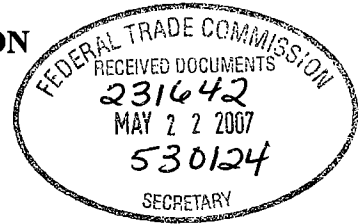


ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

REALCOMP II LTD.,

a corporation.

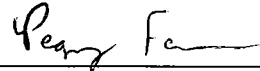
Docket No. 9320

Public

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

Respondent Realcomp II Ltd. ("Realcomp") has proffered Karen Kage, Robert Taylor, Douglas Hardy and Douglas Whitehouse to testify to, among other areas, the hypothetical application of contract law to certain disputes between brokers, without adequate foundation or qualifications as an expert in legal issues. Complaint Counsel respectfully submits this Motion *in limine* to preclude Ms. Kage, Mr. Taylor, Mr. Hardy, Mr. Whitehouse, and any other Respondent witnesses, from testifying as to lay opinions, either live or by deposition, for the justification of the Realcomp Policies regarding the possible outcome of a procuring cause dispute under an Exclusive Agency contract, or any other opinions as to which they do not have personal knowledge or are not qualified as experts in legal issues.

Respectfully Submitted,



Sean P. Gates

Peggy Bayer Femenella

Joel Christie

Linda Holleran

Christopher Renner

Counsel Supporting the Complaint

Bureau of Competition

Federal Trade Commission

Washington, D.C. 20580

(202) 326-3711

Facsimile (202) 326-3496

Dated: May 18, 2007

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

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

Docket No. 9320

Public

**MEMORANDUM IN SUPPORT OF COMPLAINT COUNSEL'S MOTION IN LIMINE
REQUESTING AN ORDER TO PRECLUDE LAY OPINION TESTIMONY
REGARDING CERTAIN HYPOTHETICAL LEGAL ISSUES**

Sean Gates
Peggy Bayer Femenella
Joel Christie
Linda Holleran
Christopher Renner

Counsel Supporting the Complaint

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Complaint Counsel respectfully submit this memorandum of law in support of their Motion *in limine* for an Order precluding the introduction by Respondent Realcomp II Ltd. (“Realcomp” or “Respondent”) of deposition or trial testimony by certain lay witnesses relating to the application of contract law to certain hypothetical disputes between brokers. Such testimony, purportedly providing a justification for Realcomp’s Website and Search Function Policies (together, the “Policies”), would be without adequate factual foundation or qualification of the witnesses as experts in legal issues.

I. INTRODUCTION AND BACKGROUND

Respondent filed its Preliminary Witness List and Expert Witness List on January 26, 2007, and its Deposition Designations and Final Proposed Witness List on May 15, 2007. These filings make it clear that Respondent intends to defend the Policies by introducing testimony of certain of its fact witnesses regarding the application of contract law to certain hypothetical disputes between brokers.

Realcomp seeks to offer testimony regarding the application of legal principles to a hypothetical dispute involving a listing broker that uses an Exclusive Agency¹ contract and a cooperating broker that procures a buyer for the property.² The hypothetical dispute arises if the

¹ 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 also reserves to the property owner or principal a right to sell the property without assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold. Answer at ¶ 9.

In contrast, an Exclusive Right to Sell Listing is the traditional listing agreement, under which the property owner 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 listing broker a commission when the property is sold, whether by the efforts of the broker, the owner or another broker. Answer at ¶ 8.

² Realcomp Final Proposed Witness List at 3-4; [REDACTED]; Taylor Dep. at 92:4-92:8.

buyer of the property closes the sale without involving the cooperating broker. Such a situation, Realcomp argues, could conceivably give rise to an arbitration dispute concerning whether the cooperating broker was the “procuring cause” for the sale, and therefore entitled to receive a commission. Realcomp seeks to offer testimony from its “fact” witnesses that under this hypothetical, and using their view of the law, the listing broker would be excused from paying the offer of compensation to the cooperating broker if the listing broker did not receive a commission. Realcomp apparently offers this hypothetical result as justification for its Policies disfavoring Exclusive Agency listings.

Specifically, Respondent listed Karen Kage, Douglas Whitehouse, Douglas Hardy, and Robert Taylor as “fact” witnesses. Realcomp’s Final Proposed Witness List (“Witness List”) at 1-4. Realcomp’s filings show that it seeks to offer opinion testimony of these witnesses regarding a hypothetical legal problem that it claims justifies the Policies:

- Mr. Taylor may “offer testimony concerning the arbitration process concerning the issue of procuring cause and the limitations of that process as not being applicable when no commission is being paid.” Witness List at 4-5.
- Mr. Whitehouse and Mr. Hardy are expected to explain how the “proposed relief will set up a system by which prospective purchasers, through promotion and advertisements paid for by Realcomp members, would essentially be placed in a position of dealing directly with homeowners who, for purposes of transaction, would akin to a for sale by owner, negotiating and handling the sale of their residential property directly with prospective purchasers with no commission to be paid to any cooperating broker.” Witness List at 2-4.
- Ms. Kage is expected to testify about Realcomp’s “efficiency justifications and the harm that would be caused by Complainant’s Counsel’s proposed relief.” Witness List at 1-2. Ms. Kage’s investigational hearing testimony shows that these “justifications” include the hypothetical legal dispute described above. [REDACTED]

The witnesses’ sworn deposition testimony, however, shows that none of them have

personal knowledge of any actual instance of this having occurred, and are simply offering their opinions on a hypothetical problem. In addition to being purely speculative, the testimony also clearly is based on the witnesses' views concerning the application of legal principles. None of these witnesses have been qualified as experts in this matter and none of these witnesses are even lawyers. As lay witnesses, they cannot offer opinions on legal issues. The Court should therefore issue an Order precluding any testimony at the hearing of this matter or by deposition, regarding the possible outcome of a procuring cause dispute involving a listing under an Exclusive Agency contract.³

II. ARGUMENT

A. Legal Standard

The Scheduling Order in this case specifically provides, “[w]itnesses shall not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.... [and] witnesses not properly designated as expert witnesses shall not provide opinions beyond what is allowed” by F.R.E. 701. Scheduling Order ¶¶ 20-21; Fed. R. Evid. 602, 701, 702. Under Rule 701, a witness not testifying as an expert may give an opinion only if it is “(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness’s testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701. The proponent of lay opinion testimony has the burden of establishing that the testimony meets these foundational requirements. *United States v. Garcia*, 291 F.3d 127, 140

³ Attached to the accompanying Declaration of Peggy Bayer Femenella are the documents and portions of deposition testimony Complaint Counsel refers to in this memorandum.

(2d Cir. 2002).

Witnesses not designated as experts are limited to testifying to opinions which are rationally based on their own actual perception. *Indemnity Ins. Co. v. Am. Eurocopter*, 227 F.R.D. 421, 424 (D.N.C. 2005). As noted in the Advisory Committee Notes to Rule 701, “Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” Moreover, lay witnesses may not answer hypothetical questions or assume facts not in evidence in their testimony. *Teen-Ed, Inc. v. Kimball Int’l, Inc.*, 620 F.2d 399, 403-404 (3d Cir. 1980); *Hartzell Mfg. v. American Chem. Technologies*, 899 F. Supp. 405, 408 (D. Minn. 1995) (“[a] lay witness’s opinion testimony must be based upon his or her personal perceptions and, unavoidably, those perceptions must be of a type that are admissible in evidence”). Lay opinion testimony may not be based on inadmissible hearsay. *K.W. Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265, 1273 (M.D. Al. 2001).

A. The Witnesses Lack Personal Knowledge of this Hypothetical Problem.

As non-expert witnesses, Realcomp’s witnesses must be able to testify from actual personal knowledge. *Indemnity Ins. Co.*, 227 F.R.D. at 424; F.R.E. 701; *see also* Complaint Counsel’s Memorandum in Support of Its Motion in Limine Barring Certain Lay Opinion Testimony Regarding Supposed Justifications for Realcomp’s Rules at 3-4. Ms. Kage, Mr. Taylor, Mr. Hardy, and Mr. Whitehouse, however, admitted that they have no personal knowledge of any actual procuring cause disputes involving an Exclusive Agency Listing:⁴

⁴ Not only do Realcomp’s witnesses lack any personal knowledge of any procuring cause dispute involving an Exclusive Agency agreement, Messrs. Hardy, Whitehouse, and Taylor admitted that they did not even know the reasons why the Realcomp Policies were adopted. None was a member of the Realcomp Board of Governors at the

- Ms. Kage, CEO of Realcomp, has no first hand knowledge of procuring cause issues or any issues regarding a Cooperating Broker not getting paid, because Realcomp does not directly deal with grievance and arbitration issues, and does not receive any reports or information regarding these proceedings. [REDACTED]; Kage Dep. at 37:24-38:5; CX 33 at 6 (Realcomp “does not hold hearings for procuring cause, as this is conducted at the Board or Association of Realtor’s level.”).
- Mr. Whitehouse has no first hand knowledge of any disputes or problems involving Exclusive Agency Listings:

Q. Okay. So going back in your experience, you know, prior to 2000 even, tell me of all the problems [with Exclusive Agency Listings] that you can tell me of from firsthand knowledge.

A. From first hand experiencing a problem myself?

Q. Yes.

A. I can't. I can only tell you secondhand.

Whitehouse Dep. at 111:1-111:5.

- Mr. Whitehouse, who serves on the Metropolitan Consolidated Association of Realtors arbitration committee, generally does not even know what type of listing contract is involved in a procuring cause dispute. Whitehouse Dep. at 7:12-8:16.
- All of the arbitrations involving procuring cause issues that Mr. Taylor can remember involved Exclusive Right to Sell Listings. Taylor Dep. at 111:12-111:15.

Moreover, not a single deponent in this matter could point to an arbitration that did involve an Exclusive Agency Listing. *See, e.g.*, Baczkowski Dep. at 126:24-127:17 (Listing contract type plays no role in arbitration hearings); Nowak Dep. at 19:1-19:9 (None of the NOCBOR arbitrations involved Exclusive Agency, Limited Service or MLS Entry Only Listings.); Nead Dep. at 141:6-141:19 (Listing agreement is not an issue in procuring cause disputes for WWOCAR.); Tucholski Dep. at 38:9-38:12 (DABOR has no records of procuring

time the Realcomp Policies were adopted. None had any role in the adoption of the Realcomp Policies. And none knows why the Realcomp Policies were adopted in the first place. Hardy Dep. at 100:13-100:16; Whitehouse Dep. at 105:6-105:8, 105:23-106:5; Taylor Dep. at 102:2-102:5.

cause disputes involving discount or flat fee brokers).

B. Commission Determinations Are an Issue of Contract Law.

Even if Respondent's witnesses had personal knowledge regarding commission disputes involving an Exclusive Agency Listing, the opinions they offer are based on their own views of the application of contract law. These witnesses, who have no expertise in the law, should be precluded from testifying on legal issues.

Whether or not a cooperating broker is the procuring cause of sale and entitled to the offer of compensation laid out in the Realcomp MLS, is a question of basic contract law: Was there an offer, acceptance and performance justifying compensation to the cooperating broker? The offer of compensation to a cooperating broker is clearly laid out pursuant to the rules of the Realcomp MLS, which require every listing to include an offer of compensation:

The Listing Participant shall specify, on each listing filed with the MLS, the compensation offered to MLS participants, for their services with respect to the sale/lease of the real estate covered by such listing. Such offers are unconditional except that entitlement to compensation is determined by the Cooperating Broker's performance as the procuring cause of sale (or lease) or as otherwise provided for in this rule.

CX 100 at RC1346.

Cooperating brokers accept the specified offer of compensation when they bring the buyer to the table, and the specific performance of the contract is the act of procuring the buyer for the transaction, therefore considered the procuring cause of the transaction. Procuring cause is defined as "the interplay of factors which together demonstrate that the unbroken efforts of a specific broker were responsible for the buyer making the decision to consummate the sale on terms which the seller found acceptable." CX 86 at 1; Hardy Dep. at 44:12-45:3. Basically,

procuring cause comes down to the fact that “the sale would not have occurred but for the broker’s efforts.” CX 86 at 1. So, if the cooperating broker brings in the buyer, that broker has accepted the listing broker’s offer of compensation laid out in the MLS, and has earned the stated commission by being the procuring cause of sale.

The issue of performance under the contract also involves application of established legal principles to particular facts. In Michigan, where Realcomp is located, there have been numerous cases over the last 120 years where the courts determined whether a broker was entitled to a commission.⁵ Michigan courts have frequently held that the test of a broker’s right to a commission was “whether or not he was the procuring or the producing cause of the sale...” *Advance Realty Co.*, 83 N.W.2d at 344-345; *see also Amend v. 485 Properties, LLC*, 443 F.3d 799, 800 (11th Cir. 2006) (Procuring cause must be established to collect a contractually-based commission where the broker worked on, but did not close the deal.); *Ditzik v. Schaffer Lumber Co.*, 360 N.W.2d 876, 880-81 (Mich. Ct. App. 1984); *Craib*, 6233 N.W.2d at 676-678. (In order for a real estate broker to receive a commission on a broker’s contract, he must show performance of the terms of the contract); *Hubbard*, 108 N.W. 735-736. For example, in *Ditzik*, the Michigan Court of Appeals addressed and resolved the issue of whether or not a real estate broker satisfied the performance portion of the contract and was therefore entitled to a commission regarding the sale of a lumber yard. 360 N.W.2d at 881.

⁵ See, e.g., *Craib v. Comm. on Nat’l Missions of the Presbytery of Detroit of the United Presbyterian Church*, 233 N.W.2d 674, 676-678 (Mich. Ct. App. 1975); *Advance Realty Co. v. Spanos*, 83 N.W.2d 342, 344-345 (Mich. 1957); *Hubbard, Merwin & Farmer v. Leiter*, 108 N.W. 735 (Mich. 1906).

Whether a broker is excused from obligations under the contract is also an issue of law.⁶ For example, the Sixth Circuit has addressed the very hypothetical Realcomp poses. Specifically, the Sixth Circuit has addressed the issue of whether a cooperating broker was entitled to a commission when the listing broker was not paid by the seller. *Reisenfeld & Co. v. Network Group, Inc.*, 277 F.3d 856, 859-863 (6th Cir. 2002). The Court in *Reisenfeld* held that under a quasi-contract theory, the cooperating broker was entitled to a commission from the seller even though the listing broker was not paid by the seller, and remanded the case back to the district court to determine how much of a commission the cooperating broker should receive. *Id.* at 862. This decision by the Sixth Circuit flatly contradicts the basic legal view held by the lay witnesses here – it holds that a cooperating broker was still entitled to the offer of compensation even though the listing broker was not paid.

The fact that, under Realcomp MLS Rules and Regulations, Realcomp members must first submit their procuring cause disputes for arbitration, does not change the dispute into something other than an application of legal principles. *See, e.g.*, [REDACTED]; CX 100 at 8. A Realcomp member must file a grievance or arbitration with one of the Realcomp Shareholder Boards, to address procuring cause issues.⁷ The Realcomp Shareholder Boards, who are all affiliated with the National Association of Realtors (“NAR”),⁸ are required to follow the NAR Code of Ethics and Arbitration Manual. CX 94 at NARFTC0000224-263. However, even

⁶ CX 100 at RC1346 (The listing broker’s obligation to pay the procuring cause cooperating broker the offer of compensation may be excused if it is “impossible or financially infeasible” for the listing broker to collect some or all of the commission.).

⁷ *Id.*; CX 100 at RC1344.

⁸ *See, e.g.*, [REDACTED]; Williams Dep. at 57:25 - 58:2; Baczkowski Dep. at 14:5 - 14:16.

though Realcomp members need to go through arbitration first, NAR relies on case law and state statutes to determine whether or not a broker is the procuring cause of a sale and entitled to the offered commission. *See, e.g.*, CX 86.

Under the NAR arbitration rules, “all arbitration hearings must be conducted in a manner consistent with state law.... [and it is necessary to know] case law governing arbitration and to conform the Board’s arbitration procedures to the law.” CX 94 at NARFTC0000265. Moreover, if a party refuses to abide by the arbitration award, the award recipient can seek “judicial enforcement of the award by a local court of competent jurisdiction and to request reimbursement of legal fees incurred in seeking enforcement.” *Id.* at NARFTC0000268. These arbitrations must correctly apply the law, and an arbitration award can be vacated by the courts for an “error in law.” *See, e.g., Saveski v. Tiseo Architects, Inc.*, 682 N.W.2d 542, 544 (Mich. Ct. App. 2004)(“Arbitrators exceed their power when they act ... in contravention of controlling principles of law.”); *DAIIE v. Gavin*, 331 N.W.2d 48, 55 (Mich. 1982) (If arbitrators have been lead to the wrong conclusion through an error in law, the decision will be set aside (citation omitted)).

C. No Lay Opinions Are Allowed Regarding Issues of Law.

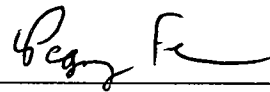
The case law is clear that lay opinion testimony should be excluded when it contains legal conclusions. *Torres v. County of Oakland*, 758 F.2d 147, 150 (6th Cir. 1985) (“The problem with testimony containing a legal conclusion is in conveying the witness’ unexpressed, and perhaps erroneous, legal standards....”); *FAA v. Landy*, 705 F.2d 624, 632 (2nd Cir. 1983); *see also United States v. Baskes*, 649 F.2d 471, 478 (7th Cir. 1980). For example, in *Baskes*, the Court held it was proper to exclude lay witness testimony “as to the legal implications of what occurred.” *Baskes*, 649 F.2d at 478; *see also United States v. Hearst*, 563 F.2d 1331, 1351 (9th

Cir. 1977) (testimony admissible because the “average layman would understand those terms and ascribe to them essentially the same meaning intended”). Numerous courts have even held expert testimony on issues of law, giving a legal conclusion or discussing the legal implications of evidence, to be inadmissible. *See, e.g., Estate of Sowell v. United States*, 198 F.3d 169, 171-72 (5th Cir. 1999); *United States v. Simpson*, 7 F.3d 186, 188 (10th Cir. 1993); *Estes v. Moore*, 993 F.2d 161, 163 (8th Cir. 1993).

III. CONCLUSION

These witnesses have no personal knowledge concerning any instance of a hypothetical dispute of the kind at issue. They have not been listed as experts on Respondent’s Expert Witness List, and none of these witnesses are lawyers. Their views are based on issues of law that are readily determinable without their lay views. For all these reasons, these witnesses, and any others that Realcomp tries to put forth for the same purpose, should be precluded from testifying on this proposed justification for the Policies.

Respectfully submitted,



Peggy Bayer Femenella
Complaint Counsel

May 18, 2007

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

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

Docket No. 9320

Public

[PROPOSED] ORDER

On May 18, 2007 Complaint Counsel moved *in limine* to limit the trial and deposition testimony of Karen Kage, Robert Taylor, Douglas Whitehouse, Douglas Hardy, and other “fact” witnesses listed by Respondent to factual, rather than lay opinion testimony regarding certain hypothetical legal issues.

Accordingly, upon due consideration of the parties’ submissions, it is hereby

ORDERED that Karen Kage, Robert Taylor, Douglas Whitehouse, Douglas Hardy, and any other Respondent witnesses, are precluded from testifying as to lay opinions, either live or by deposition, for the justification of the Realcomp Policies regarding the possible outcome of a procuring cause dispute under an Exclusive Agency contract, or any other opinions as to which they do not have personal knowledge or are not qualified as experts in legal issues.

ORDERED:

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 17, 2007, in an effort in good faith to resolve the issues raised by this Motion, and we have been unable to reach an agreement.
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 Court documents and deposition transcripts relevant to Complaint Counsel's Motion in Limine and Memorandum in Support of Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues.
4. The materials submitted to the Court in the Appendix to the Memorandum in Support of Complaint Counsel's Motion in Limine Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues are true and correct copies of the following:

CX Number	Document Title	Document Date
CX 33	Respondent's Responses and Objections to Petitioner's First Set of Interrogatories and Attachments	1/11/07
CX 86	Procuring Cause Factors, National Association of Realtors Legal Affairs Article	

CX Number	Document Title	Document Date
CX 100	Realcomp II Ltd., Rules & Regulations, Revised October, 2006	10/06
Tab 1	Realcomp's Final Proposed Witness List	5/15/07
Tab 2	Deposition Transcript excerpts of Robert Taylor	3/14/07
Tab 3	Deposition Transcript excerpts of Karen Kage	02/20/07
Tab 4	REDACTED	
Tab 5	Deposition Transcript excerpts of Douglas Whitehouse	02/22/07
Tab 6	Deposition Transcript excerpts of Douglas Hardy	2/21/07
Tab 7	Deposition Transcript excerpts of Walt Baczkowski	1/29/07
Tab 8	Deposition Transcript excerpts of Martin Nowak	1/30/07
Tab 9	Deposition Transcript excerpts of Alissa Nead	1/2/07
Tab 10	Deposition Transcript excerpts of Ryan Tucholski	1/23/07
Tab 11	Realcomp's Answer to the Complaint	11/20/06
Tab 12	Deposition Transcript excerpts of Carl Williams	1/17/07
Tab 13	Excerpts from CX 94: NAR Code of Ethics and Arbitration Manual, Pages NARFTC0000222 - NARFTC0000269	2006

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

Executed on May 18, 2007.



 Peggy Bayer Femenella

CERTIFICATE OF SERVICE

This is to certify that on May 22, 2007, I caused a copy of the attached **PUBLIC VERSION** of Complaint Counsel's Motion *In Limine* Requesting an Order to Preclude Lay Opinion Testimony Regarding Certain Hypothetical Legal Issues, the Memorandum in Support of the Motion *In Limine*, Proposed Order, a Declaration of Peggy Bayer Femenella and Exhibits, to be served upon the following persons:

by hand delivery to:

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

and 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 M. Langley

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

In the Matter of:

REALCOMP II LTD.,

Docket No. 9320

Respondent.

**RESPONDENT'S RESPONSES AND OBJECTIONS TO PETITIONER'S
FIRST SET OF INTERROGATORIES**

Respondent Realcomp II Ltd. ("Realcomp"), through its attorneys, Foster, Swift, Collins & Smith, P.C., pursuant to the Federal Trade Commission Rules of Practice ("FTC Rules"), 16 C.F.R. § 3.35, hereby responds and objects to Petitioner's First Set of Interrogatories, stating as follows:

GENERAL OBJECTIONS

Realcomp II Ltd. ("Realcomp") asserts the following general objections to each interrogatory, and each such general objection is hereby incorporated into Realcomp's response to each interrogatory as if fully set forth therein:

1. Realcomp objects to the interrogatories because and to the extent that they seek interrogatory responses that are protected from discovery under the attorney-client privilege or the work-product doctrine, or which fall within any other privilege, immunity, protection, statute, regulation, rule or restriction.
2. Realcomp objects to the interrogatories because and to the extent that they seek interrogatory responses containing confidential or proprietary information. Realcomp will only provide such interrogatory responses subject to the terms of the protective order.
3. Realcomp objects to the interrogatories because and to the extent that they are vague and ambiguous therefore requiring Realcomp, to the best of its ability, to make a subjective determination as to what interrogatory responses are being sought.
4. Realcomp objects to the interrogatories because and to the extent that they are overly broad, unduly burdensome, redundant, harassing, oppressive or seek interrogatory responses not reasonably calculated to lead to the discovery of admissible evidence, as well as to the extent it would impose an unjust burden on Realcomp to respond in the form of an excessive expenditure of time and/or money. This objection includes all interrogatories, asking Realcomp in Answers to Interrogatories to set forth "all facts," "all the reasons," "all reasons," or the like, as such matters cannot be set forth in the form of Answers to Interrogatories without undue burden and expense.

5. Realcomp objects to the interrogatories because and to the extent that they request responses that are not in the Realcomp's actual possession, custody or control.

6. No objection, response, or limitation, or lack thereof, made in these general objections or the specific responses shall be deemed: (i) an admission by Realcomp as to the existence or non-existence of any document; or (ii) a waiver of Realcomp's right to assert such objection or limitation at any future time in connection with the interrogatories or otherwise. In responding to the interrogatory, Realcomp neither waives nor intends to waive, but expressly reserves, any and all objections to relevance, competence, susceptibility to discovery, materiality or admissibility of any information provided.

7. Realcomp's responses and objections to the interrogatories are not intended to be and shall not be deemed an admission of the matters stated, implied or assumed by or in the interrogatories.

8. Realcomp objects to Petitioner's use of terminology which is not properly defined for purposes of these inquiries. Such undefined terms include, but are not limited to, active listing information, Real Estate advertising sites, unbundled services, and the like.

9. Realcomp reserves the right to supplement or modify its responses and objections to the interrogatories, if and while, it discovers any additional responsive information, or as is otherwise appropriate under applicable rules.

10. Realcomp incorporates by reference the objections it has previously filed to these interrogatories and does not waive those objections by responding to these interrogatories.

INTERROGATORIES

Interrogatory No. 1

State the number of Realcomp members (on a yearly basis) who have authorized the display of their active listing information by other Realcomp members pursuant to Realcomp's IDX Rules and Regulations.

Response:

Realcomp objects to Interrogatory No. 1 on the grounds that the inquiry is vague in that the terms "active listing information" and "IDX Rules and Regulations" are undefined.

Notwithstanding this Objection, Realcomp states that it does not document or retain activation dates for Realcomp members. Realcomp can only provide the current number of offices (and the current number of agents in those offices) that have authorized their listing data to be included in IDX. This information is reflected in the chart below, as of January 3, 2007.

1/3/2007	Authorized Data To be in IDX	Total In Realcomp	% Authorizing Data for IDX
Offices	1,028	2,395	43%
Agents	11,989	14,568	82%

Interrogatory No. 2

State the number of Realcomp members (on a yearly basis) who have participated in Realcomp's IDX through either the FTP download or framing option pursuant to Realcomp's IDX Rules and Regulations.

Response:

Realcomp objects to Interrogatory No. 2 on the grounds that the inquiry is vague in that the term "IDX Rules and Regulations" is undefined.

Notwithstanding this Objection, Realcomp states that it does not document or retain activation dates for Realcomp members. Realcomp can only provide the current number of offices (and current number of agents in those offices) that have authorized their listing data to be included in IDX. This information is reflected in the chart below, as of January 3, 2007.

1/3/2007	Number of Participating Via IDX Framing or FTP	Total In Realcomp	% Framing or FTP
Offices	369	2,395	15%
Agents	8,656	14,568	59%

Interrogatory No. 3

State the number of Realcomp members (on a yearly basis) who have authorized Realcomp to provide their active listing information to Realtor.com.

Response:

Realcomp objects to Interrogatory No. 3 as vague as to what constitutes "their active listing information to Realtor.com."

Notwithstanding this Objection, Realcomp references the Responses to Interrogatory Nos. 1 and 2. Realcomp also references the attached spreadsheet, but notes that it changed its data extraction process several years ago, and accordingly, can only provide the requested information beginning in 2002.

Interrogatory No. 4

State the number of Realcomp members (on a yearly basis) who have authorized Realcomp to provide their active listing information to MoveInMichigan.com.

Response:

Realcomp objects to Interrogatory No. 4 as vague as to what constitutes "their active listing information to MoveInMichigan.com."

Notwithstanding this Objection, Realcomp references the Responses to Interrogatory Nos. 1 and 2. Realcomp also references the attached spreadsheet, but notes that it changed its data extraction process several years ago, and accordingly, can only provide the requested information beginning in 2002.

Interrogatory No. 5

State all facts supporting Respondent's contention in its Answer that "the challenged conduct at issue in the Complaint has significant pro-competitive efficiencies that outweigh any alleged anti-competitive effects."

Response:

In summary and without limitation, the purpose of a multiple listing service is to provide a means by which authorized participants make blanket unilateral offers of compensation to other authorized participants, and a mechanism for enhancing cooperation among participants. Realcomp's primary source of income is derived from REALTOR® subscription fees, and this income is utilized to maintain and update the service.

Consumers purchasing and selling homes have a wide variety of options available to them. Sellers can list their property with a REALTOR®, and negotiate a fee for the services they select. Alternatively, they can choose from a variety of other products in the marketplace or attempt to sell the property independently without the assistance of any real estate sales assistance products or personnel. Buyers and sellers have access to numerous websites that are just as popular, if not more popular, than Realcomp's. Buyers and sellers also have access to non-electronic media such as newspapers, fliers, yard signs, and the like.

In the case of an Exclusive Agency Listing, the seller has chosen to enter into an agreement giving them the option of independently locating a buyer, with no commissions to be tendered to their listing broker (or the selling broker since there is generally no selling broker). When an Exclusive Agency listing is posted on public websites, it can be reviewed by all potential buyers. If a potential buyer independently locates a home that is an Exclusive Agency and MLS Entry Only Listing, the listing office would typically direct the potential purchaser to contact the seller directly. Once an independent buyer has contacted the seller directly, it is highly probable that if the purchase is consummated, no REALTOR® would receive commission for the sale. If the interested buyer had been working with a REALTOR® prior to independently locating the property, the buyer's agent likely would not receive any compensation after potentially investing considerable time with the buyer. This thwarts the choices available in the market to persons wishing to purchase homes as it takes away the incentive for buyer agents to work with persons interested in purchasing a home. The challenged conduct has pro-competitive efficiencies as it promotes a greater sharing of information and effort, affords buyers, including first-time and minority buyers, with more opportunities, and affords both parties in the transaction the

advantage of having professional real estate professionals with incentives to assist them in their efforts to buy and sell a house. This also avoids the result of persons being given a "free ride" by not following the Rule at issue but, nevertheless, seeking all of the promotion afforded to members who agree to follow the Rule.

Interrogatory No. 6

State all facts supporting Respondent's contention in its Answer that "Respondent lacks market power as a significant amount of sales in the described market are from persons or entities other than Respondent and there is competition in that market."

Response:

Preliminary review of available data suggests that of the total residential properties sold in Realcomp's market area, approximately 40% of the homes were listed on the Realcomp MLS. Realcomp is currently in the process of collecting and compiling data to support this contention.

Interrogatory No. 7

Identify all websites that Respondent contends allow real estate brokers in Southeast Michigan whose listings are not displayed on Realcomp Websites to effectively compete with brokers whose listing are displayed on Realcomp Websites.

Response:

Realcomp objects to Interrogatory No. 7 as overly broad, vague and unduly burdensome in that it asks Realcomp to identify "all websites" responsive to the inquiry. Realcomp further objects on the grounds that the Internet has an expansive amount of data, and it is impossible to identify all such websites.

Notwithstanding this Objection, Realcomp references the attached list of websites, which is a representative sample of the expansive amount of information requested in Interrogatory No. 7.

Interrogatory No. 8

Identify all members (past or present) of the Realcomp Board of Governors who voted against the Web Site Rule and/or Search Function Rule.

Response:

Realcomp lacks the information necessary to respond to Interrogatory No. 8, as it does not document how individual members of the Board of Governors vote on motions, nor which individuals "move for" or "second" any such motion.

Interrogatory No. 9

Identify each instance in which a Realcomp member procuring cause cooperating broker did not receive a commission on the sale of a home because the listing was an Exclusive Agency, Limited Services, or MLS Entry Only listing.

Response:

Realcomp objects to Interrogatory No. 9 on the grounds that it is unduly vague and unclear what is meant by "a Realcomp member procuring cause cooperating broker."

Notwithstanding this Objection, Realcomp states that it lacks the information necessary to respond to Interrogatory No. 9, as it does not hold hearings for procuring cause, as this is conducted at the Board or Association of REALTOR®'s level.

Interrogatory No. 10

Identify all persons involved in creating the documents submitted to the Federal Trade Commission under Commission Rule 3.31(b) regarding Initial Disclosures and describe their involvement.

Response:

Karen Kage, CEO of Realcomp, gathered and analyzed the information for the Initial Disclosures. Ken Franklin, Director of Technology for Realcomp, conducted the necessary database searches and electronic information retrieval, including statistics on the number of REALTORS® participating in IDX, REALTOR.com and MoveInMichigan.com.

Interrogatory No. 11

Describe in detail all the reasons for Realcomp's Web Site Rule.

Response:

See response to Interrogatory No. 5.

Interrogatory No. 12

Describe in detail all the reasons for Realcomp's Search Function Rule.

Response:

Prior to implementing the Search Function Rule, Realcomp received several inquiries seeking clarification on how an agent could determine the listing type for listed properties.

In many Exclusive Agency listings, the listing agent is only providing limited services to the seller. Potential sellers' agents need to understand the scope of services the listing agent is providing to the sellers prior to initiating efforts to show or sell the property. The National Association of Realtors ("NAR") Code of Ethics prohibits an agent from soliciting or working directly with a seller that is under contract with another agent, but this rule excludes any services that the listing broker is not providing to the seller. It also helped to make sure that the agents searching the databases were aware of this listing type prior to scheduling an appointment. Simply, in many of the Exclusive Agency Agreements, the listing agent is providing limited services as requested by the seller. The selling agent needs to know in advance the sellers' relationship with their agent.

Even though each entry includes a listing type, Realcomp received requests to better distinguish between the types of listings. In response, Realcomp added listing type fields to the search screen to facilitate retrieval of this information.

Realcomp also determined that nearly all of the listings in the MLS were comprised under the Exclusive Right to Sell (ERTS) or "Unknown" listing type. Since an overwhelming majority of the listings were in one of these two categories, Realcomp decided to default the search to include these two types. This helps to ensure that the agents searching the database were aware of the listing type prior to taking any action for the reasons stated above.

Interrogatory No. 13

Describe in detail all the reasons for Realcomp's rule that Exclusive Agency, Limited Services and MLS Entry Only listings will not be distributed to any Real Estate advertising sites.

Response:

Realcomp objects to Interrogatory No. 13 on the grounds that the term "Real Estate advertising sites" is undefined.

Notwithstanding this Objection, Realcomp references its response to Interrogatory No. 5. Realcomp further states that it assists its broker subscribers, that have their listings included on a Realcomp Website, by providing the broker with a feed of all of their listings so that they can include the information on any web site of their choosing. In this case, Realcomp includes all properties regardless of the listing type to ensure that the broker has access to all of his or her information.

Interrogatory No. 14

State (on a yearly basis) the number of searches conducted on the Realcomp MLS using the Listing Type default search of ERTS and Incomplete (or Unknown) listing types.

Response:

Realcomp objects to Interrogatory No. 14 as vague as to what constitutes the "Listing Type default search of ERTS and Incomplete (or Unknown) listing types."

Notwithstanding this Objection, Realcomp states that it lacks the information necessary to respond to Interrogatory No. 14 because it does not document or log the types of searches conducted on Realcomp Online.

Interrogatory No. 15

State (on a yearly basis) the number of searches conducted on the Realcomp MLS using the Listing Type search that included EA, LS, or MEO listing types.

Response:

Realcomp states that it lacks the information necessary to respond to Interrogatory No. 15 because it does not document or log the types of searches conducted on Realcomp Online.

Interrogatory No. 16

Describe in detail the benefits to home sellers and buyers of the Website Rule.

Response:

Realcomp states that individual sellers and buyers derive different and unique benefits from the Website Rule. That being said, it is Realcomp's position that the Website Rules enhances the ability for agents to offer a menu of services to consumers. The Website Rule offers one such level of services consumers can purchase from a listing agent. See also response to Interrogatory No. 5.

Interrogatory No. 17

Describe in detail the benefits to home sellers and buyers of the Search Function Rule.

Response:

Realcomp states that individual sellers and buyers derive different and unique benefits from the Search Function Rule. That being said, it is Realcomp's position that the Search Function Rule enhances the opportunity for potential selling brokers to offer services to consumers that were not purchased from the listing agent for any variety of reasons. For instance, a listing agent may not offer certain services that selling agent offers, and the buyer is able to purchase those specific services from the selling agent.

Interrogatory No. 18

Describe in detail the benefits to home sellers and buyers of Realcomp's rule that Exclusive Agency, Limited Services and MLS Entry Only listings will not be distributed to any Real Estate advertising sites.

Response:

Realcomp objects to Interrogatory No. 18 on the grounds that the term "Real Estate advertising sites" is undefined.

Notwithstanding this Objection, Realcomp references the response the Interrogatory No. 16. See also Response to Interrogatory No. 5.

REALCOMP II LTD.

Dated: January 11, 2007

By: Karen Kage, CEO
Karen Kage, CEO

FOSTER, SWIFT, COLLINS & SMITH, P.C.
Attorneys for Respondent

Dated: January 10, 2007

By: 

Steven H. Lasher (P28785)
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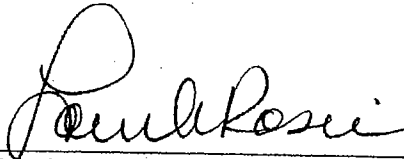
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CERTIFICATE OF SERVICE

This is to certify that on January 11, 2007, I caused a copy of the attached Respondent's Objections to Petitioner's First Set of Interrogatories in Docket No. 9320, to be served upon the following persons by Electronic Transmission and Overnight Courier:

Sean P. Gates
Deputy Assistant Director
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Counsel for Claimant.



Lorri A. Rosier

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www.thishouseforsale.com

www.virtualfsbo.com

www.yoursalebyowner.com

http://base.google.com/base/s2?a_n0=housing&a_y0=9&hl=en&gl=US

www.zillow.com

REALTOR.com Participation

YEAR	Number of Offices ¹ Activated for REALTOR.com Participation Annually	Number of Offices Participating With REALTOR.com and Still Active in Realcomp on 1/3/2007	Number of Agents in Offices Activated for REALTOR.com Participation Annually	Number of Agents in REALTOR.com Participating Offices and Still Active in Realcomp on 1/3/2007
2002	n/a ³	n/a ³	n/a ³	n/a ³
2003	1386	869	n/a ²	8541
2004	356	242	n/a ²	1727
2005	375	257	n/a ²	1495
2006	407	355	n/a ²	1421
TOTAL	2524	1723	n/a ²	13184

NOTES:

- 1 If an office changed ID they may be counted twice or more in these counts.
- 2 This number is unattainable because the number of agents active with an office changes over time.
- 3 Our data extract method changed in 2003 to the current method.

MoveInMichigan.com Participation

YEAR	Number of Offices ¹ Activated for REALTOR.com Participation Annually	Number of Offices Participating With REALTOR.com and Still Active in Realcomp on 1/3/2007	Number of Agents in Offices Activated for REALTOR.com Participation Annually	Number of Agents in REALTOR.com Participating Offices and Still Active in Realcomp on 1/3/2007
2002	1056	293	n/a ²	4697
2003	843	144	n/a ²	1540
2004	406	283	n/a ²	2812
2005	540	427	n/a ²	2390
2006	381	352	n/a ²	1334
TOTAL	3226	1499	n/a ²	12773

NOTES:

- 1 If an office changed ID they may be counted twice or more in these counts.
- 2 This number is unattainable because the number of agents active with an office changes over time.

PROCURING CAUSE FACTORS

Whether a broker is the procuring cause of a sale must be factually determined on a case-by-case basis. Many factors can impact a determination of procuring cause, but no one factor is by itself determinative. Procuring cause is in fact the interplay of factors which together demonstrate that the unbroken efforts of a specific broker were responsible for the buyer making the decision to consummate the sale on terms which the seller found acceptable. In other words, a broker who is the procuring cause of a sale is a sine qua non of the sale -- the sale would not have occurred but for the broker's efforts.

When reviewing the factors listed below, it is important to note that the occurrence of any particular factor in a fact situation does not necessarily mean that procuring cause does or does not exist. This is because it is the interplay of factors that is so important in recognizing procuring cause, not the presence of any one factor alone. A specific factor can, in fact, cut either way, depending on its importance compared to the other factors in the case and depending on when it occurs in the timeline of the case.

Procuring cause factors may be grouped, for organizational purposes, into nine different categories. These categories are:

- The nature and status of the transaction
- The nature, status and terms of the listing agreement or offer to compensate
- The roles and relationships of the parties
- The initial contact with the purchaser
- The conduct of the broker* or agent
- Continuity and breaks in continuity
- The conduct of the buyer
- The conduct of the seller
- Other information

In the analysis that follows, specific procuring cause factors are grouped by the above categories. In addition, where there is supporting case law, citations and brief explanations are provided to offer examples of the interplay of that factor with other factors and to suggest outcomes. Please note that much of the case law does not resolve disputes between brokers, but between sellers and brokers. Likewise, most of the cases involve open listings rather than exclusive listings. Nevertheless, these cases focus on two issues which are relevant to fact situations involving exclusive listings and broker-broker disputes -- that is, what has the broker been promised (by either the seller or the listing broker) and what must the broker do to attain his promised commission.

PROPOSED Procuring Cause Factors:

I. The Nature and Status of the Transaction

- A. What was the nature of the transaction?
- B. Is or was the matter the subject of litigation?

II. The Nature, Status and Terms of the Listing Agreement or Offer to Compensate

- A. What was the nature of the listing or other agreement: exclusive right to sell, exclusive agency, open or some other form of agreement?
- B. Was the agreement in writing?
- C. Was the agreement in effect at the time the sales contract was executed?
- D. Was the property listed subject to a management agreement?
- E. Is the claimant a party to whom the listing broker's offer of compensation was extended?
- F. If an offer of cooperation and compensation was made, how was it communicated?
- G. Were the broker's actions in accordance with the terms and conditions of the agreement or offer of cooperation and compensation (if any)?

The nature, status and terms of the listing agreement or offer to compensate are the starting points for any procuring cause analysis. For the broker to be the procuring cause, however, the agreement need not be exclusive. Farm Credit Bank of St. Louis v. Miller, 872 S.W.2d 376 (Ark. 1994); Hennessy v. Schmidt, 384 F.Supp. 1073 (N.D. Ill. 1974); Atkinson v. S.L. Nusbaum & Co., 59 S.E.2d 857 (Va. App. 1950). Neither must the agreement be written. Christo v. Ramada Inns, Inc., 609 F.2d 1058 (3d Cir. 1979); Ahrens v. Haskin, 299 S.W.2d 87 (Ark. 1957); Feeley v. Mullikin, 269 P.2d 828 (Wa. 1954); Wilson v. Sewell, 171 P.2d 647 (N.M. 1946). The critical questions are whether the agreement was in effect at the time the sales contract was executed and whether the claiming broker was a party to whom the agreement extended. Farnsworth Samuel Limited v. Grant, 470 So.2d 253 (La.App. 1985); Winograd, Inc. v. The Prudential Insurance Company of America, 476 N.Y.S.2d 854, aff'd, 472 N.E.2d 46 (1984); Mohamed v. Robbins, 531 P.2d 928 (Ariz. App. 1975); Hampton Park Corporation v. T.D. Burgess Company, Inc., 311 A.2d 35 (Md. App. 1973); Wright v. Jaegeris, 427 S.W.2d 276 (Mo. App. 1968).

For instance, in Winograd, one broker supplied information about the subject space to a second broker who finalized the transaction. 476 N.Y.S.2d at 856. Neither activity was dispositive. Id. The second broker, not the first, was the procuring cause because the listing agreement did not extend to the first broker. Id.

In Mohamed, the extension clause of an exclusive listing agreement was a key factor in establishing that the broker was the procuring cause. 531 P.2d at 930. Here the broker made contact with an appropriate representative of the ultimate purchaser during the period of the listing agreement, initiated negotiations with him and followed up after the listing agreement expired. Id. The broker took no part, however, in the final negotiations. Id. Nevertheless, the broker was the procuring cause of the ultimate sale because the listing agreement provided that a commission would be due the broker if the property was sold to any person whom the broker had negotiated with prior to the expiration of the listing. Id.

1. Were all conditions of the agreement met?

Where a condition precedent to the payment of commission is not met, the broker is not the procuring cause -- even though he has produced a buyer/lessee who is otherwise ready, willing and able and even though the seller/lessor has acted in bad faith. The Quadrant Corporation v. Spake, 504 P.2d 1162 (Wash. App. 1973). In Quadrant, the agreement provided that the broker would get a commission if he produced a lessee who would agree to the terms acceptable to the lessor and if the lessor was able to secure construction financing necessary to make improvements to the property. Id. With regard to the financing, the broker found lenders willing to take loan applications from the lessor, but the lessor refused to sign said applications. Id. at 1164. The court held that the lessor's refusal was in bad faith and constituted a breach of his agreement with the broker. Id. Nevertheless, the broker was not the procuring cause because it was factually unlikely that the lessor would have been approved for the loans and thus unlikely that the condition precedent to the payment of the broker's commission could have been met. Id. at 1166.

2. Did the final terms of the sale meet those specified in the agreement?

For a broker to be the procuring cause of a sale, the final agreed-upon price need not be the same as that specified in the listing agreement. Follman Properties Company v. Daly, 790 F.2d 57 (8th Cir. 1986); Fanning v. Maggi et al., 126 N.Y.S.2d 551 (1953); Wilson v. Sewell, 171 P.2d 647 (N.M. 1946). Courts recognize that the buyer and seller will negotiate and that the seller's agreement to a lesser price than originally asked for should not negate the broker's efforts. Wilson, 171 P.2d at 649.

It is not, however, sufficient for the broker to bring the parties to agreement only

as to price. Kaelin v. Warner 267 N.E.2d 86 (N.Y. App. 1971). There must be agreement as to all essential terms for the broker to be entitled to receive the commission specified in the listing agreement. Id. For instance, in Kaelin, the listing agreement required the broker to procure a buyer at a sale price of \$100,500, "with terms to be arranged." Id. at 87. The broker procured an offer of \$100,500, but the parties could not agree as to the terms normally required for a real estate transaction, including payment terms and closing date. Id. Since there was no agreement as to all essential terms, the broker did not earn his commission. Id. at 88.

In In re Fox' Will, a broker who introduced the parties and showed the property to the buyer first was not the procuring cause where it was another broker who was able to bring the buyer to the terms specified in the listing agreement. 126 N.Y.S. 158 (1953).

III. Roles and Relationships of the Parties

- A. Who was the listing agent?**
- B. Who was the cooperating broker or brokers?**
- C. Are all appropriate parties to the matter joined?**
- D. Were any of the parties acting as subagents? As buyer brokers? In some other capacity?**
- E. Did any of the cooperating brokers have an agreement, written or otherwise, to act as agent or in some other capacity on behalf of any of the parties?**
- F. Were any of the brokers (including the listing broker) acting as a principal in the transaction?**
- G. What were the brokers' relationships with respect to the seller, the purchaser, the listing broker, and any other cooperating brokers involved in the transaction?**

In most instances, the broker's relationship with the parties is a straightforward one that does not in itself raise questions as to whether or not the broker is the procuring cause of a sale. At other times, however, the relationship is less straightforward and courts have had to ask additional questions in order to determine procuring cause:

- 1. Was the party to whom the property was ultimately sold represented by a party with whom the broker had previously dealt?**

Knight v. Hicks, 505 S.W.2d 638 (Tex. App. 1974) demonstrates this kind of relationship and its effect on determining procuring cause. In Knight, the broker introduced Herschel Johnson to the seller and showed him the seller's property. Id. at 641. The broker also initiated negotiations between the parties, but was not able to finalize them. Ultimately, Mr. Johnson's son purchased the property from the seller. Id. Even though the broker had never shown the son the property or negotiated with him, the broker was the procuring cause of the sale because the parties had understood from the beginning that Mr. Johnson had been interested in the property on behalf of his son. Id. at 642.

2. Is the primary shareholder of the ultimate buyer-corporation a party with whom the broker had previously dealt?

O'Brien v. Morgan, 104 A.2d 411 (D.C. App. 1954) offers a good example of the kinds of complex relationships that can occur and the kinds of procuring cause questions that are raised when dealing with corporations. O'Brien is a case involving the sale of interstate motor carrier operating rights, rather than real estate; the principles, however, are applicable to the sale of real property as well. In O'Brien, the broker initiated negotiations between the seller and the Shoe City Corporation, the sole owner of which was a Mr. Lyons. Id. at 412. Ultimately, the negotiations broke down, though through no fault of the broker. Id. Later, a sale was finalized between the seller and Quinn Freight Lines, Inc., the controlling shareholder of which was also Mr. Lyons. Id. The court held that the broker was indeed the procuring cause of the sale to Quinn Freight Lines because his prior efforts with regard to the ultimate decision-maker had been sufficient. Id. at 413.

3. Was a prior prospect a vital link to the ultimate buyer?

Strout Realty, Inc. v. Haverstock, 555 A.2d 210 (Pa. 1989) shows how a broker's efforts with regard to one prospect may make her the procuring cause of a sale to a different prospect -- if the first prospect is the chief conduit to the ultimate buyer. In Strout, the broker first showed the seller's property to a Reverend Shafer and reached the point of discussing price and financing with him. Id. at 211. The Reverend then brought Stewardship Consultants, Inc. into the picture and the seller ultimately and directly negotiated a sale of the same property with this corporation. Id. The court held that because Reverend Shafer had conveyed critical information given to him by the broker to the corporation, the sale would not have occurred but for the introduction of the property to Reverend Shafer by the broker. Id. at 214. The broker, therefore, was the procuring cause of the sale to the corporation. Id.

IV. Initial Contact with the Purchaser

A. Who first introduced the ultimate purchaser or tenant to the property?

A broker who makes the initial contact with the purchaser does not automatically become the procuring cause of an ensuing sale. Mohamed, 531 P.2d at 931. When and how the initial contact was made can, however, be important factors in determining procuring cause. United Farm Agency of Alabama, Inc. v. Green, 466 So.2d 118 (Ala. 1988); Mehlberg v. Redlin 96 N.W.2d 399 (S.D. 1959); Wilson v. Sewell, 171 P.2d 647 (N.M. 1946). Thus, the following factors must be considered:

B. When was the first introduction made?

1. Did the ultimate buyer find the property on his own?

Hampton Park demonstrates that where a decisionmaker/buyer discovers the subject property, arrives at his decision and negotiates the terms through means which are independent of the claiming broker's efforts, the claiming broker is not the procuring cause. 311 A.2d at 35. In this case, after negotiations arranged by the broker had broken down between the owner and one representative of the Post Office, another representative of the Post Office, who had learned of the property through his own investigations, independently negotiated a sale with the owner. Id. at 39. The claiming broker was not the procuring cause because his introduction of the property was not "the foundation" on which the sale was ultimately made. Id. at 41.

2. Was the introduction made when the buyer had an immediate need for that specific property?

Mehlberg v. Redlin establishes how important it can be for a broker to introduce a prospective buyer to the right property at the right time. 96 N.W.2d 399 (S.D. 1959). In Mehlberg, the broker told a pastor about a property which was suitable for a parsonage at the time a church was in immediate need of a parsonage. Id. at 400. The broker, however, did not show the property to the officers of the church; rather the officers viewed the property on their own from the outside, sought out the seller and negotiated a sale directly with him. Id. The court held that the broker was nevertheless the procuring cause of the sale because he had brought the parties together at a propitious moment. Id. at 402.

3. Did the buyer know about the property before the broker contacted him? Did he know it was for sale?

In Farnsworth Samuel Limited v. Grant, the buyer lived across the street from the subject property. 470 So.2d 253 (La.App. 4th Cir. 1985). Yet he did not know it was listed for sale until the broker informed him. Id. The broker initiated negotiations between the parties, but was not able to consummate the deal. Id. Subsequently, the buyer and seller entered into direct negotiations with each other.

Id. Curiously, the difference between the original bid submitted via the broker and the price agreed upon by the parties in their direct negotiations equaled the broker's commission. Id. at 254. The court held that the broker was the procuring cause, listing a number of factors it considered in making its decision: "whether the prospect who ultimately purchased the property knew about the property before being contacted by the broker; the relative success or failure of the negotiations conducted by the broker, including the continuity or discontinuity of the original and final negotiations; the length of time elapsing between the broker's negotiations and the final sales agreement; development of a new, different, or independent motive for the prospect to purchase; whether or not the broker abandoned efforts to negotiate the transaction with a particular prospect; and finally, the good or bad faith of the principal and the broker." Id.

4. Were there previous dealings between the buyer and the seller?

A broker may be the procuring cause of a sale even if there were previous dealings between the buyer and the seller. Mohamed, 531 P.2d at 931; Chamness v. Marquis, 383 P.2d 886 (Wash. 1963). In Chamness, the prospective buyer had previously had direct, but unsuccessful dealings with the seller. Id. The broker then made substantial contributions by showing the property to the prospective buyer several times, re-initiating negotiations and attempting to secure financing. Id. at 887. Even though the buyer and seller ultimately came to terms on their own, the broker was the procuring cause because his efforts were the foundation for the final, successful negotiations between the parties. Id. at 888.

C. How was the first introduction made?

1. Was the introduction made to a different representative of the buyer?

A broker may be the procuring cause of a sale even if she introduced the property to one individual and negotiated final terms with another, so long as both individuals represented the same buyer and so long as the individual making the ultimate decision to buy did not arrive at his decision independent of the broker's efforts. Arthur H. Richland Company v. Morse, 169 F. Supp. 544 (Md.), aff'd, 272 F.2d 183 (4th Cir. 1959). Cf. Hampton Park, 311 A.2d at 35 (where ultimate decision-maker had found property through his own investigations and did not avail himself of any of broker's efforts).

2. Was the "introduction" merely a mention that the property was listed?

Merely alerting a buyer to the fact that a property is available does not usually constitute procuring cause. United Farm Agency of Alabama, Inc. v. Green, 466 So.2d 118 (Ala. 1988); Greene v. Hellman, 412 N.E.2d 1301 (N.Y. App. 1980). But See Mehlberg, 96 N.W.2d at 402 (where broker brought specific property to

the attention of prospective buyer when buyer had an immediate need for that specific property, the broker was the procuring cause). For instance, in United Farm, the sellers had two properties listed with the broker. Id. at 119. The broker showed one property to the prospective buyers; he merely mentioned to the prospects that the second property was listed. Id. Shortly thereafter and without the involvement of the broker in the negotiations, the prospects purchased both properties directly from the sellers. Id. at 120. The court held that the broker was the procuring cause as to the first property. Id. With regard to the second property, however, he was not the procuring cause because he had done nothing more than mention that it was listed. Id. at 121.

3. What property was first introduced?

In Doyal & Associates, Inc. v. Wilma Southeast, Inc., the broker represented the buyer bank. 322 S.E. 2d 24, 25 (Ga. App. 1985). He showed one property and made appropriate follow-up efforts. Id. The bank and the owner of the first property, however, eventually and directly finalized a sale of another property, which the broker had never shown the bank. Id. The broker was not the procuring cause just because he had introduced the parties. Id. The broker needed to prove that negotiations had been pending on the second property. Id.

V. CONDUCT OF THE BROKER

- A. Were all disclosures mandated by law or the Code of Ethics complied with?**
- B. Was there faithful exercise of agency on the broker's part, or was there any breach or failure to meet the duties owed to a principal?**

A broker who breaches his duty to his principal is not entitled to his commission. Haymes v. Rogers, 222 P.2d 789 (Ariz. 1950). In Haymes, the broker was alleged to have breached his duty to the seller by telling the prospective buyer how much another party had bid and what he could get the seller's property for. Id. Subsequently, the buyer and seller finalized the transaction directly with one another, bypassing the broker. Id. In determining whether the broker was nevertheless the procuring cause, the court left it to the jury to decide whether the allegation that the broker had breached his duty to his principal was true. Id. However, it noted that if such a breach was found to have occurred, the broker would not be entitled to his commission. Id. at 790.

- C. If more than one cooperating broker was involved, was either (or both) aware of the other's role in the transaction?**

Although it is often overshadowed by other factors, the awareness by one broker of the recent efforts of another is a factor to be considered in determining

procuring cause. Wright, 427 S.W.2d at 276; Atkinson, 59 S.E.2d at 860. Where one broker is aware of another's continuing efforts and in bad faith interferes with the transaction, he will not be the procuring cause. Wright, 427 S.W.2d at 276. However, where one broker, aware that another broker's efforts have broken down, steps in and finalizes a sale, his efforts are legitimate, and he will be the procuring cause of the sale. Atkinson, 59 S.E.2d at 860.

- D. Did the broker who made the initial introduction to the property engage in conduct (or fail to take some action) which caused the purchaser or tenant to utilize the services of another broker?**

A broker may cause a buyer to seek the services of another broker either through estrangement or abandonment. Levy Wolf Real Estate Brokerage, Inc. v. Lizza Industries, Inc., 500 N.Y.S.2d 37 (1986). In Levy Wolf, one broker did little more than bring the subject property to the attention of the prospective buyer and unsuccessfully try to set up a meeting between the parties. Id. at 38. He then in essence abandoned his efforts. Id. The prospect thus sought out the services of a second broker, who did background research and made inquiries and proposals that ultimately resulted in a sale. Id. The second broker was the procuring cause. Id.

- E. Did the cooperating broker (or second cooperating broker) initiate a separate series of events, unrelated to and not dependent on any other broker's efforts, which led to the successful transaction – that is, did the broker perform services which assisted the buyer in making his decision to purchase?**

See Marathon Realty Corporation v. Gavin, 398 N.W.2d 689 (Neb. 1987); Atkinson, supra V.C.

- 1. Did the broker make preparations to show the property to buyer?**

Courts examine the preparatory efforts a broker makes. Farm Credit Bank, 872 S.W.2d at 378 (broker sent brochure, made aerial photographs); United Farm, 466 So.2d at 119 (broker took pictures of house); Hampton Park, (broker prepared description, report).

- 2. Did the broker make continued efforts after showing the property?**

Likewise, courts consider the continued efforts a broker makes. Farm Credit Bank, 872 S.W.2d at 378 (broker who made fifty to sixty follow-up phone calls was procuring cause); Flamingo Realty, Inc. v. Midwest Development, Inc., 879 P.2d 69 (Nev. 1994), cert. denied, 115 S.Ct. 1999 (1995)(broker who made continued efforts to secure joint venturer that was prerequisite to sale was procuring cause; Levy Wolf, 500 N.Y.S.2d at 38 (broker who abandoned efforts

was not procuring cause).

3. Did the broker remove an impediment to the sale?

A broker's efforts in removing an impediment to the sale will be considered in determining procuring cause. C. Myers & Simpson Company v. Feese Real Estate, Inc., 705 S.W.2d 600 (Mo. App. 1986). For example, in Myers, one broker showed the property to the buyer first; however, another broker was responsible for satisfying a prerequisite of the buyer's, the removal of outdoor advertising signs from the property. Id. at 602. The court held that the second broker was the procuring cause. Id.

4. Did the broker make a proposal upon which the final transaction was based?

A broker's proposal may be critical in determining procuring cause. Hennessey, 348 F. Supp. at 1073. In Hennessey, the broker introduced the parties, sent numerous letters to the buyers and made numerous phone calls to the buyers. Id. at 1075. However, he did not participate in the negotiations, he did not assist in the preparation of the final papers and he did not even attend the closing. Id. He nevertheless was the procuring cause because his proposal was the one which the parties adopted in finalizing the transaction. Id.

5. Did the broker motivate the buyer to purchase?

Courts may even consider various motivational strategies a broker may employ to bring the buyer to the decision to purchase. Richland, 169 F. Supp. at 551. For instance, in Richland, the broker motivated the buyer by letting him know that he had introduced another serious prospect to the seller. Id. The court believed that this was one of several important factors in the buyer's ultimate decision to purchase and that the broker was thus the procuring cause of the sale. Id.

F. How do the efforts of one broker compare to the efforts of another?

"When more than one broker competes for a single commission, these factors have to be carefully examined by comparing each broker's activities to the activities of the other brokers involved and by evaluating them in light of the general guidelines." A.N. Associates, Inc. v. Quotron Systems, Inc., 159 Misc.2d 515 (C.C. N.Y. 1993).

1. What was the relative amount of effort by one broker compared to another?

See Levy Wolf, supra V.D., (broker who made greater efforts was procuring cause).

2. What was the relative success or failure of negotiations conducted by one broker compared to the other?

See Farnsworth, *supra* IV.B.3., (listing factors relevant to procuring cause: "the relative success or failure of the negotiations conducted by the broker...").

- G. If more than one cooperating broker was involved, how and when did the second cooperating broker enter the transaction?

See Feeley, *infra* VIII.A.3 (second broker entered transaction only after seller acted in bad faith).

VI. CONTINUITY AND BREAKS IN CONTINUITY

- A. What was the length of time between the broker's efforts and the final sales agreement?

A short lapse of time between a broker's efforts with regard to a particular buyer and the finalization of an agreement with that buyer is indicative that the finalization is the result of the unbroken efforts of the broker. United Farm, 466 So.2d at 120. Thus, in United Farm, where the broker had made considerable preparatory efforts, introduced the parties, and shown the property to the buyer, the court found the short lapse of time between the broker's efforts and the buyer's purchase directly from the seller significant. *Id.* See also Farnsworth, 470 So.2d at 254; Seckendorff v. Halsey, Stuart & Co., 182 N.E. 14 (N.Y. App. 1932).

- B. Did the original introduction of the purchaser or tenant to the property start an uninterrupted series of events leading to the sale (or to any other intended objective of the transaction), or was the series of events hindered or interrupted in any way?

1. Did the buyer terminate the relationship with the broker? Was such termination in good faith?

A buyer or lessee's good faith termination of his relationship with a broker will defeat that broker's claim of procuring cause, provided the termination occurs before successful negotiations are achieved. Aegis Property Services Corp. v. Hotel Empire Corp., 484 N.Y.S.2d 555 (1985). In Aegis, one broker introduced the parties and showed the space to a potential lessee. *Id.* After the broker followed up with the lessee, but before negotiations were successful, the prospect terminated its relationship with the broker, refusing to authorize the broker to negotiate on its behalf. *Id.* at 558. The prospect subsequently retained the services of another broker, who was able to successfully negotiate a lease. *Id.*

The court found there to be no bad faith on the part of lessee; its termination of the first broker was not motivated by a desire to escape payment of a commission. Id. at 559. The court reasoned that absent bad faith, a prospect's termination of a broker's efforts is absolute, and held that the second broker, not the first, was the procuring cause of the transaction. Id.

2. Did negotiations break down?

Hecht Realty, Inc. v. Whisnant demonstrates that the breakdown of negotiations is a significant factor in determining procuring cause. 255 S.E.2d 647 (N.C. App. 1979). In Hecht, the broker introduced the parties and showed the subject property to the ultimate buyers. Id. Later, after the broker's exclusive listing agreement had expired, the prospects decided they wanted the property and made an offer. Id. The sellers made changes to the contract, but the prospects refused to accept the counteroffer. Id. Negotiations broke down and the broker was not able to finalize a transaction. Id. Later, a second broker was able to re-initiate negotiations and ultimately finalize a sale. Id. The court held that the second broker was the procuring cause of the sale. Id. at 648. See also Christo v. Ramada Inns, Inc., 609 F.2d at 1058.

C. If there was an interruption or break in the original series of events, how was it caused, and by whom?

1. Did the seller change the listing agreement from an open listing to an exclusive listing agreement with another broker?

An example of this situation is Belleau v. Hopewell, 411 A.2d 456 (N.H. 1980). Here, a broker had a non-exclusive listing agreement. Id. at 458. After he had shown the property to a prospective buyer and had made continued efforts, the seller gave an exclusive agreement to another broker, unbeknownst to the first broker. Id. The buyer then sought the services of the second broker who finalized the transaction. Id. The new, exclusive agreement did not break the continuity of the first broker's efforts, and, the court held, the first broker was the procuring cause of the sale. Id. at 460.

2. Was there the development of a new, different or independent motive behind the purchase?

See Farnsworth supra IV.B.3., (listing factors relevant to procuring cause: "development of a new, different, or independent motive for the prospect to purchase").

3. Was there interference in the series of events from any outside or intervening cause or party?

See VIII. CONDUCT OF THE SELLER

- D. Did the broker making the initial introduction to the property maintain contact with the purchaser or tenant, or could the broker's inaction have reasonably been viewed by the buyer or tenant as a withdrawal from the transaction?

See Levy Wolf, *supra* V.D.

- E. Was the entry of any cooperating broker into the transaction an intrusion into an existing relationship between the purchaser and another broker, or was it the result of abandonment or estrangement of the purchaser, or at the request of the purchaser?

See Nestle, *infra* VIII.A.4; Levy Wolf, *supra* V.D., Aegis, *supra* VI.B.1.

VII. Conduct of Buyer

- A. Did the buyer make the decision to buy independent of the broker's efforts/information?

See Hampton Park, *supra* IV.B.1.

- B. Did the buyer negotiate without any aid from the broker?

See Hampton Park, *supra* IV.B.1.

- C. Did the buyer seek to freeze out the broker?

Neither the buyer nor the seller may act in bad faith so as to deprive a broker of his commission which he has otherwise rightfully earned. Sanders et al. v. Devereux, 189 A.2d 604 (Md. App. 1963). Sanders demonstrates how a buyer may attempt, for her own gain, to freeze out a particular broker. *Id.* In this case, a broker introduced the parties, showed the property, followed up and brought the negotiations to a point where success seemed likely. *Id.* One of the buyers, a broker herself, then conspired with the seller to temporarily take the property off the market, place it back on the market shortly thereafter, and consummate a sale so that she and a broker with whom her agency had a business association would receive the commission. *Id.* at 605. In holding that the first broker was the procuring cause of the subsequent sale, the court asserted: "Although it is not sufficient that the broker has merely planted the seed from which the harvest was reaped, on the other hand the owner [or buyer] cannot take advantage of a broker's services and make the sale himself, or through another broker, so as to deprive the broker of his commission when he has introduced a prospective buyer to the seller and

negotiations have progressed to a point where success seems imminent." Id. at 607.

1. Did the buyer seek another broker in order to get a lower price?

A buyer may not freeze out a broker who has sufficiently performed by seeking the services of a broker whom she believes may be able to get a lower price on the subject property. Wright, 427 S.W.2d at 276. In Wright, a broker introduced the buyers to the seller, showed them the property and properly followed up with them. Id. at 278. The buyers, however, believed that another broker, with whom they had a long-time acquaintance, could get them the property at a lower price. Id. at 279. They thus contacted the second broker and finalized the sale via him. Id. The court held that they could not circumvent the first broker and thereby deprive him of his commission in this way. Id. at 281.

2. Did the buyer express the desire not to deal with the broker and refuse to negotiate through him?

A buyer may decide not to negotiate through a broker and unless the broker has an exclusive right to sell agreement, the broker will not be the procuring cause of a subsequent sale. Walker v. David Davies Inc., 296 N.E.2d 691 (Oh. App. 1973). In Walker, the broker had no direct negotiations with the buyer; in fact the buyer expressed a desire not to deal through the broker. Id. at 695. Thus, the court held that the broker was not the procuring cause even though he had incurred expense and spent time trying to sell the property. Id.

3. Did the contract provide that no brokers or certain brokers had been involved?

Buyer and seller may contractually provide that no broker was involved in their transaction. However, where there is evidence that the parties have not been truthful and that a broker has performed sufficiently so that he is the procuring cause, the broker will be entitled to the commission. Risser v. Hirshhorn, 199 F.2d 917 (2nd Cir. 1952).

D. Did the buyer divulge to the seller that a certain broker had brought him to the transaction?

Where a broker has been instrumental in bringing the buyer to the subject property, the buyer must reveal this to the seller. Risser, 199 F.2d at 917. Indeed, even where the buyer fails to divulge this information to the seller, the seller is responsible for paying a commission to the broker if the seller could have ascertained by reasonable diligence that the broker's role was sufficient. Id. For instance, the buyer in Risser discovered the subject property when he was given a brochure the broker had prepared and forwarded to an associate of the buyer's. Id. at 918. Because the buyer at first wished to remain anonymous, the broker

reported to the seller that the associate was interested in the property; he did not mention the ultimate buyer himself. *Id.* The buyer, however, eventually negotiated directly with the seller and the two inserted a statement in the contract which asserted that no broker had been involved in the transaction. *Id.* at 919. The court determined that the purpose of this provision was to avoid paying the broker a commission. *Id.* The court noted that the buyer had a duty to divulge the broker's role to the seller and that even if he failed to do so, the seller would be liable for the broker's commission if the seller could have ascertained the broker's role by reasonable diligence. *Id.* at 920.

VIII. CONDUCT OF THE SELLER

A. Did the Seller act in bad faith to deprive the broker of his commission?

The following scenarios demonstrate that courts will not allow the bad faith of the seller to negate the efforts of a broker who would otherwise be the procuring cause of a sale. In most instances, the same would prove true if it were the listing broker who acted in bad faith to deprive a subagent or cooperating broker of her commission.

1. Was there bad faith evident from the fact that the difference between the original bid submitted and the final sales price equalled the broker's commission?

See Farnsworth, *supra* IV.B.3.

2. Was there bad faith evident from the fact that a sale to a third party was a straw transaction which was designed to avoid paying commission?

Farm Credit Bank demonstrates that courts will not allow straw transactions to deprive a broker of her commission. 872 S.W. at 379. In Farm Credit the brokers registered both the U.S. Fish and Wildlife Service and the Nature Conservancy with the seller bank under their non-exclusive listing agreement. *Id.* at 378. The brokers made extensive efforts to interest the Fish and Wildlife Service in the subject property. *Id.* They wrote letters, made fifty or sixty telephone calls, had aerial photographs made, advised the agency of the flood plain and kept the agency informed as to potential buyers. *Id.* Although the agency wanted to acquire the property, it did not have such an appropriation in its budget that year. *Id.* Ultimately, however, a sale was consummated to a corporation which had been set up to resell the land to the Nature Conservancy which resold the land to the Fish and Wildlife Service when it could afford to make the purchase. *Id.* at 379. The court refused to let such straw transactions deprive the brokers of the commission they had earned. *Id.* See also Flamingo Realty, 879 P.2d at 70 (where seller sold property to corporation which in turn

