

ORIGINAL
UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



PUBLIC

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

Docket No. 9320

Murray Consulting, Inc.'s Motion for *In Camera* Treatment

I. Introduction

It is the understanding of third-party Murray Consulting, Inc. ("Murray Consulting") that Complaint Counsel and Respondent Realcomp II Ltd. intend to use a study conducted by Murray Consulting, "*The Consumer Tsunami - Waves of Change for the Residential Real Estate Industry*," dated August 2006 ("*Consumer Tsunami*"), as an exhibit in the trial of the above entitled matter. As explained in the attached declaration of Stephen H. Murray, CEO and President of Murray Consulting, public disclosure of the *Consumer Tsunami* study, a copy of which is also attached, will result in "clearly defined, serious injury" to Murray Consulting. 16 C.F.R. § 3.45(b). Murray Consulting therefore respectfully requests that the *Consumer Tsunami* study be given *in camera* treatment until December 31, 2007, to protect Murray Consulting's proprietary and confidential information in that document.

II. Legal Standard

A party seeking *in camera* treatment “must make a clear showing that the information contained [within the relevant document] is sufficiently secret and sufficient material to [its] business that disclosure would result in serious competitive injury.” *In re Volkswagen of America, Inc.*, 103 F.T.C. 536, 538 (1984) (internal citation omitted); *see also In re H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961) (applicant has the burden of showing “that the public disclosure ... will result in a clearly defined, serious injury to the person or corporation whose records are involved”).

The secrecy and materiality of an applicant’s documents are evaluated according to the standards articulated by the Commission in *In re Bristol-Meyers Co.*:

(1) the extent to which the information is known outside of his business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; [and] (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

1977 FTC LEXIS 25, at *5 (Nov. 11, 1977).

III. Argument

Application of the *Bristol-Meyers* factors to the circumstances surrounding Murray Consulting’s production, distribution and use of the *Consumer Tsunami* study supports *in camera* treatment of that document. The *Consumer Tsunami* study is both secret and material to Murray Consulting’s business.

As discussed in the Murray declaration, the *Consumer Tsunami* study contains the confidential research and analysis of Murray Consulting. (Murray Dec. ¶¶ 5-7.) Murray

Consulting provides consulting services to residential real estate brokerages, multiple listing services and associations of real estate professionals. (Murray Dec. ¶ 1.) A substantial portion of Murray Consulting's business activities are devoted to the preparation, production and sale of proprietary studies that analyze the residential real estate industry, such as the *Consumer Tsunami* study. (Murray Dec. ¶ 1.)

Murray Consulting invested significant amounts of time and money in producing the *Consumer Tsunami* study with the expectation that it would be able to recoup these expenditures by selling the study, and associated consulting services, to its customers. (Murray Dec. ¶ 3.) Murray Consulting designed the *Consumer Tsunami* study, conducted focus groups in metropolitan areas around the country, reviewed and analyzed large amounts of raw data, and drafted the report. (Murray Dec. ¶ 3.) Murray Consulting also retained a well-respected, third party research firm at a significant cost to assist with the production of the *Consumer Tsunami* study. (Murray Dec. ¶ 3.)

This study is made available only to customers who subscribe to Murray Consulting's services, and the *Consumer Tsunami* study is specifically available only to clients for a fee. The *Consumer Tsunami* study is not otherwise publicly available. (Murray Decl. ¶ 6.) For example, Stephen Murray, the CEO and President of Murray Consulting, also owns and operates a related business, REAL Trends, a trends and research firm serving the residential real estate industry. (Murray Dec. ¶ 6.) The *Consumer Tsunami*, however, is not available to REAL Trends: it has not been reproduced in REAL Trends publications or discussed at REAL Trends conferences or gatherings. (Murray Dec. ¶ 6.)

The research and analyses contained in the *Consumer Tsunami* study are the unique work

product of Murray Consulting and cannot easily be duplicated by others. (Murray Dec. ¶ 10.) The *Consumer Tsunami* study is an important competitive advantage that Murray Consulting enjoys over its competitors, none of whom have performed or commissioned similar studies. (Murray Dec. ¶ 9.) Moreover, the information contained in the *Consumer Tsunami* study, which was only released in August 2006, is fresh and would be of value to Murray Consulting's competitors. (Murray Dec. ¶¶ 8 - 9) *See in re Amway Corp., Inc.*, 1977 FTC LEXIS 24, at * 7-8 (Nov. 11, 1977) (granting *in camera* status to studies less than two years old).

Murray Consulting has taken significant steps to protect the secrecy of the *Consumer Tsunami* study. As already discussed, access to the *Consumer Tsunami* study is restricted to clients of Murray Consulting who have paid for such access. These clients are obligated, pursuant to written agreements, to keep secret the findings and analyses in the study. Murray Consulting has also filed for copyright protection of the *Consumer Tsunami* study. (Murray Dec. ¶¶ 6-8.) In addition, Stephen Murray, who has been retained by Complaint Counsel to offer certain opinions in this litigation, designated his expert report as "Restricted Confidential" in accordance with the Scheduling Order in this case, in part because it relied on citations to the *Consumer Tsunami* study. (Murray Dec. ¶ 4.)

As described in more detail in the Murray declaration, sales of the *Consumer Tsunami*, and other studies like it, are a substantial portion of the business activity and revenue of Murray Consulting. (Murray Dec. ¶¶ 1, 9.) Murray Consulting expects to earn significant additional revenues from the sale of the *Consumer Tsunami* study as well as from associated consulting services. (Murray Dec. ¶ 9.)

If the *Consumer Tsunami* is publicly disclosed, Murray Consulting will suffer the loss of

substantial expected revenue associated with the sale of the study. (Murray Dec. ¶¶ 5, 9.)

Moreover, because Murray Consulting regularly produces studies like the *Consumer Tsunami* and makes those studies available only for a fee, the public disclosure of the *Consumer Tsunami* study could adversely impact future sales of other studies if clients become unwilling to pay for studies that they perceive will subsequently become available for free. (Murray Dec. ¶ 9.)

These prospective pecuniary losses qualify as the “clearly defined, serious injury” required to demonstrate a need for *in camera* treatment. “The likely loss of business advantages is a good example of a ‘clearly defined, serious injury.’” *In re Dura Lube Corp.*, 1999 FTC LEXIS 255, at *7 (Dec. 23, 1999). Materials that “represent ... significant work product, compiled at great expense, [and the] disclosure of which would give other companies the benefit of [the applicant’s] labors” are good candidates for *in camera* treatment. *In re General Foods*, 1980 FTC LEXIS 99, at *7-8 (March 10, 1980); *see also Bristol-Meyers*, 1977 FTC LEXIS 25, at *3 (remanding for additional consideration because decision failed to afford *in camera* treatment to research performed by in-house and third-party consultants, at significant expense, that contained timely information of value to competitors).

In fact, Administrative Law Judges have decided cases similar to this one. The Court in *In re Kellogg*, 1980 FTC LEXIS 161, at *3 (Jan. 16, 1980), granted *in camera* treatment to a study produced by a consultant who “spreads out the costs of producing its reports and must rely on multiple sales of the same information to different parties and public disclosure of [the study] would drastically curtail the market value of [applicant’s] reports containing such information.” Accordingly, the *Consumer Tsunami* should be afforded *in camera* treatment.

III. Time Frame of Proposed *In Camera* Treatment

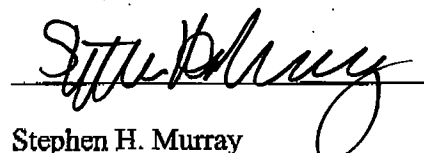
Murray Consulting hereby requests *in camera* treatment for the *Consumer Tsunami* study until December 31, 2007. After that date, the contractual obligation of clients of Murray Consulting who have purchased the study to keep its findings and analyses confidential will expire. (Murray Dec. ¶ 8.) Until that time, however, Murray Consulting anticipates additional revenues associated with the sale of the *Consumer Tsunami* study, revenues that are contingent upon the non-public status of the study. (Murray Dec. ¶¶ 9, 11.)

IV. Conclusion

For all the reasons above, Murray Consulting respectfully requests *in camera* treatment for the *Consumer Tsunami* study until December 31, 2007.

Respectfully submitted,

Dated: May 24, 2007




Stephen H. Murray
CEO and President, Murray Consulting
6898 S. University Blvd.
Suite 200
Littleton, CO 80122

CERTIFICATE

Pursuant to Paragraph 5 of the Scheduling Order, I hereby certify that I have conferred with counsel for Realcomp II Ltd. and Complaint Counsel for the Federal Trade Commission. Neither party expressed an objection to the Murray Consulting, Inc.'s Motion for *In Camera* Treatment.

Date: May 24, 2007


Stephen H. Murray

CERTIFICATE OF SERVICE

This is to certify that on May 24, 2007, I caused a copy of Murray Consulting, Inc.'s Motion for *In Camera* Treatment, and public and non-public versions of the Declaration of Stephen H. Murray with attached exhibit, to be served upon the following persons:

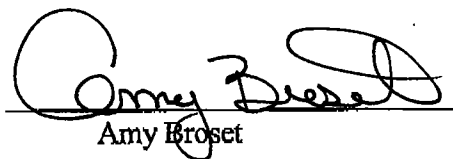
by hand delivery to:

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

and by overnight courier to:

Scott Mandel, Esq.
Foster, Swift, Collins & Smith P.C.
313 South Washington Square
Lansing, MI 48933-2193
Ph: (517) 371-8185

Sean Gates, Esq.
Federal Trade Commission
600 New Jersey Ave, NW
Washington, DC 20580
Ph: (202) 326-3711


Amy Broset