

ORIGINAL

PUBLIC

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

Docket No. 9320

REALCOMP II LTD.,

Chief Administrative Law Judge

Respondent.

Stephen J. McGuire

RESPONDENT REALCOMP II, LTD'S PRETRIAL BRIEF

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Dated: May 30, 2007

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INTRODUCTION

This case seeks to redress a harm that does not exist. Consumers have not been injured by Respondent's practices at issue. Rather than focusing on consumers, this matter essentially rests on a group of brokers called "Exclusive Agents." But the harm this group claims to have suffered is of questionable validity – these agents largely admit that their businesses are doing well – and in any event is not attributable to Respondent's policies. Moreover, Complaint Counsel seeks relief that at most would marginally benefit one group of consumers at the expense of another. Because Complaint Counsel cannot prove injury to consumers, and cannot establish that the requested relief would improve consumer welfare, the claims against Respondent must fail.

SUMMARY OF FACTS

Respondent Realcomp II Ltd. ("Respondent" or "Realcomp") is a Michigan corporation that is owned by certain realtor boards and associations. (Complaint and Answer at ¶ 1.)¹ Realcomp serves its members in Southeastern Michigan, including Livingston, Oakland, Macomb, St. Clair and Wayne Counties ("Realcomp Service Area"). (*Id.* at ¶ 5.) Realcomp's primary function is operating the Realcomp Multiple Listing Service ("Realcomp MLS") for the benefit of its members. (Answer at ¶ 2.)

To be listed in the Realcomp MLS, a home seller must enter into a listing agreement with a real estate broker (the "listing broker") that is a member of the Realcomp MLS. The compensation paid by the home seller to the listing broker is determined by negotiation between the home seller and the listing broker. Whatever type of listing agreement is entered into between the home seller and the listing real estate broker, the Realcomp MLS rules require that the home

¹ The "Complaint" refers to the Complaint that was issued in this case, dated October 10, 2006. The "Answer" refers to Realcomp's Answer to that Complaint, dated November 20, 2006.

seller must offer to pay a commission to a cooperating real estate broker, known as a selling broker, who successfully secures a buyer for the property. (Complaint and Answer at ¶ 12.)

Selling brokers bring the buyer of residential real estate to the transaction. The Realcomp MLS is a vehicle for selling brokers to obtain information about properties listed in the Realcomp Service Area. These listings represent opportunities for the selling brokers to obtain commissions. In other words, the Realcomp MLS is a mechanism by which listing brokers make blanket unilateral offers of compensation to selling brokers. The Realcomp MLS is not accessible by, and is not a source of information for, consumers.

For purposes of this matter, the parties have agreed to the following definitions:

An Exclusive Right to Sell Listing ["ERTS"] is a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. An Exclusive Right to Sell Listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services.

An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency["EA"] Listing. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

(Complaint and Answer at ¶¶ 8, 9, emphasis added.)²

A seller who has entered into an Exclusive Agency Listing has an economic incentive to find a buyer without the assistance of either the listing or a selling broker. In such a case, the

² Exclusive right to sell listings are sometimes called "full service" listings. Exclusive agency listings are sometimes called "limited service" listings.

seller may avoid paying a commission altogether. In this respect, the seller of a property subject to an Exclusive Agency Listing is in competition with both the listing broker and prospective selling brokers. (*See Sweeney Dep.* at 70:12-72:22.)

As a service to its members, Realcomp transmits Realcomp MLS listing information to certain websites (including Realtor.com) selected by Realcomp to receive that information (collectively, "Approved Web Sites"). (Complaint and Answer at ¶ 15.) Realcomp makes these submissions voluntarily and not pursuant to any legal obligation. Thus, Realcomp is under no obligation to transmit any listing information to any public website at any time.

In 2001, Realcomp adopted and approved a rule that stated: "Listing information downloaded and/or otherwise displayed pursuant to IDX [Internet Data Exchange] shall be limited to properties listed on an exclusive right to sell basis" (the "Web Site Policy"). (Complaint and Answer at ¶ 13.)³ Under the Web Site Policy, information concerning Exclusive Agency Listings is not transmitted by Realcomp to the Approved Websites. The Complaint asserts (Complaint at ¶ 14) that the Web Site Policy prevents information from being transmitted to public real estate websites, which Realcomp denies as untrue (Answer at ¶14) because the information can be, and is, transmitted to various public real estate websites (including Realtor.com) by other means.

In or about the fall of 2003, Realcomp changed the Realcomp MLS search screen to default to Exclusive Right to Sell Listings ("Search Function Policy"). This means that Exclusive Agency listings are not included in the initial search database unless a Realcomp member selects additional listing types in the search screen. (Complaint and Answer at ¶ 16.) Realcomp members may change the search database to include EA listings for any particular

³ This Rule did not become effective until the end of 2003. (April 3, 2007 Report of Complaint Counsel's Expert, Darrell Williams at 32, fn 77.)

search, or, alternatively, may change the default search settings so that Exclusive Agency listings are always included in the database. Either option is easily accomplished and neither is prohibited by Realcomp. (*See* Taylor Dep. at 123:12-22).

Realcomp does not deny membership to brokers who choose to offer Exclusive Agency Listings to their clients. (*See* Mincy Dep. at 18:7-19.)

Realcomp has very recently changed its Rules, repealing the Search Function Policy and to change the definition of ERTS Broker, so that minimum services are no longer required (RX 160). As such, these matters, to the extent they are raised by Complaint Counsel, are moot and should not be considered as part of this case. *People v. Colorado Springs Bd of Realtors, Inc.*, 692 P.2d 1055, 1064 (Colo. 1984).

ARGUMENT

I. INTRODUCTION.

The Complaint alleges that the Web Site Policy and the Search Function Policy restrain and eliminate competition in the provision of residential real estate brokerage services (Complaint at ¶¶ 24, 25) by discriminating in favor of traditional (i.e., ERTS) listing contracts and against "limited service" contracts (including EA). The Complaint further asserts that "Participation in Realcomp is a service that is necessary for the provision of effective residential real estate brokerage services to sellers and buyers of real property in the Realcomp service area" and "Access to the Approved Web Sites is a service that is necessary for the provision of effective residential real estate brokerage services in the Realcomp service area." (Complaint at ¶¶ 19, 20.)

Although these assertions would appear to state an "essential facility" claim against Realcomp, Complaint Counsel subsequently has stated on the record that the challenged conduct "reflects concerted action among horizontal competitors," in the nature of a "group boycott"

under § 1 of the Sherman Act (May 4, 2007 Opposition at 6-7) and that "the essential facilities doctrine does not apply." (May 4, 2007 Opposition at 8.)

But the challenged conduct is not a classic boycott. Complaint Counsel does not allege that Realcomp's policies prevent non-member brokers from competing with members, or that Realcomp members have collectively refused to do business with specific suppliers or customers. The gravamen of the Complaint is that the challenged Realcomp policies affect some Realcomp members in different ways than others. "Moreover, the users of a MLS are not truly competitors. The ultimate purpose of the information exchange is the formation of a subagency relationship between the listing broker and the cooperating broker. *Derish v. San Mateo-Burlington Bd. of Realtors*, 136 Cal. App. 3d 534, 538-39; 186 Cal. Rptr. 390 (1982) (citations omitted). This curious characterization of these policies as a group boycott raises significant questions as to the plausibility of the alleged competitive harm.

A. The Rule of Reason Analysis Applies to These Allegations.

Only conduct that is "manifestly anticompetitive" is appropriate for *per se* condemnation under the antitrust laws. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988). The alleged boycott in this case does not involve the enforcement of a price agreement, territorial allocation, coercive conduct toward suppliers or customers, or denial of access to an essential facility. Rather, the alleged harm to competition here is speculative in the sense that adverse effects on consumers are not readily foreseeable. Indeed, Complaint Counsel seeks to weave a causal relationship between the type of information transmitted by Realcomp to the Internet and actual increases in prices paid by consumers for real estate. This does not define a context for a *per se* analysis. See *Northwest Wholesale Stationers v. Pacific Stationary and Printing Co.*, 472 U.S. 284, 298; 105 S. Ct. 2613; 86 L.Ed 2d 202 (1985) (holding that the *per se* rule applies only where the challenged practice facially appears to be one that always or almost always would tend

to restrain competition and decrease output); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 458-59; 106 S. Ct. 2009; 90 L. Ed. 2d 445 (1986) ("we have been slow to condemn rules adopted by professional associations as unreasonable per se . . . , and, in general, to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious . . . "); *California Dental Ass'n v. FTC*, 526 U.S. 756, 771; 119 S. Ct. 1604; 143 L. Ed. 2d 935 (1999) (remanding for full rule of reason consideration where the challenged advertising restrictions "might plausibly be thought to have a net procompetitive affect, or possibly no effect at all on competition"). *See also*, *People v. Colorado Springs Bd. of Realtors, Inc.*, 692 P.2d 1055, 1063, 1068-69 (1984) (holding that where arrangement limiting access to MLS service was not shown to be designed to destroy abilities of competitors to compete or that it in fact restricted the ability of potential sellers and purchasers of homes to enjoy competitive markets, the State failed to carry its burden of proving a per se violation, and remanding for a Rule of Reason analysis).

This case thus is governed by the Rule of Reason. The Commission itself has stated, "Rule of reason analysis focuses on the state of competition with, as opposed to without, the relevant agreement. The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement." U.S. Dept. of Justice and Federal Trade Comm., *Antitrust Guidelines for Collaborations Among Competitors*, § 3.3 (April 2000). This inquiry is considered to comprise the "four classical, subsidiary antitrust questions" that are part of a "traditional rule of reason analysis":

- (1) What is the specific restraint at issue?
- (2) What are its likely anticompetitive effects?
- (3) Are there offsetting procompetitive

justifications? (4) Do the parties have sufficient market power to make a difference?

California Dental Ass'n. v. FTC, 526 U.S. 756, 782 (1999) (Breyer, J., dissenting).

This inquiry is mirrored in 15 U.S.C. § 45(n), which provides:

The Commission shall have no authority under this section ... to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

Thus, even assuming that there is an injury, it is not necessarily "unfair" under the law. Instead there must be an "injury to consumers" that satisfies a three-part test. As the Commission has recognized: "First of all, the injury must be substantial. The Commission is not concerned with trivial or merely speculative harms . . . Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces . . . Finally, the injury must be one that consumers could not reasonably have avoided." (FTC Policy Statement on Fairness dated December 17, 1980, which was later codified by 15 U.S.C. §45(n).) As explained below, Complaint Counsel cannot satisfy this required test.

II. COMPLAINT COUNSEL CANNOT CARRY THEIR BURDEN OF PROOF.

A. Complaint Counsel Cannot Prove that Realcomp Has Market Power in a Market Relevant to the Allegations in this Case.

Proof of market power in a relevant market is, in the ordinary case, considered an essential element of an antitrust challenge to concerted action under the Rule of Reason. *See, e.g., Los Angeles Memorial Coliseum v. Nat'l Football League*, 726 F.2d 1381, 1392 (9th Cir 1984) (delineation of relevant market essential because antitrust policy divorced from market considerations would lack objective benchmarks). Whether or not the defendants have market power in a properly defined market will determine whether the challenged conduct actually

threatens competition (*i.e.*, "makes a difference"). *California Dental Ass'n, supra*, at 782. Market power is understood to mean the ability to injure consumers by curtailing output or raising price. Without market power, there is no probability of injury to consumers and, consequently, no antitrust violation. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 568 (7th Cir. 1986) (Easterbrook, J., dissenting); *see also, SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994) ("Proof of market power, then, for many courts is a critical first step, or 'screen,' or 'filter,' which is often dispositive of the case.") (citation omitted); *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) (absent market power, any restraint resulting from defendants' conduct is unlikely to implicate Section 1); *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 95 F.3d 593 (7th Cir. 1996) (challenge to television broadcast restraints imposed by league on its member teams required proof that league had market power in a relevant market); *Lie v. St. Joseph Hosp. of Mt. Clemens, Mich.*, 964 F.2d 567 (6th Cir. 1992) (analysis of potential adverse effects on competition involves inquiry into market definition and market power).

The Complaint in this matter alleges a relevant market comprising "[t]he provision of *residential real estate brokerage services* to sellers and buyers of real property in the Southeastern Michigan and/or the Realcomp Service Area" (Complaint at ¶ 17, *emphasis added*), and then posits that Realcomp has market power in the alleged market. "By virtue of industry-wide participation and control over the ability of real estate brokers to participate in the Realcomp MLS and the ability of home sellers to publicize their homes for sale on Approved Web Sites, Realcomp has market power in the Realcomp Service Area." (Complaint at ¶ 22.)

The Complaint further alleges that the "publication and sharing of information relating to residential real estate listings for the purpose of brokering residential real estate transactions is a

key input to the provision of real estate brokerage services, and represents a relevant input market." (Complaint at ¶ 18.) The Complaint does not overtly allege that Realcomp has market power in this input market, but ¶ 22 does, in fact, purport to attribute Realcomp's market power to Realcomp's ability to "control" this input market of information services. (See Complaint at ¶ 22.)

Of course, Realcomp itself is not engaged in the asserted line of commerce – *i.e.*, provision of real estate brokerage services – and thus the foregoing presumably must be understood in the context of Complaint Counsel's assertions that Realcomp is a "combination or conspiracy of competing brokers" and that the challenged policies may be deemed the concerted action of Realcomp's members by virtue of the fact that Realcomp is controlled by certain of those members. (May 4, 2007 Opposition at 6.) This apparently is the meaning of the reference to "industry-wide participation" as a source of market power in ¶ 22 of the Complaint.

To meet its burden, Complaint Counsel must demonstrate a nexus between the alleged market power and the alleged effects of the challenged Realcomp policies. However, given that the conduct challenged by the Complaint relates solely and exclusively to the "input market" described in ¶18 – the publication and sharing of listing information – it is far from clear where that nexus is to be found. Either the Complaint must be read to allege that Realcomp's market power in the market for residential brokerage services, derived from its "industry-wide participation," makes the challenged listing publication policies an effective restraint of trade, or it must be read to allege that Realcomp has market power over the listing information "input" market itself.⁴ Neither construction is plausible.

⁴To the extent the Complaint is read to state that Realcomp's control over the input market confers market power on Realcomp in the brokerage market, and that such market power (in the

Even assuming that Realcomp possesses market power in the residential brokerage services market by virtue of its broad membership, that market power does not make possible the effects (competitive or otherwise) of Realcomp's challenged policies. The logical shortcoming of this construction can be seen by changing but one fact in the Complaint. If the Realcomp MLS were a commercial subscription information service, owned and controlled (without the input of subscribers) by a person not engaged in real estate brokerage in the Realcomp Service Area, but otherwise provided the same type of information services that Realcomp currently does, had the same level of broker participation ("subscribers") that it currently has, and enforced the Web Site Policy as it exists today, the effects of the Web Site Policy (whatever they may be) would be no different, notwithstanding that the Policy would not be the product of – or the alleged beneficiary of – market power in the brokerage services market. In other words, the effects of the Policy would not be attributable to the market power described in the Complaint. The required nexus between Realcomp's market power – as a combination of persons engaged in residential real estate brokerage services in the Realcomp Service Area – and any effects resulting from the Web Site Policy (or, to the extent it remains relevant, the Search Function Policy) do not exist and cannot be proven. This failure removes the conduct at issue from the purview of the antitrust laws.

Further, if the Complaint were to be read to allege that Realcomp has market power in the listing information market, that construction likewise must fail. Realcomp's control over its own MLS database in no way constitutes power over an input market for real estate listing information. Not only are there multiple avenues for obtaining listing information on the Internet, the same information is widely available from newspapers, magazines, and other media

brokerage market) in turn imbues the Web Site Policy and/or Search Function Policy with antitrust significance, the construction would be wholly circular and thus meaningless.

outlets. *See, PepsiCo, Inc. v. Coca-Cola Co.*, 114 F. Supp. 2d 243 (S.D.N.Y. 2000), *affirmed*, 315 F.3d 101 (2nd Cir. 2002) (rejecting market defined as a single distribution channel for the affected product).

Exclusive Agents can and do take advantage of the MLSs that have less restrictive policies to have these listings placed on Realtor.com and other Approved Websites. Realcomp competes with MiRealsource, as well as MLSs in Ann Arbor, Flint, Downriver, Lapeer and Shiawassee, to publicize and distribute listings to Approved Websites (Expert Report of Dr. David M. Eisenstadt ("Eisenstadt Report") at ¶ 24.) Further, Dr. Eisenstadt concludes that EA brokers incur no, or minimal additional costs to do so, inasmuch as "dual-listing" is a prevalent practice among these brokerage firms. (Eisenstadt Report at ¶ 25.) Deposition testimony already in evidence confirms this. *See, e.g.*, testimony of Craig Mincy that he places EA onto Realtor.com through his affiliation with the Shiawassee Regional Board of Realtors (Mincy Dep. at 12:14-17), and testimony of Jeff Kermath that he places his EA Listings onto Realtor.com through the Ann Arbor Board of Realtors and the West Michigan Board of Realtors. (Kermath Dep. at 30:23-32:16.)

The evidence also will show that public websites (*i.e.*, other than the "Approved Websites") are numerous and that listings reach those websites without regard to Realcomp's policies. Particularly in light of their growing popularity, such other websites are an economically viable and effective channel for reaching prospective buyers. (Eisenstadt Report at ¶¶26-37.) Dr. Eisenstadt observes that Realtor.com and the other Approved Websites are a few among numerous Internet sources from which the general public can, and does, obtain information about real estate listings (Eisenstadt Report at ¶27.) Sellers and their listing agents can effectively market properties in the Realcomp Service Area under EA and other limited

service contracts to the public without access to the Approved Websites. (Eisenstadt Report at ¶15.)

Further, the evidence will show that Realcomp's Search Function Policy was not, prior to its repeal, a significant impediment to brokers acquiring information on Realcomp Online® about limited service contracts. Realcomp members were required only to click once on an icon to access all listings instead of only ERTS listings. (Eisenstadt Report at ¶¶ 15, 38-40.)

Thus, no matter what construction is given to the conjunctive and circular allegations of market power, Complaint Counsel cannot prove the required nexus between market power in a relevant market and any effects purporting to result from Realcomp's challenged information dissemination policies.

B. Realcomp's Policies Have Not Resulted in a Substantial Reduction of Competition.

The Complaint broadly (and vaguely) alleges that Realcomp has "hinder[ed] unreasonably the ability of real estate brokers in Southeastern Michigan to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing." (Complaint at ¶ 7.) The Complaint further alleges that there are "no cognizable and plausible efficiency justifications" for the challenged policies. (Complaint at ¶¶23, 26.)

To the extent Complaint Counsel may seek to prove that the Web Site Policy and the Search Function Policy have resulted in an actual reduction in competition, the absence of a credible nexus between market power in the alleged product market and any effects of those policies renders any such evidence suspect, in the sense that any putative effects are likely attributable to extrinsic causes. In any event, however, Realcomp's policies have not resulted in a substantial reduction of competition.

1. Complaint Counsel Must Demonstrate "Substantial" Harm to Competition, as Measured by Effects on Consumers, and Not Merely Adverse Effects on Competitors.

It is well understood that the antitrust laws protect competition, not competitors. *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985) ("The purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process -- which means . . . to discourage practices that make it hard for consumers to buy at competitive prices -- rather than to promote the welfare of particular competitors."). Under the standard of 15 U.S.C. § 45(n), Complaint Counsel must prove "substantial injury to consumers." Upon the enactment of § 45(n), Congress explained that "substantial injury is not intended to encompass merely trivial or speculative harm. In most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks." S. Rep. No. 103-130, at 13 (1994).

Further, as the Commission long ago noted, the assessment of the effects of a challenged practice must be considered collectively, not in isolation: "The Commission ... will not find that a practice unfairly injures consumers unless it is injurious in its **net effects**." (FTC Policy Statement on Unfairness (December 17, 1980) (emphasis added.) The net effects of the Web Site Policy (and, to the extent relevant, the Search Function Policy) on consumers, to the extent they exist at all, are not substantial.

2. Realcomp's Policies Have Not Resulted in the Exclusion of EA Brokerage Arrangements from the Market.

As previously discussed, notwithstanding Complaint Counsel's disavowal of an "essential facility" theory, the Complaint is based in part on inferences that the challenged policies have the effect of excluding brokers who offer EA arrangements from the market by denying them access to resources (namely, the Approved Websites and visibility in the Realcomp MLS search

database) that are "necessary" to competition. (Complaint at ¶¶ 19-20.) In reality, Complaint Counsel has identified only one witness who claims that his business was discontinued in Michigan on account of the Realcomp rules at issue in this case. That witness, however, has admitted that his company in fact continues to do substantial business in Michigan. Specifically, Wayne Aronson is the president and general manager of YourIgloo, Inc., which is an exclusive agent real estate company located outside of the Realcomp Service Area (in Florida). (Aronson Dep. at 4:14-18.) He testified that YourIgloo's revenue declined in 2003 and 2004 due to Realcomp's rules, and that YourIgloo stopped doing business in Michigan. (Aronson Dep. at 28:7-29:7.) He nonetheless admitted that YourIgloo continues to do a substantial referral business in Michigan, and receives compensation for each referral. (Aronson Dep. at 92:3-96:4.)

The evidence shows, and will show, that many Exclusive Agency brokers within the Realcomp Service Area continue to do business successfully, even though sellers (and all types of brokers, both EA and ERTS) of Michigan real estate are enduring a difficult period due to Southeastern Michigan's economy, which has been crippled by structural changes faced by the automotive industry. Attributing business difficulties of selected brokers to the challenged Realcomp Policies overlooks alternative, and more plausible, explanations.

The testimony of Complaint Counsel's witnesses establishes that EA arrangements have not been excluded from the market. For example, Albert Hepp, who operates BuySelfRealty (Hepp Dep. at 4:5-8), claimed to be a victim of Realcomp's alleged anticompetitive actions, but admitted that his Exclusive Agency business in Michigan has grown 10-35% since 2004. (Hepp Dep. at 34:4-35:13, 117:1-17.) He testified that his business had grown more in other states (Hepp Dep. at 32:2-5), but acknowledged: "From a seller perspective, Michigan - I don't know exact figures, but it wouldn't surprise me if Michigan was the most difficult market for a seller to

sell their home, in terms of taking the longest market time and likelihood of success being lower." (Hepp Dep. at 38:21-39:1.) Complaint Counsel's expert, Stephen Murray, has acknowledged that for the last three years Southeastern Michigan has probably been the worst housing market in the country in terms of the decline in sales and increase in inventory. (Murray Dep. at 35:8-11.)

Craig Mincy, another of Complaint Counsel's witnesses, owns MichiganListing.com, which provides both Exclusive Rights to Sell and Exclusive Agency real estate offerings. (Mincy Dep. at 4:6-17.) His Exclusive Right to Sell and Exclusive Agency business each increased about 30% from 2005 to 2006, and is trending upward for 2007 (Mincy Dep. at 7:12-8:6.) He does not notice any difference between Exclusive Right to Sell and Exclusive Agency listings with respect to the time that they spend on the market (Mincy Dep. at 25:4-7.)

Similarly, Jeff Kermath, another complaining witness, is self-employed at AmeriSell Realty, which is Exclusive Agency brokerage. (Kermath Dep. at 5:12-25.) AmeriSell has grown substantially since 2003 or 2004. (Kermath Dep. at 25:9-12.) AmeriSell's website states: "We have great success with limited-service listings, but we have much better success when you are ERTS." He testified that this statement is true and that it applies to the Realcomp Service Area. (Kermath Dep. at 88:21-89:3.)

Gary Moody is the owner of Greater Michigan Realty, which he started approximately three years ago. (Gary Moody Dep. at 4:14-5:7.) He testified that Greater Michigan Realty has "done very well," and he believes it is the largest flat fee real estate company in Michigan. (Gary Moody Dep. at 14:15-15:7.) He acknowledged that he was accurately quoted as saying: "We're doing good business. My wife had 500 listings last year. The average in the full-service industry is 25." (Gary Moody Dep. at 35:23-36:3.)

The inescapable fact is that Exclusive Agency brokers continue to do business selling residential real estate in Michigan, including within the Realcomp Service Area.

3. Realcomp's Policies Have Not Resulted In Increased Economic Costs for Consumers.

Complaint Counsel contends that the requested relief will increase "the availability and usage of low-cost real estate brokerage services offered pursuant to" limited service brokerage arrangements. (Complaint Counsel's Responses and Objections to Respondent's Second Set of Interrogatories at 8.) Based on the report of its expert, Complaint Counsel apparently expects to prove that Realcomp's challenged practices reduce the use of non-ERTS listings in Realcomp's Service Area, as a result of which, consumers purportedly purchase more ERTS services, and pay more and higher commissions to ERTS brokers. (April 3, 2007 Report of Darrell L. Williams, PhD, at 40-49.)⁵ There is affirmative evidence that sellers in the Realcomp Service Area obtain higher net prices for their properties notwithstanding the alleged restraints.

Realcomp's policies have not substantially reduced the use of non-ERTS listings in the Realcomp Service Area. Dr. Eisenstadt has examined the prevalence of non-ERTS brokerage agreements in the Realcomp Service Area as compared to the geographically proximate Ann Arbor MLS, which does not have policies like those challenged here. He concludes that there is no credible evidence that the Realcomp policies have had a significant negative effect on the overall use of discount brokers in Realcomp's territory. (Eisenstadt Report at ¶¶12, 41-44.) Dr. Eisenstadt further notes that flat-fee (discount) ERTS contracts (*i.e.*, contracts that offer the same services as EA contracts plus additional features or services for a modestly higher fee than fees typically charged for EA arrangements) appear to be more prevalent in the Realcomp Service Area. He concludes that this is further evidence that the allegation of reduced availability of

⁵ Dr. Williams' analysis overstates the alleged effects and, in any event, fails to assess the net effect to consumers.

alternative brokerage arrangements in the Realcomp Service Area is untrue. (Eisenstadt Report at ¶ 45.)

Further, when proper consideration is given to the net welfare of consumers in the Realcomp Service Area, Complaint Counsel cannot prevail. Complaint Counsel's case appears to consider sellers' payments of commissions as one-sided costs. However, sellers in the Realcomp Service Area benefit from higher selling prices, and higher **net** selling prices, even after paying sales commissions. Specifically, Dr. Eisenstadt has examined sales of residential home listed in the Realcomp MLS and the Ann Arbor MLS (which, again, does not have policies of the nature challenged here). Controlling for differences in location and home characteristics, he observes that sellers in the Realcomp Service Area realize significantly higher prices, and that the difference persists even if it is assumed that **all** sellers in the Realcomp Service Area must pay the higher commissions associated with ERTS contracts. (Eisenstadt Report at ¶¶ 64-68.) There is simply no "substantial harm" to consumers in the Realcomp Service Area, and consequently, there is no basis for relief under the Complaint.

C. Realcomp's Challenged Policies Also Have Pro-Competitive Benefits.

Even if one were to assume that Realcomp's challenged policies have some adverse effect on competition, those policies also have important competitive benefits. Specifically, Realcomp's policies enhance efficiency by increasing selling agents' incentives to show properties listed under EA contracts. (*See, generally*, Eisenstadt Report at § VIII.)

This fact is consistent with the net gains to consumers described in the preceding section. An efficient brokerage services market enables a seller to realize the highest possible price for his or her home by ensuring that the buyers who value the property most will bid for it. As described above, a comparative analysis of sale prices in the Realcomp Service Area and that of

the Ann Arbor MLS shows that Realcomp's policies have not harmed sellers, but instead appear to have helped sellers realize higher net prices. (Eisenstadt Report at ¶ 13).

While the Complaint essentially seeks the "unbundling" of traditional, full-service, exclusive right to sell listings, Realcomp's policies protect selling agents from having to subsidize the cost that property owners would otherwise have to incur to procure buyers who do not use selling agents. Realcomp is a trade organization that is supported by fees that its members pay, and which helps those members facilitate their real estate brokerage businesses. To the extent non-ERTS listings are available on public websites, sellers may be better able to sell directly to buyers without using any broker. While this may be a legitimate result, there is no reason for those sellers to be subsidized by Realcomp. Realcomp members' dues payments should not be used to facilitate transactions that directly conflict with Realcomp members' business purpose. (See Sweeney Dep. at 70:12-72:22.)

There is no legal requirement to provide a "free ride" to competitors. See *Morris Communications v. PGA Tour, Inc.*, 364 F.3d 1288, 1296 (11th Cir. 2004); *State v. Cedar Rapids Bd. of Realtors*, 300 N.W. 2d 127, 129 (Iowa 1981) (giving MLS access to non-members of the defendant Board would give a few competitors a monetary advantage over the MLS brokers whose organizing ability, money, and volunteer time has made the service a viable tool for effective selling); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986); *Montgomery County Ass'n of Realtors Inc. v. Realty Photo Master Corp.*, 878 F. Supp. 804, 817 (D. Md. 1995), *aff'd*, 91 F.3d 132 (4th Cir. 1996) (WL No. 95-2488) (rejecting a group boycott claim, and reasoning that the real estate association had no duty to provide its MLS database to a photographic service for free, nor to allow the photographic service to compete with it more efficiently).

Of particular note is *Supermarket of Homes, Inc. v. San Fernando Bd. of Realtors*, 786 F.2d 1400 (9th Cir. 1986), where the plaintiff, a discount, limited service brokerage firm, alleged that the defendant Board was engaged in an unlawful group boycott in violation of Section 1 of the Sherman Act based, in part, on the Board's rule prohibiting direct public access to the MLS (*i.e.*, required the public to access the MLS through a broker). The defendant Board was a membership association of about 95% of the real estate business entities in the San Fernando Valley of California. Board members did not show the plaintiff's listed properties because there was little or no economic incentive to do so. The District Court granted summary disposition in favor of the defendant Realtors and the Court of Appeals affirmed. The District Court noted that the restricted access rule had procompetitive effects on the market by assisting listing and cooperating brokers to conveniently match customers with properties, and that the rule protected the listing agent's right to the agreed commission upon sale. *Id.* at 1407.

A seller who signs an EA or MLS-only contract both seeks services from, and competes with, real estate brokers who are working to procure buyers for that seller's property (Eisenstadt Report at ¶ 47.) Buyers have more incentive to use the services of selling agents when they acquire ERTS properties than when they acquire EA properties, because they are economically disadvantaged as bidders in the latter case. (Eisenstadt Report at ¶¶ 48-49.) The challenged rules thus logically limit the free distribution of information to buyers who do not intend to use the services of selling agents. (Eisenstadt Report at ¶ 51.) Because listing and selling brokers each pay Realcomp the same quarterly membership fees per agent and per office, this result prevents the situation where selling agents are forced to subsidize the marketing of sellers who use EA and other limited service arrangements. (Eisenstadt Report at ¶ 50.) This result is

economically efficient because different groups of buyers are not artificially disadvantaged. (Eisentstadt Report at ¶ 51.)

Moreover, contrary to Complaint Counsel's assertions, the Realcomp policies do not force brokers using non-traditional (limited service) arrangements to subsidize those who do not. Complaint Counsel alleges that, because EA and ERTS brokers pay the same dues but receive different levels of services on account of the challenged policies, the EA brokers are economically disadvantaged. Assuming, *arguendo*, that this putative disadvantage bears some relationship to consumer welfare and thus is relevant, an analysis of incremental cost per listing shows just the opposite to be true. Because EA brokers maintain a higher volume of listings - but provide fewer services per listing - than ERST brokers, Realcomp's pricing structure actually favors, rather than penalizes, nontraditional brokers – and the advantage that nontraditional brokers enjoy is even greater if one takes into account the fact that they also receive services from Realcomp for their EA listings. (Eisenstadt Report at ¶¶ 52-63.)

Thus, the challenged Rules protect the underpinnings of the MLS of cooperation and compensation. The Rules are in accord with the economic expectations of brokers and agents who pay dues to support the Realcomp MLS. As discussed further in the next section, Complaint Counsel's proposed relief would require these brokers to subsidize sellers who are in competition with them, and would result in losses for consumers.

D. Complaint Counsel's Proposed Remedies Would Harm, Not Benefit, the Public.

Complaint Counsel seeks relief that would compel Realcomp to provide the same information for EA and ERTS listings to all Realcomp members through Realcomp Online®, and also to feed information about EA listings to Approved Web Sites. In determining the appropriate relief in a matter, the Commission takes account of the various costs that a remedy

would entail. (FTC Policy Statement on Unfairness (Dec. 17, 1980).) The relevant costs include not only the costs to the parties, but also the impact of proposed relief on consumers generally.

As discussed above, there are valid efficiency reasons for the disputed Realcomp policies. The relief that Complaint Counsel seeks will increase the costs to buyers who prefer to have real estate professionals assist them in the process of purchasing a home. A cooperating (selling) agent's incentive to show a property to a client is directly related to the expected compensation from doing so. In turn, the expected compensation is directly related to the probability that the client will place an offer and purchase the property.

Complaint Counsel expects its proposed relief to increase information about EA and other limited service properties available to prospective buyers who do *not* use selling agents, and to increase the number of offers those buyers make for such properties. In that event, the proposed relief would also be expected to reduce the number of offers for limited service properties made by buyers who prefer to use selling agents. Therefore, the net effect of the Complaint Counsel's proposed relief on the total number of prospective buyers who make offers on such properties, and the net price (i.e., the gross sale price less commissions) that the owners of those properties receive is analytically indeterminate. (Eisenstadt Report at ¶46.)

However, the empirical evidence suggests that Realcomp's policies increase selling agents' incentives to promote and show their limited service properties to their clients, and this effect outweighs any reduction in "traffic" among those buyers who do not use selling agents. (Eisenstadt Report at ¶14.) This result would be lost under the proposed relief. The proposed relief thus would actually disadvantage prospective home buyers who contract with selling agents to show them properties, including those marketed under limited service contracts. The proposed relief would not only reduce selling agents' incentives to render their services in

conjunction with purchasing EA or MLS-only properties, but also would harm home buyers who prefer to use a realtor when they purchase those properties. (Eisenstadt Report at ¶50.)

Complaint Counsel's proposed relief also would require Realcomp agents who work with home buyers (e.g., selling agents, cooperating agents, or buyers' agents) to purchase properties to subsidize other property owners who, through their use of limited service contracts, compete with them to procure or produce buyers. (Eisenstadt Report at ¶15.) Just as markets function best when classes of sellers are not artificially disadvantaged, they also function best when different groups of buyers are not artificially disadvantaged. There is no apparent reason why it would be efficient to require selling agents (or an MLS that provides services to them) to distribute for free information to buyers who do not intend to use their services, especially when the practice would disadvantage those buyers who do intend to use them. (Eisenstadt Report at ¶51.)

There is no economic basis for believing that, if implemented, Complaint Counsel's proposed relief would result in more socially optimal pricing of MLS services than Realcomp's current policy. (Eisenstadt Report at ¶15.) For the sake of argument, assume that non-traditional listing brokers who are Realcomp members do subsidize the traditional listing brokers. Some Realcomp members primarily function as selling rather than listing agents. If the Complaint Counsel prevails, those selling agents will subsidize nontraditional listing brokers who use a flat-fee business model. As explained above, this is because some buyers will use the information that Realcomp feeds to public websites about EA and other limited service properties to purchase those properties without retaining the services of Realcomp selling agents who partly underwrite the cost of Realcomp's operations. Selling agents employed by traditional brokers would be required to subsidize the customers of listing agents who use EA contracts. Complaint Counsel's

relief, if implemented, cannot benefit one group of brokers (and its customers) without harming the other group. (Eisenstadt Report at ¶60.)

Further, Complaint Counsel proposes to make Approved Website more attractive by increasing the volume of listings on them, and the number of visitors to them. As a consequence, non-approved websites may become less attractive, thereby retard the development of platforms to compete with MLSs and Approved Websites. (Eisenstadt Report at ¶62.)

The primary objective of the MLS is the formation of a subagency relationship between the listing broker and a selling broker. The challenged policies promote this purpose, and specifically tailored to serve it. Without some assurance that those who list properties on the MLS and perform the vital function of subagents, neither listing or selling brokers would be encouraged to use the service and the procompetitive benefits of the MLS would be lost. Complaint Counsel's position is detrimental to cooperation among realtors, and therefore would be detrimental to the public.

CONCLUSION

The evidence will show that judgment should be entered in favor of Realcomp, and that the complaint should be dismissed. *See EI du Pont de Nemours Co. v. FTC*, 729 F.2d 128, 140-42 (2nd Cir. 1984) (vacating decision that challenged business practices constituted "unfair methods of competition," where the practices were adopted for legitimate business reasons, and the record demonstrated that the challenged practices had little if any effect on competition).

Respectfully submitted,

FOSTER, SWIFT, COLLINS & SMITH, P.C.

Dated: May 30, 2007

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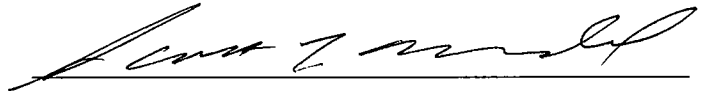
CERTIFICATE OF SERVICE

This is to certify that on May 30, 2007, I caused a copy of the foregoing Respondent Realcomp II, Ltd.'s Pretrial Brief, to be served upon the following persons by Electronic Transmission and hand delivery:

Sean P. Gates, Esq.
601 New Jersey Ave., N.W.
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And two copies of same hand delivered:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580

A handwritten signature in cursive script, appearing to read "Sean P. Gates", is written over a horizontal line.