

ORIGINAL

PUBLIC

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

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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 "No Solicitation" policy violated the FTC Act.

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.<sup>1</sup>

As reflected in the Initial Decision and the briefing of this matter, in April, 2007, Realcomp repealed the Search Function Policy. It also repealed the definitional requirement that "Exclusive Right to Sell" listings be full-service brokerage agreements.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, "I am by party subject to a cease and desist order under section

the stay is in the public interest. *Id.* § 3.56(c).<sup>2</sup> These requirements track the four-factor test set out

*in Washington Metropolitan Transit Authority v. United Transportation Union*, 550 F.2d 941, 944-45

(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 (6<sup>th</sup> Cir. 1985) (factors are not

prerequisites but are interrelated considerations that must be balanced together); *see also Holiday*

*Travel*, 550 F.2d 941, 942-45 (6<sup>th</sup> Cir. 1977) (factors are not prerequisites but are interrelated considerations that must be balanced together).



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

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 is not

not conclusive evidence that Realcomp's issues for appeal are in fact serious and substantial



2003). This case does not present circumstances in which one can legitimately determine effects "in the twinkling of an eye".<sup>11</sup>

The Supreme Court has held that the inquiry into competitive effects must be "meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the

the principal tendency of a restriction will follow from a quick (or at least quicker) look in place of

1. **Purported Evidence of Anticompetitive Effects**

The Opinion self-evidently devotes three times as much discussion to "indirect" evidence of

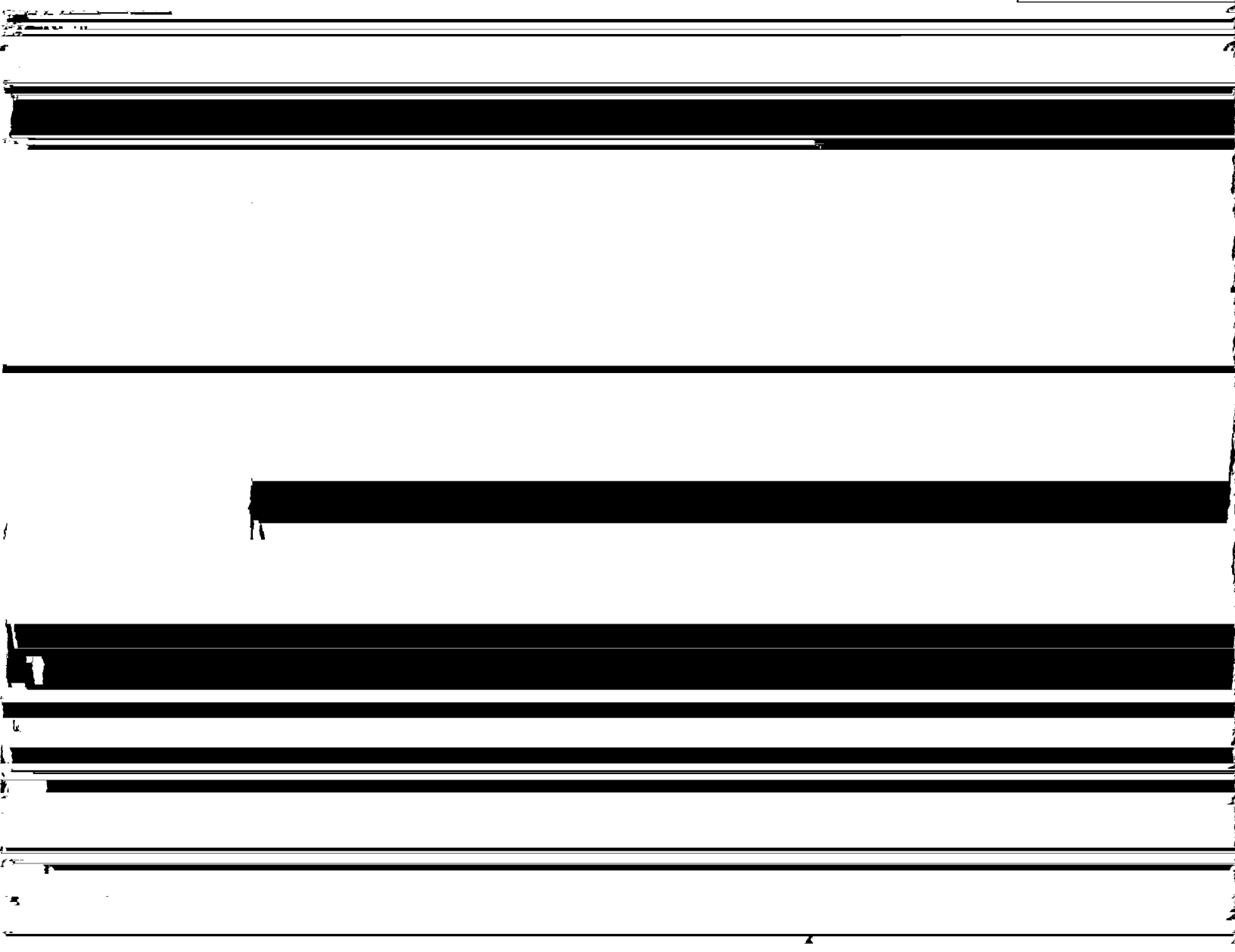
anticompetitive effects as to "direct" evidence. Op. at 12-13, 13-17. The latter

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days that homes remain on the market before sale, or whether commission rates on full-service listings are higher when multiple listing services impose restrictions in the nature of the Realcomp Policies.<sup>17</sup> Dr. Williams' testimony was wholly insufficient to demonstrate that the Realcomp Policies caused measurable harm to price competition between traditional and non-traditional brokers, or to consumers (i.e., home buyers and sellers).

Indeed, Dr. Williams ultimately repudiated one of his own Exhibits, testified that he was inexpert in the statistical software used to produce the analyses to which he testified, and ultimately

relied upon technical assistance from a computer programmer to produce the analyses.



The Commission's opinion of these agreements is based on its fundamental

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reorganization of the economies of the M.C. D-1

has a persisting economic incentive to find his or her own, lower-cost buyer, but – bearing in mind that the Realcomp multiple listing service is a service for brokers and not home sellers – there is no

rational reason for Realcomp members to facilitate a result in which their services are disadvantaged.

The Opinion's view of the efficiency justifications for the Realcomp Policies is diametrically opposed to that of Realcomp and Judge McGuire. The question is not whether the Commission agrees with Realcomp's interpretation, but whether Realcomp can assert serious and substantial grounds for appeal. On this topic, as in the foregoing areas of discussion, there are meritorious grounds for appeal.

**II. Realcomp Will Suffer Irreparable Harm in the Absence of a Stay**

[REDACTED]



who act as their own cooperating broker, and by enhancing the incentives of cooperating brokers to show and promote exclusive agency listed properties to their buyer clients.<sup>22</sup>

A party demonstrates irreparable injury where an order would cause marketplace confusion and loss of goodwill, and where costly steps would have to be taken to restore prior market conditions if the order is reversed on appeal. *California Dental*, 1996 FTC LEXIS 277 at \*7. A party may suffer irreparable harm through a loss of reputation and business opportunities. *Register.com, Inc. v. Verio, Inc.* 356 F.3d 393, 404 (2d Cir. 2004); *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6<sup>th</sup> Cir. 1992). These conditions will exist for Realcomp in the absence of a stay. Realcomp's resources will be used to advertise properties from which Realcomp members will derive no opportunity to compete for sales or commissions. The Realcomp membership will be

members of Realcomp will be separately affected because, in order to preserve the marketing

filter exclusive agency listings (which they can lawfully do), and they will be put to this expense twice as well if the Order is not stayed. There is, of course, no compensation for any of these costs to respondents who prevail in governmental enforcement actions.<sup>24</sup>

brokers. However, as discussed above, the record contains extensive and essentially uncontroverted testimony by the brokers who testified for the Commission that they have prospered economically notwithstanding the putative hindrance upon their ability to market their listings. Likewise, as noted, no broker credibly testified that the challenged policies prevented them from competing or prevented entry into the market.

Because harm to consumers is alleged by the Commission, the Commission has the burden of proving that

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2007) and the Commission did not seek to enjoin their continued enforcement during the pendency of proceedings.<sup>26</sup> While we are of course respectful of the Commission's deliberative process, the lengthy and unhurried decisional timeline in this matter belies any thought that the public interest cannot tolerate further delay for a well-grounded appeal.<sup>27</sup>

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<sup>26</sup> The 1,076 days for decision makes this case by far the most protracted adjudication in the Commission's recent history, surpassing even *Rambus* (which was decided in 825 days notwithstanding that it was argued twice) and *Evanston Northwestern* (655 days), both of which presented arguably more complex factual records than this matter.

<sup>27</sup> See *Fabrication Enterprises, Inc. v. The Hygienic Corp.*, 64 F.3d 53, 61-62 (2d Cir. 1995) (noting that unwarranted delay in seeking relief may undercut claims of irreparable injury).

**CONCLUSION**

For the reasons set forth above, Respondent Realcomp II, Ltd. requests that the Commission stay in part its order of October 10, 2009, during the pendency of appeals in the federal courts. A proposed order is attached hereto as Exhibit A.

Respectfully submitted,



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December 8, 2009

Exhibit A

**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

Docket No. 0220

**Certificate of Service**

I hereby certify that on this 8th day of December, 2009, I caused an original and twelve paper copies of the foregoing Motion of Respondent Realcomp II, Ltd. for Partial Stay of Order Pending Appeal to be served by hand delivery to:

The Commissioners  
U.S. Federal Trade Commission

Washington, DC 20580

and

Donald S. Clark, Esq., Secretary