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BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9320

PUBLIC VERSION

IN THE MATTER OF

REALCOMP II LTD.

COMPLAINT COUNSEL'S OPPOSITION TO
RESPONDENT'S MOTION FOR PARTIAL STAY OF ORDER
PENDING APPEAL

Richard Feinstein
Director

Peter Levitas
Deputy Director

Melanie Sabo
Assistant Director

Peggy Bayer Femenella
Joel Christie

Counsel Supporting the Complaint

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UNITED STATES OF AMERICA

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

In the Matter of)
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Docket No. 9320

a corporation.)
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COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR
PARTIAL STAY OF ORDER PENDING APPEAL

Present to Commission: Docket No. 9320, 10/16/08, 10/16/08, 10/16/08

("Resp. Motion for Stay"). Respondent's motion for stay should be denied so that a competitive market can be restored without further delay.

II. THE APPLICABLE STANDARD

Prior to 1994, the Federal Trade Commission Act provided that Commission orders were always to be stayed pending appeal. See *California Dental Ass'n*, Dkt. No. 9259, 1996 FTC LEXIS 277, at *9 (May 22, 1996). In 1994, Congress eliminated the automatic stay, for the reason that this rule had encouraged respondents to file petitions for review "based on frivolous or other unmeritorious claims," for the purpose of delaying, often for years, compliance with the Federal Trade Commission Act. *Id.* at *8-9 (quoting S. Rep. No. 130, 103d Cong., 1st Sess., at 11 (1993)). Following repeal of the automatic stay, the Commission will stay its own order only when it has ruled on "an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Id.* at *9-10 (citation omitted).¹

This standard is codified in Commission Rule § 3.56(c), 16 C.F.R. § 3.56(c), which provides that the Commission should consider the following factors when determining whether to grant a stay: (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 if a

stay is granted; and (4) why the stay is in the public interest. See *Id.* at *10. The Commission

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[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

F.T.C. 695, 696 (1998).

Rule 3.56(c) further provides that a motion for a stay must contain "supporting affidavits or other sworn statements, and a copy of the relevant portions of the record." *Id.* See also *Toys "R" Us, Inc.*, 126 F.T.C 695, 696 (Dec. 1, 1998).

III REALCOMP'S REQUEST FOR A STAY SHOULD BE DENIED

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consider this case to be the type of "false case" that would be "if

The Commission's truncated legal analysis in *NTSP* was subsequently upheld by the Court of

Appeals, *North Texas Specialty Division, ETC. 508 F.2 1246 (5th Cir. 1975)*. The

harm is irrelevant, particularly where there is absolutely no showing of any offsetting consumer benefit.

This brings us to Respondent's attempt to resurrect its "efficiency" justifications, both of which the Commission properly disposed of in its Opinion. As the Commission correctly found,

there is no "free riding" on the Realcomp joint venture listing EA 1 " " " " EA 1

seller has access to the Realcomp MLS service only by contracting with a willing member broker that pays its dues like any other Realcomp member – for any EA listing, as for any standard listing, Realcomp gets its full dues revenue to run the MLS.³ (Opinion at 29-32). And the Commission correctly found that preventing a "bidding disadvantage" for prospective home

Realcomp cites no legal authority for this broad claim. As for the Initial Decision in this case,

the Commission has determined “that the Commission’s decision is supported by the governing law, established antitrust policy, or economic logic.” (Opinion at 4, n. 4). The errors

of the ALJ do not establish that there are substantial grounds to question the Commission’s decision.

In sum, this is not a case with difficult legal questions or a complex factual record.

B. REALCOMP AND ITS MEMBERS WILL NOT SUFFER IRREPARABLE HARM FROM COMPLYING WITH THE ORDER

“The Respondent bears the burden of demonstrating that denial of a stay will cause irreparable harm. Simple assertions of harm or conclusory statements based on unsupported assumptions will not suffice. A party seeking a stay must show, with particularity, that the alleged irreparable injury is substantial and likely to occur absent a stay.” *California Dental*

if a stay is denied. Realcomp argues that it “will incur programming and system testing costs.”

(Resp. Motion for Stay at 12). However, Karen Kage, the CEO of Realcomp, testified that her

own staff made the initial change to the NY form to exclude EA listings. (Kage III at 57-59)

Realcomp did not need to hire any personnel or purchase additional technology to include only

relief requiring MLS to grant access to plaintiffs).⁸

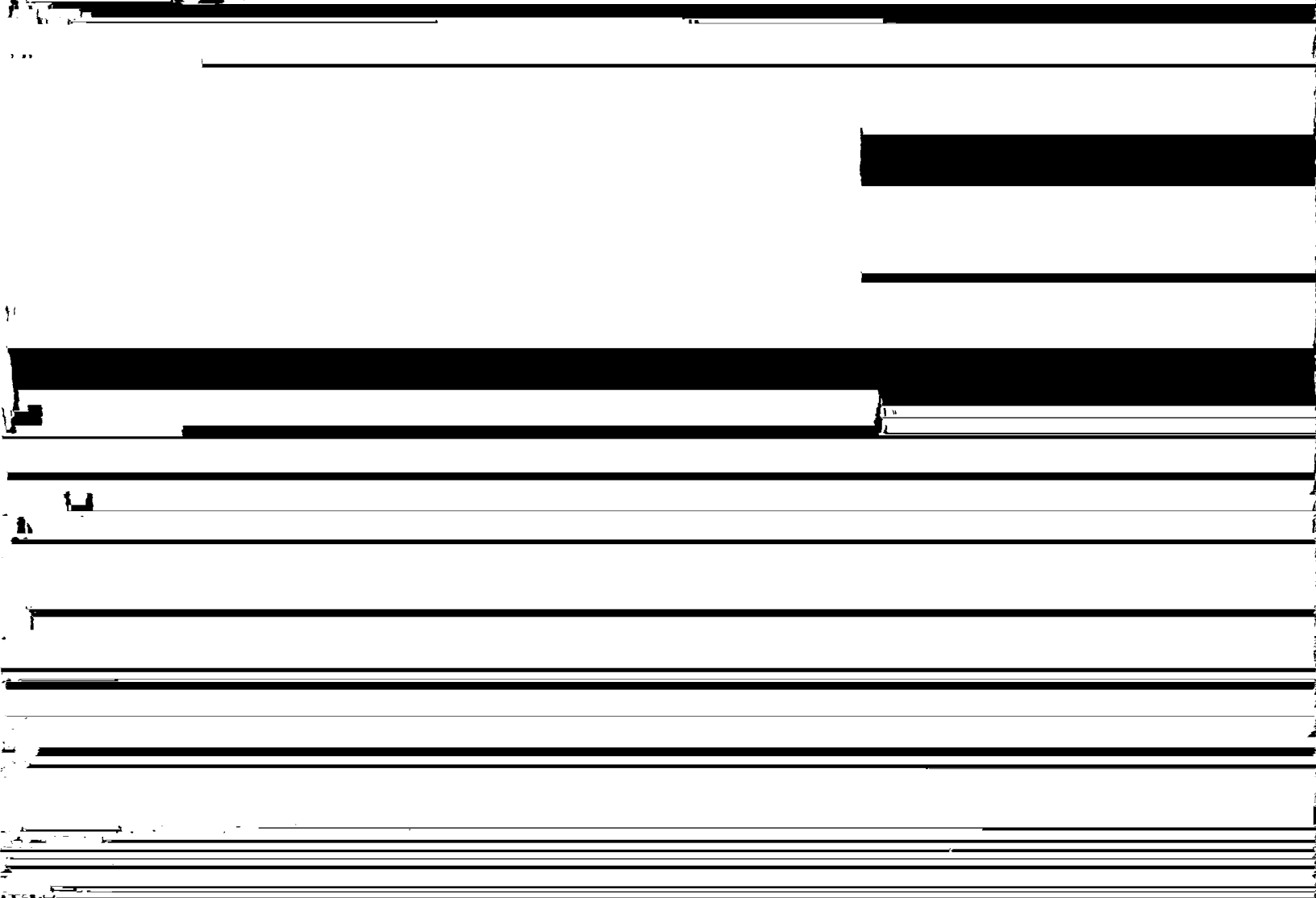
Realcomp has not met its burden of showing that it will be irreparably harmed if the Order is in place pending appeal.

C. A STAY OF THE COMMISSION'S ORDER WILL HARM CONSUMERS AND THE PUBLIC INTEREST

Because Complaint Counsel represents the public interest in effective law enforcement, the Commission analyzes the third and fourth factors together. *See Novartis Corp.*, 128 F.T.C. 233, 236 (1999). Implementing the Commission's Order against Realcomp, without delay, will benefit consumers and promote the public interest.

The challenged Policies enable traditional full service real estate brokers to extract high commissions from home sellers for services that many home sellers do not want, do not require,

or do not value. Realcomp's Policies restrict discount brokers from doing business with consumers.



problems. Paragraph II prohibits Realcomp from discriminating against nontraditional listings, including EA listings. Paragraph III of the Order requires Realcomp to amend its rules and regulations to conform to the Order.

Respectfully submitted,

Peggy Fennell

Richard Fennell

Deputy Director

Bureau of Competition

