp does not prohibit this option. (See deposition of Robert Taylor, p 123, Exhibit B.)

7. Realcomp does not deny membership to brokers who choose to offer Exclusive Agency Listings to their clients. (See deposition of Craig Mincy, p 18, Exhibit C.)

8. Complainant asserts that the Web Site Policy and the Search Function Policy restrain and eliminate competition in the provision of residential real estate brokerage services (complaint ¶¶ 24 and 25) by discriminating in favor of traditional (i.e., Exclusive Right to Sell "ERTS") listing contracts and against "limited service" contracts (including Exclusive Agency Listings).

9. The complaint bases these assertions on Realcomp's alleged possession of market power. Specifically, Complainant 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, ¶¶ 19, 20).³ See also, Complaint Counsel's Objections and Responses to Respondent's First Set of Interrogatories at 9 ("Realcomp ... has market power because it controls key inputs to real estate brokerage services, including (1) the searchable

³ Complainant has similarly characterized Realcomp as having a "choke-hold" (12/04/04 Prehearing Tr, p 23, Exhibit E). Realcomp denies these allegations as untrue (e.g., answer, ¶¶ 19, 20).

19. Complainant suggests that Realcomp precludes exclusive agency listings from getting onto Realtor.com, a national website. (12/04/06 Prehearing Tr, pp 27-28). But testimony in this case establishes that Exclusive Agents can and do take advantage of other MLSs that have less restrictive policies to have these listings placed in Realtor.com. Craig Mincy testified that he is able to place his Exclusive Agency Listings onto Realtor.com through his affiliation with the Shiawassee Regional Board of Realtors (Exhibit C deposition, p 12). Similarly, [Redacted confidential material.]

20. Thus, Exclusive Agency brokers are able to continue to do business selling residential real estate in Michigan, including the Realcomp Service Area. The Complaint fails to plead a viable cause of action, as confirmed by the evidence, and should now be dismissed.

21. It is indisputable that other public websites are numerous and that listings reach those websites without regard to Realcomp's policies.

22. Realcomp is not a public utility. Like any MLS, it is a service provided by, at the expense of, and for its members premised on cooperation between its members and compensation for its members. Indeed, the complaint in this case is premised on the proposition that multiple listing services are a competitive enterprise (and indeed Mr. Mincy's and Mr. Kermath's testimony are consistent with this premise). Yet, Complainant would have Realcomp regulated as a public utility by requiring Realcomp to "wheel" its services to potential competitors.

Certificate of Service


I hereby certify that on this 23rd day of April, 2007, I caused the original and two copies of the foregoing public record version of Respondent's Motion and Points of Authority for Dismissal to be filed with the Secretary of the Commission by overnight courier.

I also certify that on this same date I served a copy of the foregoing document by electronic mail and first class mail upon:

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

I also certify that I caused two paper copies of the foregoing document to be 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

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.)	
_____)	

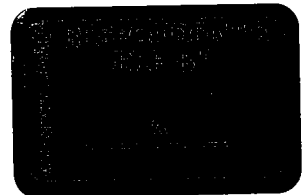
**EXHIBITS A-I
TO
RESPONDENT REALCOMP II, LTD.'S
MOTION AND POINTS OF AUTHORITY FOR DISMISSAL**

1 UNITED STATES OF AMERICA
2 FEDERAL TRADE COMMISSION
3 OFFICE OF ADMINISTRATIVE LAW JUDGES
4

5 IN THE MATTER OF:)
6 REALCOMP, II, LTD.,) Docket No. 9320
7 _____)
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11 The Deposition of KELLY SWEENEY,
12 Taken at 32300 Northwestern Highway, Suite 230,
13 Farmington Hills, Michigan,
14 Commencing at 9:43 a.m.,
15 Thursday, March 1, 2007,
16 Before Denise M. Kizy, CSR-2466, RPR, CRR.

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18
19 CONFIDENTIAL PORTIONS ON PAGES 16-22 AND PAGES 30-46
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1 Q. Are you familiar with the Realcomp rules that pertain
2 to that issue?

3 A. Yes.

4 Q. And you yourself are a member of Realcomp?

5 A. Yes.

6 Q. And a member of MiRealSource?

7 A. Yes.

8 Q. You're aware that MiRealSource had a rule itself that
9 prohibited nonexclusive right-to-sell listings from
10 even being entered into the MLS?

11 A. Yes.

12 Q. In contrast, Realcomp as you understand it allows the
13 nonexclusive right-to-sell listings to go into the
14 MLS?

15 A. Yes.

16 Q. With respect to feeding those listings to these
17 publicly available Web sites, do yourself have any
18 position one way or the other as to whether that
19 should or should not occur, these nonexclusive
20 right-to-sell listings?

21 A. My personal opinion is it should not occur.

22 Q. Can you explain the bases for that?

23 A. Well, Realcomp is a trade organization that is
24 supported by the fees that my company and all the
25 other member companies pay, and it is put in place to

1 help us, you know, facilitate our business, which is
2 real estate brokerage.

3 When a limited service or nonexclusive
4 right-to-sell listing is displayed on a public Web
5 site, it provides a pathway for the public to go
6 around using a broker and do a transaction directly
7 with the seller, and there's nothing wrong with that
8 happening. It's just that my trade organization that
9 I'm supporting with my business dollars doesn't need
10 to support it.

11 Q. Mr. Sweeney, I understand your reasoning. I just
12 want to make sure that we probe this, because we're
13 hearing different points throughout this case from
14 counsel for the Federal Trade Commission. Let me see
15 if I can articulate what we're hearing.

16 The Realcomp rules require an offer of
17 compensation for cooperating brokers for a listing to
18 get into the MLS; is that correct?

19 A. Yes.

20 Q. So what we're hearing from the Federal Trade
21 Commission is essentially where's the rub? If there's
22 a requirement of an offer for compensation, if this
23 goes into a publicly available Web site, what harm or
24 potential harm is there to you and exclusive
25 right-to-sell agents since there has to be an offer

1 for compensation there? You're talking about the
2 going around --

3 A. Well, I'm talking about, yes, there's an offer of
4 compensation for a cooperating broker, but what really
5 happens is that if we have a limited service, meaning
6 a nonexclusive right-to-sell listing, posted on a Web
7 site that my business dollars have supported, which
8 means that that seller can sell directly to the
9 consumer without any -- without using a broker, why
10 should our dollars be used to facilitate a member of
11 the public going on a public Web site, identifying
12 that listing, and going directly to that seller to do
13 that transaction in direct conflict with my business
14 model -- or my business purpose.

15 Q. And that member of the public would not even need to
16 go to a cooperating broker?

17 A. No. They could go right to the seller.

18 Q. They can figure it out themselves and go right to the
19 seller?

20 A. Yes. Again, nothing wrong with doing that, but, you
21 know, let the seller pay for his own Web site to do
22 that. He doesn't have to use our Web site to do that.

23 Q. You understand that MiRealSource has entered into a
24 consent agreement with the FTC to change its rules
25 with respect to the treatment of these nonexclusive

