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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

In the Matter of REALCOMP II, LTD. a corporation	Docket No. 9320

MOTION OF RESPONDENT REALCOMP II, LTD. FOR PARTIAL STAY OF ORDER PENDING APPEAL

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Pursuant to 16 C.F.R. § 3.56, respondent Realcomp II, Ltd. ("Realcomp") respectfully moves for a partial stay of the October 30, 2009, Final Order ("Order") of the Federal Trade Commission ("Commission") until the final disposition of Realcomp's appeals in the federal courts.

INTRODUCTION

The Order was issued upon the Commission's opinion dated October 30, 2009 ("Opinion"), holding that Realcomp's maintenance and enforcement of its "Website Policy" and "Search Function Policy" (hereinafter, the "Realcomp Policies") constituted an unreasonable restraint of trade prohibited by Section 1 of the Sherman Act and, accordingly, constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

The Opinion reversed the Initial Decision by Chief Administrative Law Judge McGuire, who, after hearing live testimony predominantly elicited by Complaint Counsel and reviewing an extensive record, concluded that Complaint Counsel had failed to prove that the Realcomp Policies had or were likely to have any anticompetitive effect, and dismissed the Complaint. In reversing the Initial Decision, the Commission held, *inter alia*, that the Realcomp Policies fall into the realm of "inherently suspect" conduct that can be condemned without close inquiry into their actual effects on competition. The Commission further concluded that the record, in any event, contained evidence that the Realcomp Policies restrained competition by certain real estate brokers.

The Commission's Order directs Realcomp to cease and desist from adopting or enforcing any policy, rule, practice or agreement that denies, restricts, or interferes with the ability of Realcomp members to enter into lawful listing agreements, including so-called "Exclusive Agency" agreements, with sellers of properties. The Order enumerates specific prohibited conduct, including a general prohibition on treating any type of listing in a "less advantageous" manner than any other

listing. Realcomp is required to modify its website operations to conform to the Order, to amend its rules and regulations in accordance with the Order, to provide each member with a copy of the Order, and to communicate directly with each Member to inform them of the amendments to Realcomp's rules and regulations, and to post the Order on its website, along with a statement directing any website user to the Order.[1]

As reflected in the Initial Decision and the briefing of this matter, in April, 2007, Realcomp repealed the Search Function Policy. It also repealed the definitional requirement that "Exclusive Right to Sell" listings be full-service brokerage agreements. Realcomp does not seek to stay the Order insofar as it would prohibit Realcomp from reversing those actions.

However, unless it is stayed, the Order otherwise will cause significant and irreparable harm to Realcomp even while Realcomp pursues its appeal of the significant legal issues and disputed interpretation of the facts of this case.

ARGUMENT

Under the Commission's rules, "[a]ny party subject to a cease and desist order under section 5 of the FTC Act ... may apply to the Commission for a stay of that order pending judicial review." 16 C.F.R. § 3.56(b). Realcomp will file a notice of appeal in this matter by January 8, 2010.

An applicant for a stay must address the following factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties likely to result from the requested stay; and (4) why

[1] By statute, the Order will become effective 60 days after service, 15 U.S.C. § 45(g)(2). By the terms of the Order, compliance by Realcomp is required 30 days after the effective date. Service upon Realcomp was effected on November 9, 2009, and thus compliance by Realcomp is required no later than February 7, 2010.

the stay is in the public interest. *Id.* § 3.56(c).[2] These requirements track the four-factor test set out in *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977), which test the Commission cited approvingly prior to its codification in Rule 3.56. *See In re California Dental Association*, 1996 FTC LEXIS 277 at *2-3 (May 22, 1996). The four factors are not rigidly applied or weighed equally, and no one factor is determinative. *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987); *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995) (strength of one factor may outweigh "rather weak" arguments in other areas); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (factors are not prerequisites but are interrelated considerations that must be balanced together); *see also Holiday Tours*, 559 F.2d at 843-45 (granting stay notwithstanding movant's inability to prevail on one factor).

I. Realcomp Has Established a Material Likelihood of Success on Appeal

The burden upon a movant to establish a "likelihood" of success on appeal does not require that the movant prove that its success is more likely than not. *Holiday Tours*, 559 F.2d at 843 (rejecting the view that success is a mathematical exercise requiring proof of "50% plus probability"). As *Holiday Tours* explains and the Commission likewise has recognized, a request for stay would be futile if the initial decision-maker "could properly grant interim relief only on a prediction that it has rendered an erroneous decision." *Id.* at 844-45; *California Denta*, 1996 FTC LEXIS 277, *9. Thus, a court or agency may grant a stay "even though its own approach may be contrary to the movant's view of the merits." *Holiday Tours*, 559 F.2d at 843. To demonstrate a

[2] "Because complaint counsel represents the public interest in effective law enforcement," the Commission considers the third and fourth factors together as a single inquiry. *See In re Novartis Corp.*, 128 F.T.C. 233, 236; *California Dental*, 1996 FTC LEXIS 277, at *7.

likelihood of success on the merits, it is sufficient for the movant to show that its appeal involves serious and substantial questions going to the merits of the decision. *Six Clinics Holding Corp., II v. Cafcomp Systems*, 119 F.3d 393, 402 (6th Cir.1997).

A. The Contrary Findings of Chief Judge McGuire Are Evidence That Serious and Substantial Issues Exist for Appeal

The review of an agency decision for substantial evidence requires "a review of the record as a whole, which include[s] the ALJ's decision." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 493 (1951). Realcomp prevailed in the proceedings before Chief Judge McGuire, who dismissed the Complaint.

The Courts of Appeals have recognized that, notwithstanding the deference due the Commission's findings under 15 U.S.C. § 45(c), those findings will be scrutinized more closely when the Commission has overruled, and substituted its findings for those of, its ALJ. *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert denied*, 548 U.S. 919 (2006); *Thiret v. FTC*, 512 F.2d 176, 179 (10th Cir. 1975); *California Dental Association v. FTC*, 128 F.3d 720, 725 (9th Cir. 1997), *rev'd on other grounds*, 526 U.S. 756 (1990); *see also Detroit Auto Dealers Assn. v. FTC*, 955 F.2d 457, 466 (6th Cir.1992) (difference of opinion between Commission and ALJ demonstrates "complexity and difficulty" of the case); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 219 (2d Cir. 1976); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 772-73 (6th Cir. 1966). This is particularly so when the Commission has substituted its assessments of witness credibility for those of the ALJ, as the Commission effectively has done here. *Schering Plough*, 402 F.3d at 1069-71; *Universal Camera*, 340 U.S. at 487-88, 496.

These decisions demonstrate that the existence of a conflict between the findings and conclusions of the Commission and those of its Chief Administrative Law Judge itself is strong, if not conclusive, evidence that Realcomp's issues for appeal are in fact serious and substantial.

B. The Commission's Opinion Relies on a Disputed Legal Standard

As Realcomp will argue on appeal, the Opinion errs in treating the Realcomp Policies as "inherently suspect" conduct capable of condemnation under a "quick look" analysis under the standards articulated in *Polygram Holding*.[3] There is ample basis for Realcomp's position.

This case does not involve a naked restriction by members of an association about how each of them will do business, nor a restriction on what members of a joint venture will do outside the venture. Rather, it involves rules governing how an *admittedly efficient*[4] joint venture will operate. Significantly, the Realcomp Policies at issue are not – as the Opinion suggests – price restraints, a fact conceded at trial by Complaint Counsel.[5]

In the Opinion, the Commission has all but discarded well-established rule of reason principles for analysis of joint venture conduct in favor of, in effect, an expanded *per se* rule. The Commission's view is not the prevailing standard for Section 1 analysis of joint ventures.[6] The

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[3] *Polygram Holding, Inc.*, 136 FTC 310 (2003), *aff'd*, *PolyGram Holding, Inc. v. FTC*, 416 F.3d 329 (D.C. Cir. 2005).

[4] Opinion at 2.

[5] Tr. 1898-99.

[6] In the joint venture context, courts consider whether the restraint is "reasonably related to ... and no broader than necessary to effectuate" the venture's purpose. *SCFC ILC, Inc. v. Visa USA*, Inc., 36 F.3d 958, 970 (10th Cir. 1994); In *United States v. Realty Multi-Li*st, 629, F.2d 1351, 1367 (5th Cir. 1980) the court warned that "we must be cautious to determine whether conduct whose apparent purposes, standing alone, might warrant per se treatment are reasonably connected to an integration of productive activities or other efficiency-creating activity in such a manner as to require an inquiry into the net competitive effects under the rule of reason.". Indeed, the Commission's own joint venture Guidelines do not describe an "inherently suspect" analytical framework. Federal Trade Commission & U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000).

Polygram Holding approach to Section 1 analysis has been viewed skeptically or unfavorably in many circumstances by the Sixth Circuit and other Courts of Appeals,[7] and has been criticized by commentators.[8] This approach was abandoned by the Commission itself for seven years,[9] and has been unembraced for 20 years by the United States Department of Justice.[10]

As the Commission itself recognizes, Opinion at 7-8, Realcomp, as a multiple listing service, is a two-sided market platform with network effects. The Commission's conclusion that rules governing the operation of such a market may be condemned on a quick look is at odds with judicial views of the rule of reason. *See United States v. Visa USA Inc.*, 344 F.3d 229, 238 (2d Cir.

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[7] *See, e.g., Madison Square Garden, L.P. v. National Hockey League*, 270 F. App'x 56 (2d Cir. 2008) ("quick look" inappropriate to analyze ban on NHL team independent websites because "the likelihood of anticompetitive effects is not so obvious that 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'"); *Craftsman Limousine v. Ford Motor Co.*, 491 F.3d 380, 388-393 (8th Cir.), cert. denied, 128 S.Ct. 654 (2007) (rejecting use of quick-look to analyze prohibition on certain limousine builders advertising in trade publications); *Expert Masonry, Inc. v. Boone County*, 440 F.3d 336, 343-44 (6th Cir. 2006) ("only if a restraint clearly and unquestionably falls within one of the handful of categories that have been collectively deemed per se anticompetitive can a court be justified in failing to apply an appropriate economic analysis to make this determination"); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004) (an abbreviated or quick-look analysis is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that an arrangement in question would have an anticompetitive effect on customers and markets"); *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499 (4th Cir. 2002) (rejecting quick look analysis of carry-on luggage size restrictions where lower court had not considered the unique architecture of the airport and failed to recognize plausible procompetitive justifications for restriction); *Brookins v. International Motor Contest Assn.*, 219 F.3d 849, 854 (8th Cir. 2000) (auto racing body rules that allegedly precluded use of plaintiff's transmission were "not the kind of 'naked restraint' on competition that justify foregoing the market analysis normally required in Section 1 rule-of-reason cases"); *Law v. NCAA*, 134 F.3d 1010, 1018 (10th Cir. 1998) (analyzing NCAA rule limiting compensation of coaches under rule of reason); *Sullivan v. NFL*, 34 F.3d. 1091, 1102 (1st Cir. 1994) (certain restraints by joint ventures may render the joint activity more efficient).

[8] Kolasky, William and Richard Elliott, *The Federal Trade Commission's Three Tenors Decision: 'Qual due fiori a un solo stello'*, 19 ANTITRUST 50 (Spring 2004); *see also*, Meyer, D. and D. Ludwin, *Three Tenors and the Section 1 Analytical Framework*, 20 ANTITRUST 63 (Fall 2005); Keyte, J.A. and N.R. Stoll, *Markets? We Don't Need No Stinking Markets! The FTC and Market Definition*, 49 ANTITRUST BULL. 593 (Fall 2004)

[9] The Commission first applied the "inherently suspect" categorization in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), but abandoned that approach in *California Dental Association*, 121 F.T.C. 190 (1996), and it did not reappear until *Polygram Holding*.

[10] Even an authority relied upon by the Commission describes the truncated "inherently-suspect" analysis as a "murky and unclear" area of the law. *Detroit Auto Dealers Assn.*, 955 F.2d at 472.