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Complaint Against Michigan Realtors' Group Dismissed

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RISMEDIA, Dec. 17, 2007-Chief Administrative Law Judge (ALJ) Stephen J. McGuire dismissed a Federal Trade Commission complaint issued last year against a Realtors' group in southeast Michigan, ruling that "upon review of the totality of the evidence . . . it is determined that Complaint Counsel has not met its burden" of demonstrating that the policies of Realcomp II, Ltd. (Realcomp) have unreasonably restrained or substantially lessened competition in the relevant market. McGuire accordingly concluded that Complaint Counsel had not shown that the group's policies resulted in "actionable consumer harm" in violation of Section 5 of the FTC Act.

On October 12, 2006, the FTC announced seven law enforcement actions against real estate groups in various locations nationwide for allegedly engaging in anticompetitive conduct related to their policies regarding access to real estate listings. Two were administrative complaints issued against the following: 1) Realcomp II, Ltd., a corporation owned by several realtor boards and associations, which provides services to more than 2,100 real estate brokerage offices in southeastern Michigan, and has more than 14,800 members and 2) MIRealSource, Inc., which is owned by the real estate professionals it serves and provides services to more than 840 real estate brokerage offices in southeastern Michigan and has more than 7,000 members.

Five other real estate groups entered into consent agreements with the Commission, settling charges that they violated the FTC Act by adopting anticompetitive rules or policies that limited the publication and Internet marketing of certain sellers' properties based only on the terms of their listing contracts.

In February 2007, the FTC announced that the MIRealSource matter had been removed from administrative litigation and that the respondent group also had agreed to a consent order settling the allegations in the Commission complaint. Administrative litigation against Realcomp continued, and the case was heard before the Chief ALJ, resulting in the initial decision announced today.

The Realcomp Complaint

According to the October 2006 administrative complaint, Realcomp had engaged in anticompetitive conduct in violation of Section 5 of the FTC Act. Specifically, the complaint alleged that Realcomp engaged in anticompetitive conduct by prohibiting information on Exclusive Agency (EA) Listings and other forms of nontraditional listings from being transmitted from the multiple listing service (MLS) it maintains to public real estate Web sites. The complaint further alleged that the conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the MLS or from public Web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the MLS from real estate brokers who did not go along.

The Initial Decision

In his initial decision, the ALJ stated that he applied a traditional 'rule of reason' analysis standard and examined such factors as the nature of the allegedly anticompetitive restraints, market power, the evidence of actual effects, and the pro-competitive justifications offered by the respondent, Realcomp. With respect to Realcomp's Web site Policy, while he concluded that Complaint Counsel "has made a prima facie showing as to the anticompetitive nature of the alleged restraints," he wrote that Complaint Counsel had not demonstrated that Realcomp's policy "actually culminated in anticompetitive effects or actionable consumer harm." With respect to Realcomp's Search Function Policy, he concluded that Complaint Counsel had not shown that the nature of the alleged restraint was anticompetitive or unduly hindered consumer choice.

"The record in this case illustrates that much of the economic evidence presented is unreliable due to deficiencies in methodology and/or flaws in analytic interpretation," the ALJ wrote. "Such evidence therefore is of little probative value . . . The remaining empirical and factual evidence demonstrates that, despite Realcomp's market power and the implementation of the Web site Policy, discount EA brokerage services continue to be widely available in the established relevant market. As such, there is insufficient evidence that consumer welfare has in fact been unduly diminished or otherwise significantly harmed as a result of the challenged policy."

The decision continued by stating that the evidence "does not reliably demonstrate" that the Realcomp Web site Policy: 1) has eliminated or limited consumer choice of a desired product; 2) has excluded discount EA listings from substantial exposure on the Realcomp MLS or other public Web sites; 3) has unreasonably impeded the ability of discount brokers to compete in Southeastern Michigan; or 4) has forced discount brokers to exit the market or deterred entry.

"As such, Complaint Counsel has not demonstrated that Realcomp unreasonably restrained competition, thereby resulting in significantly increased economic costs for consumers.

The ALJ added that in his view "there is sufficient evidence of Respondent's plausible procompetitive justifications to establish the 'reasonable necessity' of its Web site Policy," as well as "insufficient evidence of actual anticompetitive effects to demonstrate a substantial lessening of competition or an unreasonable restraint of trade."

The Appeals Process

The ALJ's initial decision in this matter is subject to review by the full Commission on its own motion or at the request of any party. The initial decision will become the final decision of the Commission 30 days after it is formally served on Realcomp, unless either complaint counsel files a timely notice of appeal, and perfects its appeal with the timely filing of an appeal brief, or the Commission issues an order placing the case on its own docket for review or staying the effective date of the initial decision.

For more information, visit www.ftc.gov.

RISMedia welcomes your questions and comments. Send your e-mail to: realestatemagazinefeedback@rismedia.com.

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