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	)	
REALCOMP II, LTD.,	)	**Docket No. 9320**
a corporation.	)	

OPINION OF THE COMMISSION

By Kovacic, Commissioner, For A Unanimous Commission:

For many consumers, the purchase or sale of a home is one of life's most important and memorable experiences. Realty transactions often entail great financial stakes and summon the deepest personal emotions that accompany leaving a beloved dwelling or acquiring a place that one hopes will be a reassuring retreat from the press of a daily routine. These characteristics imbue the conveyance of residential real estate with extraordinary national significance.

In this matter the Commission returns to issues associated with the operation of an integral element of the U.S. real estate sector – the multiple listing service.[1] Here the Commission considers whether an association of real estate brokers with market power may adopt rules and practices that restrict the ability of members to offer consumers products that create "price pressure" on more expensive products that most of the association's members provide. In doing so, we continue the Commission's efforts to clarify the application of antitrust standards governing concerted action by competitors.

[1] Real estate services, and the development of the multiple listing service, have occupied a substantial amount of the agency's attention as an adjudicatory tribunal and policymaking body in recent decades. Relevant FTC competition cases have included *Port Washington Real Estate Board, Inc.*, 120 F.T.C. 882 (1995); *Puget Sound Multiple Listing Service*, 113 F.T.C. 733 (1990); *Multiple Listing Service of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985). Noteworthy examples of the Commission's policy work include U.S. Department of Justice & Federal Trade Commission, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY (Apr. 2007) (available at http://www.ftc.gov/reports/realestate/V050015.pdf); Federal Trade Commission, THE RESIDENTIAL REAL ESTATE AND BROKERAGE INDUSTRY: LOS ANGELES REGIONAL OFFICE STAFF REPORT AND THE BUTTERS REPORT (1983) (available at http://www.ftc.gov/bc/realestate/workshop/index.htm).

We find that the practices at issue improperly limit consumers' access to information about the availability of these lower-priced alternatives, and we conclude that the association's acts and practices unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. We reverse the Initial Decision dismissing the complaint and enter a cease and desist order.

I. Background

Homes are not fungible commodities. Within a given price range in a specific geographic area, there can be many housing options. The array of possibilities concerning price, style, and location is so great that the search for the right match between the seller and the buyer requires considerable effort and knowledge. Most individuals engage a licensed real estate broker to guide them through the often daunting process of selling or buying a home. The conveyance of residential real estate is one of a number of transactions in which consumers turn to knowledgeable intermediaries to assist them in sorting through an abundance of complex information about product or service offerings. In real estate and other sectors that feature substantial information complexity, the contributions of, and competition among, expert intermediaries play crucial roles in helping consumers satisfy their preferences. Competition law has a major stake in seeing that rivalry presses expert intermediaries to improve the range of options from which consumers can choose.

Real estate brokers advise on marketing and sales strategy and, most important, provide access to the local multiple listing service ("MLS"). The MLS is a closed database system accessible only to member brokers and, in more limited form, to the general public through data feeds to various public websites. IDF 106, 117-118.[2] Each MLS listing includes details about the property for sale, (*e.g.*, the number of bedrooms and bathrooms, square footage), the type of listing agreement, and a description of the services provided by the listing broker, as well as an offer of compensation to any broker who procures a buyer for the property. IDF 109. The MLS enhances the sharing of information among its members and provides systematic, enforceable rules governing the sale of listed properties. IDF 103-105.

The development of the MLS has made major contributions to improvements in the economic performance of the real estate sector. The MLS is generally acknowledged to be a superior platform for matching home buyers and sellers. IDF 289, 432. Its effectiveness is unrivaled by other advertising methods, such as newspaper ads, flyers, and "For Sale" signs planted on a home's front lawn. The MLS database itself, however, is not the only information-sharing product that real estate associations provide. The development of the Internet and the substantial increase in the number of broker websites have spurred these associations to create data feeds based

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[2] We use the following abbreviations to refer to matters in the case record:

ID	Initial Decision
IDF	Initial Decision's Findings of Fact
RPFF	Respondent's Proposed Findings of Fact
RRPF	Respondent's Reply to Complaint Counsel's Proposed Findings

on information the MLS contains. IDF 114, 117, 218. These data feeds are provided to certain websites available to the general public, though without all the information available in the MLS database. Through these data feeds, MLS associations today routinely supply home listing information to public websites, including their broker members' own websites and to Realtor.com, the public website of the National Association of Realtors ("NAR"). IDF 117, 226. Buyers can access these websites, search for homes that meet their needs, and then either work with their own broker to pursue these leads or, if unrepresented by a broker, directly contact the seller's broker.

The Internet and public access to MLS listings are not the only forces to change the real estate industry in recent years. In the traditional brokerage model, sellers pay approximately six percent of the sales price to their brokers. This amount usually is split between the seller's broker and the broker who brings a buyer, or is kept entirely by the seller's broker if the buyer is unrepresented. IDF 53, 54. Today the traditional model faces competition from brokers who discount their fees by offering lower commission rates, accept flat fees, or unbundle real estate services previously available only as a package. The limited service model offered by agents who unbundle their services is typically less expensive than the traditional model, and it allows consumers to customize a package of services that best fits their needs.

The changes sketched here illustrate how technological dynamism and organizational innovation can place enormous pressure on traditional business models and create possibilities for "the new commodity, the new technology, the new source of supply, the new type of organization"[3] that can transform markets. Because technological and organizational dynamism are powerful stimulants for economic progress, an especially important application of antitrust law is to see that incumbent service providers do not use improper means to suppress innovation-driven competition that benefits consumers.

Complaint counsel alleges that Realcomp II Ltd. ("Realcomp") reacted to new forms of competition by adopting policies that (1) prohibited discount real estate broker listings from being distributed from Realcomp's MLS to public websites and (2) limited the exposure of these listings on the closed MLS database. In the Complaint issued on October 10, 2006, the Commission alleged that Realcomp's actions improperly restrained trade and competition in the provision of residential real estate brokerage services in southeastern Michigan and violated Section 5of the FTC Act by:

- Prohibiting information about Exclusive Agency (EA) Listings and other forms of nontraditional listings from being transmitted from Realcomp's Multiple Listing Service (MLS) to publicly accessible real estate Web sites;

- Excluding EA listings and other nontraditional listings from the default search setting in the Realcomp MLS; and

- Implementing a Minimum Service Requirement, which compelled brokers to provide full brokerage services in order to have their listing included in data feeds to public

[3] Joseph A. Schumpeter, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (1942).

websites and the default search setting in the Realcomp MLS, and to gain access through Realcomp to publicly accessible real estate websites.

Complaint ¶¶ 13-16.

The Administrative Law Judge ("ALJ"), Stephen McGuire, held hearings over eight days in June 2007. He heard live testimony from eight witnesses and admitted into evidence deposition testimony excerpts from 28 witnesses and over 800 exhibits. In an extensive Opinion issued on December 10, 2007, Judge McGuire found that Realcomp's policies did not violate Section 5 of the FTC Act, and he dismissed the complaint. ID 2, 126-129. Complaint counsel filed a timely appeal, and Respondent did not cross-appeal. Oral argument took place on April 1, 2008.

In hearing this appeal, we exercise *de novo* review of the facts and the law. We base our review on careful study of the record, Judge McGuire's initial decision, and the written and spoken presentations of the parties. For reasons set out below, we reverse the Initial Decision and enter a cease and desist order.

II. Facts

We adopt the ALJ's findings of fact to the extent that they are not inconsistent with our Opinion.[4]

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[4] We note, however, that substantial portions of the section of the Initial Decision labeled as "Findings of Fact" actually represent inferences that the ALJ drew from the facts or his opinions or legal conclusions. We adopt some, but not all, of those inferences, opinions and conclusions. *See infra,* note 11. As discussed below, we conclude that many of the ALJ's conclusions are inconsistent with governing law, established antitrust policy, or economic logic. We explain the basis for our disagreement with such conclusions in Section V of this Opinion.

Thus, for example, we decline to endorse the section headings in sections II.G, II.H, or II.*I* of the Initial Decision, which are argumentative in tone and appear to represent the ALJ's opinions or conclusions rather than findings of fact. *See, e.g.,* ID at 64 (§ II.H.3, "Complaint Counsel's Expert's Testimony on Non-ERTS Share is Flawed"); *compare* Section V.D.2, *infra* (explaining why the ALJ's analysis of the expert economic and econometric testimony was faulty and unsound). We also decline to endorse the purported "findings of fact" in certain numbered paragraphs that contain the ALJ's inferences or conclusions, rather than statements of fact. *See, e.g.,* IDF 442-443 (characterizing certain costs as "nominal" rather than simply stating the amount of such costs); IDF 511 (according "little weight" to complaint counsel's expert's opinion because, in the ALJ's view, certain of the methodologies he used were "flawed"); IDF 601 ("Realcomp's Website Policy has procompetitive effects * * *").

In addition, the findings of fact in many of the numbered paragraphs in the Initial Decision – especially those in section II.H of the Initial Decision – summarize the opinions expressed or analysis conducted by an expert witness. We adopt those findings to the extent that they simply

Real Estate Brokers/Agents

A real estate broker is a licensed real estate professional who acts as a representative for either a home buyer or a home seller, and who is authorized to engage in the sale of real estate and provides services in conjunction with the sale. A real estate agent is a licensed real estate professional who works for, or under the supervision of, a real estate broker. IDF 3-4.[5]

More than 80 percent of homeowners hire a real estate broker to assist with some or all tasks associated with the typical real estate transaction. IDF 13. A residential real estate transaction usually involves two brokers: (1) a "listing broker," whom the home seller retains and; (2) a "cooperating broker," who assists home buyers. IDF 18.

Listing Broker Services and Agreements

A listing broker may provide a wide variety of services to a home seller. Among other activities, the listing broker may determine the home's initial asking price, show the property to prospective buyers, present and explain purchase offers to the seller, list the home on a multiple listing service, advertise the listing on the Internet, hold open houses, put a "For Sale" sign in the yard, and assist the home seller with the closing of the sale. IDF 21.

The contract between a listing broker and a home seller is called a "listing agreement." This contract defines the relationship between the listing broker and the home seller. The listing agreement usually specifies the contract's duration and the compensation to be paid to the listing broker. A listing contract typically includes an offer of compensation to any cooperating broker who obtains a buyer for the home. IDF 24-25. Listing agreements use different ways to pay listing brokers. Some agreements specify a commission based on a percentage of the home's selling price to be paid at closing. Others provide a flat fee paid at the time the listing agreement is signed. Still others use a combination of these methods. IDF 28.

Most compensation arrangements are commission-based. Full service listing brokers in Realcomp's service area typically charge a commission rate of approximately six percent of a home's selling price. IDF 53, 67. The offer of compensation to a cooperating broker commonly calls for the listing broker to share the commission with the cooperating broker. Although the home seller usually is responsible for paying the listing broker's brokerage commission, a home buyer

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summarize such testimony or analysis, but without any implication that we endorse such opinions or analyses. *See, e.g.,* IDF 482 ("Realcomp's antitrust economic expert, Dr. Eisenstadt testified that Realcomp's Policies' effect on the non-ERTS share in Realcomp was at most a 1% decrease in the percentage of non-ERTS listings."). We accept this as an accurate factual summary of what Dr. Eisenstadt said, but we do not necessarily endorse the conclusion he expressed.

[5] Because a real estate agent is the broker's agent, this Opinion does not refer separately to real estate agents.

bears part of the cost of the brokerage fee to the extent that the sale price of the home incorporates some or all of the commission. IDF 30.

This case focuses on two types of listing agreements. The first is an Exclusive Right to Sell ("ERTS") listing agreement. This type of agreement requires a home seller to appoint a real estate broker as the seller's exclusive agent for a designated time to sell the property on the seller's stated terms. IDF 50, 51. The seller agrees to pay the broker a commission when the property is sold, whether the sale occurs through the efforts of the listing broker, the owner, or another broker, or even if a buyer independently approaches the seller. IDF 51. Traditionally, brokers offering ERTS listings provide a full set of real estate brokerage services. These services are "bundled" in the sense that sellers must buy the entire package; sellers cannot customize contracts to pick and choose among the services offered. IDF 52.[6]

The second type of listing agreement is an Exclusive Agency ("EA") agreement. Under an EA listing, the listing broker acts as the seller's exclusive agent, but the seller reserves the right to sell the property without further assistance from the listing broker.[7] IDF 58. An EA listing agreement calls for an initial, nonrefundable payment – in many instances, $500 – to the listing broker. The seller owes the listing broker nothing more if a buyer approaches the seller directly without a cooperating broker's assistance. IDF 60. With an EA listing, the seller need not pay for the services of a cooperating broker when an unrepresented buyer purchases the property. IDF 59. EA sellers are, however, obligated to pay cooperating brokers who procure a buyer for the home. Unlike ERTS brokers, brokers who offer EA contracts often provide an unbundled menu of brokerage services from which the home seller may choose. IDF 62. These contracts meet a "consumer demand for lower cost brokerage services where consumers are willing to carry out some of the homeselling tasks themselves that otherwise would be performed by real estate professionals." CX 533-041. In general, EA listings and other unbundled services offered by limited service brokers offer consumers a low-cost alternative to traditional brokerage services. IDF 69.

One variant of the ERTS listing – the flat-fee ERTS – resembles the EA listing in some respects. The flat fee ERTS compensates the listing broker with a fixed fee, rather than a commission based on a percentage of the selling price. The fee set in a flat fee ERTS agreement ordinarily is higher than the fee established in an EA listing. For example, AmeriSell Realty charges $200 more for a flat-fee ERTS listing than for a non-ERTS listing. IDF 57. As mentioned below, flat-fee ERTS listings offer 3 percent compensation to a cooperating broker who procures a buyer for the property. IDF 54.

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[6] We refer to brokers offering ERTS listings as "full service brokers" and call their listings "full service listings."

[7] We refer to brokers offering EA listings as "limited service brokers" and to their listings as "limited service listings."

Cooperating Brokers

A cooperating broker works with consumers who are interested in buying a home. IDF 31. Cooperating brokers assist the buyer in a number of ways. They search an MLS for homes that meet the buyer's criteria, they tour homes and neighborhoods, and, once the buyer finds the right home and reaches an agreement to purchase that home, they assist the buyer during the closing of the sale.

The listing broker ordinarily pays the cooperating broker. Regardless of the listing's form (ERTS or EA), the listing broker makes an offer of compensation to any cooperating broker who finds the buyer who purchases a house which the listing broker has offered. IDF 40, 43, 45-46, 193-194. The offer of compensation is unconditional, other than requiring the cooperating broker to find the buyer who purchases the house. IDF 42. Under a traditional ERTS listing, the listing broker's commission is bundled with the cooperating broker's commission. IDF 77. Thus, a sale of a home listed under an ERTS agreement and involving a cooperating broker would require the seller to pay a six percent listing commission; the listing broker would retain three percent and would pay the cooperating broker three percent. IDF 54. If no cooperating broker is involved in the transaction, the listing broker retains the entire six percent commission. IDF 55, 52. In contrast, home sales involving EA or flat-fee ERTS contracts require home sellers to pay a commission only if a cooperating broker finds the buyer who purchases the house. IDF 78. No additional commission or compensation is due to the listing broker under an EA or flat-fee ERTS agreement. IDF 60.

EA listings and flat-fee ERTS listings thus differ in an important respect when the seller obtains a buyer without the intervention of a cooperating broker. Under an EA listing, the seller pays the listing broker only the fixed fee negotiated in the listing agreement. The EA listing broker does not receive the commission that otherwise would have been paid to the cooperating broker. By contrast, under an ERTS flat fee arrangement, the listing broker absorbs the commission that would have been paid to a cooperating broker had the seller not procured the buyer through the seller's own efforts.

A Multiple Listing Service ("MLS")

As noted above, an MLS is an information sharing service that provides data about homes listed for sale by its member brokers within a geographic area. IDF 102-110. MLS listings contain details about a property's features, an offer of compensation to a cooperating broker, and other information concerning the purchase and sale of a home. IDF 109. By centralizing this information, the MLS makes the marketplace for homes more efficient and orderly. IDF 103, 105.

The creation of the MLS system has been one of the most significant competitive developments in the real estate industry. IDF 428. It is the most effective marketing tool and substantially more important than any other method of promoting the sale of residential real estate in southeastern Michigan. IDF 430. An MLS exposes listings to all other MLS members, "dramatically increasing" the listing brokers' marketing reach. RX 154-A-026-027; Sweeney Tr. 1315 (the MLS provides "a huge buyer stream available" for brokers' listings).

The Realcomp MLS accepts listings of all kinds, whether limited service or full service. IDF 181. Realcomp does not, however, provide equivalent services for the different types of listings. Realcomp's Search Function Policy excluded EA listings from the default MLS search results. IDF 364. Realcomp's Website Policy also excludes EA listings from data feeds to public websites. IDF 349-350.

Realcomp requires that all listings contain an offer of compensation to cooperating brokers, although it does not require that a cooperating broker be involved in a home sale. IDF 190, 193.

The MLS is an example of what economists call two-sided markets with network effects. IDF 620-628. In this framework, the MLS product is a "platform" for which there are two types of users. Each group of users regards the platform as more desirable if the platform succeeds in attracting the other category of users. "Network effects" are present when a product's value to a purchaser depends on the number of other users. As we will see later in this Opinion, the value of an MLS increases as the number of properties listed on the MLS grows.

Public Websites, Including IDX Websites

In addition to operating a closed database of information about properties for sale listed by its members, an MLS ordinarily disseminates listing information to certain websites that members of the public can search. IDF 114, 218-221. Publicly available websites include NAR's Realtor.com, websites operated by the local MLS association itself, and member broker and agent websites, known as Internet Data Exchange ("IDX") websites. IDF 211. Using an IDX feed, broker websites can display listing information from their local MLS database. This practice allows consumers to visit the broker's website and search for properties listed for sale by all participating MLS members. IDF 120.

Not all listing information available in the MLS is provided in its feeds to public websites. Realcomp's IDX feeds, for example, do not provide information about the type of listing agreement under which a home is being sold (whether ERTS or EA), and the offer of compensation may also be omitted. IDF 116. A central focus of this case is Realcomp's practice of excluding EA listings completely from its IDX feeds to public websites.

Realcomp

Respondent Realcomp is a corporation organized, existing and doing business under, and by virtue of, the laws of the state of Michigan. Realcomp was founded in November 1993 and began doing business in January 1994. Its office and principal place of business are located in Farmington Hills, Michigan. IDF 132-134. Realcomp has over 2200 office members in Southeastern Michigan and a total of approximately 14,000 members. IDF 157-158. Realcomp is the largest MLS in Michigan and counts almost half of all realtors in Michigan as members. IDF 159. Realcomp's members consist of real estate brokers and real estate agents who compete with one another to provide residential brokerage services to customers. Most Realcomp members are full service brokers and their agents. IDF 90-91, 158.

Realcomp is currently owned by seven shareholder realtor boards and associations, each of which in turn consists of competing realtor members. IDF 136, 138. Realcomp's business and affairs are conducted by its Board of Governors, whose members are selected by the shareholder boards and associations. IDF 140. Each Realcomp Governor must be a realtor, and one Governor from each shareholder must be "actively practicing real estate." IDF 141.

Realcomp serves a region within southeastern Michigan that includes Livingston County, Oakland County, Macomb County and Wayne County. IDF 175. Realcomp permits agents who offer discount services to become Realcomp members. All Realcomp members, including brokers and agents who offer limited services, pay the same fees to Realcomp. IDF 164, 176-177.

Realcomp's Services

Realcomp's primary member service is its MLS. IDF 179. The Realcomp MLS online system allows members access to the Realcomp MLS from any computer with Internet access. IDF 180. A key benefit of the Realcomp MLS is access to Internet advertising on "Approved Websites," which include MoveInMichigan.com, Realcomp's own site; IDX participant websites; and Realtor.com. IDF 210, 218, 231. Realcomp MLS listings also appear on ClickOnDetroit.com, a website operated by a television station which "frames," and takes its data exclusively from, MoveInMichigan.com. IDF 211, 237-240.

Importance of Realcomp's Approved Websites

In today's commercial environment, the Internet is vital to the marketing and sale of homes, and thus to brokers' earning of commissions. IDF 218; Murray Tr. 145-46, 206; RX 154-A-035 (explaining that the Internet has "revolutionized" the real estate brokerage industry). The Internet is the leading source of information to consumers when buying or selling a home. According to Realcomp's Chief Executive Officer, Karen Kage, the "majority of home buying and selling now begins on the Internet," so "[i]f you miss that consumer connection, you miss a lot of potential commissions and fees." CX 221-001. Most home buyers and sellers want to be able to search for homes on the Internet before they engage in a transaction. IDF 220. Realtors benefit from having their listings shown on the Realcomp Approved Websites, and sellers benefit from the additional exposure their listings gain. IDF 219; CX 254-02. Many Realcomp members advertise their ability to market homes on the Internet to potential home sellers. CX 357; CX 310-006, 013; CX 287; CX 43 (Hardy Dep.), at 80-81, 82-83; CX 288-001; CX 40 (Elya Dep.), at 30-32; CX 109-001.

At the request of its broker members, Realcomp began offering its members the option of providing IDX feeds of MLS listing information to public real estate websites. IDF 223, 225. Eighty-two percent of Realcomp's members authorized their listing data to be included in the IDX feed. IDF 354. Ninety-one percent of broker websites contain searchable property listings, and those sites obtain their information about other broker's listings from IDX feeds. IDF 121.

No other MLS in Southeastern Michigan provides the geographic reach or membership size of Realcomp. IDF 159. Realcomp emphasizes the importance of its data feeds, including Realtor.com, MoveInMichigan.com, and, through MoveInMichigan.com, ClickonDetroit.com. IDF

221-222, 232, 234-235. One Realcomp document describes how Realcomp's MLS enables listing brokers to reach: (1) approximately 15,000 Realcomp MLS subscribing realtors; (2) millions of Internet users shopping for homes on MoveInMichigan.com, Realtor.com, and the Realcomp IDX websites; and (3) over 1,250,000 cable TV viewers in approximately 350,000 households subscribing to Comcast's Digital Cable-TV in Southeastern Michigan. CX 272.

Public websites provide great value to an MLS, its member brokers, and consumers. Marketing homes on certain key websites, such as MoveInMichigan.com, Realtor.com, and IDX websites, is "significant to a broker's ability to compete effectively because it exposes homes for sale to potential buyers who are now using the Internet as an integral part of their home search." RX 154-A-005; Murray Tr. 210-13 (explaining that the Realcomp IDX feed is significant because it feeds the websites "where the buyers are"). A paper prepared in 2006 by NAR explains that "[t]he brokerage firm of the future will need to embrace the realities of the new world order and learn to convert internet leads to paying customers in order to compete effectively." CX 380-008. Median brokerage firms derive 7 percent of their actual sales from leads generated by the firms' website, a "big chunk of business" to be derived from one marketing channel. Murray Tr. 218-19.

The Realcomp Policies

Beginning in 2001, in response to entry by limited service brokers into its service area, Realcomp adopted a set of policies relating to the exposure of certain listing data available through its MLS. Realcomp first adopted a Website Policy, which prohibited the distribution of limited service listings from the Realcomp MLS to Approved Websites – *i.e.*, Realtor.com, MoveInMichigan.com (and, through it, ClickOnDetroit.com), and the IDX. IDF 349-355. Realcomp began active enforcement of the Website Policy in 2004, after Realcomp had adopted its Minimum Service Requirement and amended a third policy, the Search Function Policy, to exclude discount listings from the default search results for those directly accessing the Realcomp MLS. IDF 355, 361-363, 372-374.

The Website Policy remains in place. Realcomp enforces the Policy with a range of penalties that includes fines of up to $2,500 for each violation, lengthy suspension from the MLS, and expulsion from Realcomp. IDF 380-387; CX 6-014; CX 7-015.

In 2003, Realcomp adopted the "Search Function Policy." By this measure, the default setting on the Realcomp MLS searched only full service listings and listings classified as "unknown." IDF 361. Realcomp amended its policy manual in 2004 to require members to identify the listing type in their MLS submissions, which eliminated the "unknown" category of listings. Under the amended Policy, Realcomp refused to accept a listing into the Realcomp MLS unless the type of listing was specified. IDF 372-373. In other words, the default settings excluded properties listed by limited service brokers.

The Search Function Policy remained in place until April 2007. IDF 370. Until then, in order to see all of the available listings typed into Realcomp's MLS (*e.g.,* EA or non-ERTS listings), Realcomp members needed to select the specific listing types they wished to see or to choose the button labeled "select all listings." IDF 363. Thus, a broker who wished to see EA listings needed

either to select "all listings" or the "EA listings" button. IDF 364. If a broker did not wish to see ERTS listings, the broker needed to de-select the "ERTS listings" button. IDF 364.

Until April 2007, Realcomp also had a Minimum Service Requirement, which compelled brokers who listed properties to provide full brokerage services in order to qualify their listing as an ERTS listing. IDF 374-375. Until then, brokers had to provide all of the following services in order for a listing to be considered an ERTS listing: (1) arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) accept and present to the sellers offers to purchase procured by cooperating brokers; (3) advise the sellers as to the merits of the offers to purchase; (4) assist the sellers in developing, communicating, or presenting counteroffers; and (5) participate on behalf of sellers in negotiations leading to the sale of listed property. IDF 66.

The combined effect of Realcomp's three Policies was to limit exposure of EA listings to brokers searching the MLS for homes to present to potential buyers, and to consumers searching public websites for homes to purchase. The Search Function Policy operated to suppress EA listings from the MLS's default search results and thus limit their exposure to brokers. IDF 361, 364. In conjunction with the Minimum Service Requirement, the Search Function Policy also operated to exclude all brokers who did not have full service listings from disclosure on the MLS default setting. IDF 363, 374. In conjunction with the Minimum Service Requirement, the Website Policy excluded brokers without an exclusive right to sell from exposure, through Realcomp, to the general public through publicly available websites such as Realtor.com, MoveInMichigan.com, and broker websites. IDF 349-350, 374.

The National Association of Realtors

Since its creation in 1993, Realcomp has been affiliated with the National Association of Realtors. IDF 172. Each Realcomp shareholder owner board is also affiliated with NAR, and all Realcomp members are NAR members. IDF 173, 165. Realcomp's bylaws require that Realcomp abide by NAR's rules, and Realcomp incorporates changes to the NAR rules into its own rules and informs Realcomp members of NAR's rule changes. IDF 174. In November 2006, NAR amended its rules to require an MLS to "include all current listings," including discount listings, in its IDX feeds. IDF 418. Due to the rule change, no NAR member, including Realcomp, could exclude EA listings from their IDX feeds without violating NAR's rules. IDF 105, 418.

In November 2006, Realcomp's Board of Governors tried unsuccessfully to persuade NAR to postpone its rule change. IDF 424; CX 233, 234, 235. The Realcomp Board argued that, without the Website Policy, the MLS would become a public utility. IDF 424-425. NAR rejected Realcomp's request and responded that including EA listings on the IDX feeds would not detract from the purpose of an MLS. IDF 426. Nonetheless, in April 2007, the Board voted against adopting NAR's new IDX policy. IFD 423.

The Relevant Product and Geographic Markets and Market Power

There is no dispute in this appeal about the dimensions of the relevant market and Realcomp's significance within the relevant market. There are two relevant product markets in this case. The first consists of the supply of residential real estate brokerage services, in which Realcomp's broker members compete. IDF 285-286. The ALJ's decision referred to these services as the output market. The second relevant market consists of multiple listing services; Realcomp is a participant in this market. *Id.* The MLS is a vital input into the supply of residential real estate brokerage services.

The relevant geographic market in both product markets is local. It consists of four Michigan counties: Oakland, Livingston, Macomb, and Wayne. IDF 321, 328.

The ALJ determined that, within the relevant market, Realcomp enjoyed market shares that courts traditionally have relied upon to infer the presence of market power. ID 84-85; IDF 340-348. The ALJ also found that high barriers to entry protected Realcomp's market position. ID 85; IDF 329-338. Realcomp's position also is reinforced by "network effects" inherent in the cooperative nature of an MLS. The value or quality of the service to each MLS user rises as the number of other users of the MLS service increases. ID 85; IDF 305-310.[8] For these reasons, Judge McGuire concluded that Realcomp has "substantial market power" in the relevant market for multiple listing services. ID 84-85, 97. In this appeal, Realcomp does not contest the ALJ's finding that the association has substantial market power in the relevant markets. Oral Argument Tr. 72-73.

Competitive Pressure Exerted by Limited Service Brokers

Real estate brokers compete to obtain listings and to represent home buyers. IDF 79. Brokers offering limited services and brokers offering traditional full services compete with one another for new listings. IDF 81. Limited service brokers are a fairly new and increasingly important form of competition in the real estate industry. RX 154-A-015-16; CX 534-039, 041. Brokers offering unbundled services (limited service brokers such as those using EA listing agreements) offer a low cost alternative to consumers of residential real estate brokerage services and put "price pressure" on full service brokerage commissions. IDF 69, 99. In effect, the limited brokerage service model allows home sellers to buy a subset of the full range of brokerage services while supplying other services by themselves. IDF 69, 72. Limited service brokers compete not only by unbundling listing services, but also by unbundling the commission structure. Sellers using a limited service broker can save significantly on the price of a commission. IDF 75-78.

Limited service brokerages grew from a 2 percent nationwide market share in 2003 to a 15 percent share in 2005, an increase partly attributable to the use of the Internet. IDF 90, 92. NAR explained that "a growing percentage of consumers are asking agents to reduce their commissions.

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[8] Realcomp highlights to consumers the "market power and benefits of Multiple Listing Service." CX 78-003.

This has been sparked by awareness of discounted online and limited-service models, and remains a challenge for full service agents." IDF 100-101.[9]

III. The Initial Decision

The ALJ found that Realcomp had substantial market power in the supply of multiple listing services to real estate brokers in southeast Michigan, and stated, with respect to Realcomp's Website Policy and Minimum Service Requirement, that "the nature of the restraint is such that it is likely to be anticompetitive." ID 97, 128. The ALJ did not find that the Search Function Policy was likely to have an anticompetitive effect. *Id.* Despite his findings that Realcomp possessed substantial market power and that two of Realcomp's policies likely had anticompetitive effects, the ALJ ruled that Realcomp's practices did not violate Section 5 of the FTC Act and dismissed the complaint.

In reaching his conclusion about Realcomp's behavior, the ALJ rejected the use of any abbreviated rule of reason analysis. He declined to apply the analytical framework that the Commission articulated, and which the Court of Appeals endorsed, in *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). ID 89. The ALJ instead conducted what he called a "traditional rule of reason analysis" and required complaint counsel to provide proof of "actual competitive effects." ID 90. On the basis of that "expanded inquiry," ID 97, the ALJ concluded that "the challenged restraints have not substantially lessened competition by discount brokers in the relevant market or harmed consumers, by either depriving them of choice or resulting in significantly increased economic costs." ID 98.

In requiring a more elaborate rule of reason analysis, the ALJ distinguished the use of truncated analyses in prior MLS cases on the ground that they involved membership requirements or other restrictions that entirely excluded discount brokers from the MLS. The ALJ emphasized that Realcomp's Policies do not entirely exclude discount listings from the MLS service. ID 88-89.

The ALJ also expressed skepticism that the Commission's *Polygram* framework was generally accepted among courts outside the D.C. Circuit. ID 89. He also interpreted *Polygram* to apply only to express agreements by co-venturers to cease price competition on products outside the joint venture. The ALJ characterized the restraints imposed by Realcomp as non-price in nature and therefore not governed by the *Polygram* approach. *Id*.

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[9] The ALJ found that the nationwide market share of limited service brokers fell in 2006 to about 8 percent, which he attributed to a softening of the housing market. IDF 91, 96. His finding rested principally on the opinion of a single full service broker. It is not so evident to us that a softening of the housing market would necessarily yield this result. A number of brokers (including that very same full service broker) testified that, in a softening housing market, the demand for limited service brokers can be expected to increase as home sellers try to save on commissions by finding a buyer themselves. IDF 97-98. If the nationwide market share of limited service brokers actually declined after 2005, it is at least as plausible that any such decline reflects the fact that, before November 2006, NAR permitted members like Realcomp to adopt policies of the type challenged in this case. IDF 418-419.

Proceeding under what he described as a full rule of reason analysis, the ALJ concluded that Realcomp's Policies did not violate Section 5 of the FTC Act because complaint counsel had not proven that the challenged Policies had an actual adverse effect on competition. ID 97-119, 126-27. In particular, the ALJ concluded that, despite some competitive disadvantages, limited service brokers can and do market their listings to the public in the Realcomp service area, without having direct access to Realcomp's Approved Websites. Further, the ALJ found that sellers who could not obtain access through Realcomp to Realtor.com could dual-list their listings with other MLSs and gain access to Realtor.com with relatively nominal cost and administrative effort. ID 101-03.

The ALJ found that any reduction in discount brokers' business could be attributed to local economic conditions and national trends, and not necessarily to Realcomp's Policies. ID 103-04. He said that expert testimony demonstrated no significant anticompetitive effects resulting from Realcomp's Policies. He was not persuaded that any of the three analyses performed by Dr. Darrell Williams, complaint counsel's economic expert, supported a finding of adverse effects. ID 105-19.

The ALJ also accepted two of Realcomp's proffered justifications for its Policies.[10] According to Realcomp, the Policies addressed a free rider problem stemming from competition between home sellers using EA listings and cooperating agents. The ALJ accepted this argument. ID 120-23. According to the ALJ, allowing EA listings to be distributed to public websites and to appear on the default MLS search results would allow home sellers who were not Realcomp members to avail themselves of Realcomp's advertising services without paying dues or other fees to Realcomp, thus "free riding" on the cooperative efforts of Realcomp's member brokers.

The ALJ also agreed that the Realcomp Policies eliminated a "bidding disadvantage" faced by home buyers represented by cooperating brokers when bidding against an unrepresented home buyer for a home sold under an EA listing. ID 124-25. Because a home seller selling a home under an EA listing must pay a commission to the represented buyer's broker but not to the unrepresented buyer, all other things being equal, the seller is more likely to sell the home to the unrepresented buyer in order to save the cost of the commission.

Finally, the ALJ concluded that the restraints were narrowly tailored to address the problems raised by EA listings. ID 125-26. According to the ALJ, the restraints did not deny membership

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[10] The ALJ correctly found without merit Realcomp's claim that, aided by the two-sided nature of the MLS platform, Realcomp's Policies can be expected to result in an efficiency-enhancing increase in its MLS participation. ID 123-24. Realcomp had argued that because listing brokers will have more demand for an MLS that attracts more cooperating brokers, its Policies promote a more efficient MLS because they are expected to result in more participation by cooperating brokers. The ALJ rejected this reasoning, first because the evidence shows that most brokers compete as both listing and cooperating brokers, so that each Realcomp member is typically operating on both sides of that two-sided market. Moreover, the ALJ rejected Realcomp's assumption that EA listings will result in fewer cooperating brokers, because the evidence shows that EA brokers bring in more listings, which should be more attractive to an MLS. ID 124. Realcomp did not pursue this argument on appeal.

to EA brokers or prevent EA listings on the MLS and thus did not deprive them completely of Realcomp's services. Furthermore, the ALJ found the restraints reasonably necessary to support the cooperative nature of the MLS.

IV. Question Raised on Appeal

Complaint counsel argues that Realcomp's Policies are by their nature anticompetitive and, in combination with Realcomp's market power, are likely to harm competition and are unlawful under the Rule of Reason. We address this question *de novo*.[11]

V. Analysis

A. Summary of Analysis and Conclusions

In assessing whether the challenged Realcomp Policies violate Section 5 of the FTC Act, we follow the authoritative direction of the Supreme Court under Section 1 of the Sherman Act in a long series of cases culminating in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).[12]

Although the methodological instruction of those cases is clear, lower courts, scholars, and agencies have not always been consistent in the terminology they have used to describe the methodology laid out by the Supreme Court. In Section V.B., therefore, we review the case law and methodology we rely on in this Opinion.

We then analyze the Realcomp Policies using several related, although distinct, variations of the antitrust "rule of reason." In Section V.C., we consider whether the Realcomp Policies can be condemned under the "inherently suspect" mode of analysis. We conclude that they can be—in

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[11] The *de novo* standard of review with regard to findings of facts and inferences drawn from those facts, as well as conclusions of law, is compelled by the Administrative Procedure Act, 5 U.S.C. § 557(b), and the FTC Act, 15 U.S.C. § 45(b) & (c). Consistently, the Supreme Court has confirmed that, unlike the standard that applies to courts of appeals reviewing district courts' factual decisions, an agency has plenary authority to reverse ALJ decisions on factual as well as legal issues, including factual findings "based on the demeanor of a witness." *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955). Moreover, under the Administrative Procedure Act, the "highly deferential standard of review is not altered merely because the [Agency] disagrees with the ALJ, and [the courts] defer to the inferences that the [Agency] derives from the evidence, not to those of the ALJ." *Varnadore v. Sec'y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998) (citations omitted). *See also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 (1951).

[12] The Commission's authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. *See, e.g., FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 463-64 & n.4 (1941); *California Dental*, 526 U.S. at 762 n.3. In the case at hand, our analysis under Section 5 is the same as it would be under Section 1 of the Sherman Act.

part because they closely "resemble[] practices that * * * [the Supreme] Court has in the past stated * * * are unlawful *per se*." *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986). We also consider in that section the "procompetitive justifications" that Realcomp offers in support of its Policies—a critical issue that must be addressed under either the "inherently suspect" analysis or one of the forms of rule of reason that considers anticompetitive effects. We assess whether those purported justifications are legitimate (*i.e.* "cognizable" and "plausible"); whether they are supported by evidence in the record; and whether the restraints they impose are a reasonably necessary means to achieve a legitimate, procompetitive end. We conclude that Realcomp has failed to satisfy its burden and that its proffered justifications are unconvincing. Nonetheless, we do not rest our decision solely upon the "inherently suspect" methodology. In Section V.D., we consider the anticompetitive effect of the challenged Policies on the relevant markets under a more elaborate rule of reason framework. The Supreme Court has instructed that such effect can be established either by evaluating market power, the nature of the conduct, and the characteristics of the market, or through direct evidence of effect. Accordingly, in Section V.D.1. we assess the first type of evidence, and in Section V.D.2. we consider the second.

Our conclusion, based on the rule of reason analytical framework summarized in the following section, is that the Realcomp Policies constitute unreasonable restraints on competition and are not justified by countervailing procompetitive considerations. Accordingly, we conclude that the Policies violate Section 1 of the Sherman Act and therefore Section 5 of the FTC Act, and we issue an order enjoining these practices. The remedy we adopt is discussed in Section VI below.

B. Overview of the Rule of Reason

The Supreme Court's development of the rule of reason – from *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), through *Indiana Federation*, to *California Dental* – has been extensively recounted in this Commission's and the D.C. Circuit's decisions in the *Polygram* case. *See* 136 F.T.C. at 325-52; 416 F.3d at 33-37. We do not repeat that history in detail here. For present purposes, two major features of the Court's modern jurisprudence stand out. First, the Court has generally distinguished between practices deemed "*per se* unlawful" because of their "pernicious effect on competition and lack of any redeeming virtue," *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958), and those that require more detailed analysis.[13] Second, in evaluating restraints that require more detailed analysis, the rule of reason

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[13] Even with respect to restraints that superficially appear to be *per se* unlawful, the Court has been open to efficiency justifications that might call for rule-of-reason treatment, observing that "there is often no bright line separating per se from Rule of Reason analysis." *California Dental*, 526 U.S. at 779 (citing *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 n.26 (1984) ("*NCAA*")). For example, in *NCAA* and in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979) ("*BMI*"), the Court considered potential economic benefits of the challenged practices and concluded that they should be evaluated using the rule of reason, despite the practices' close resemblance to established *per se* unlawful categories. By contrast, in *Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332 (1982) and *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Court carefully

calls for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," with the aim of reaching "a confident conclusion about the principal tendency of a restriction." *California Dental*, 526 U.S. at 781. Thus, the Court has generally "backed away from any reliance upon fixed categories and toward a continuum." *Polygram v. FTC*, 416 F.3d at 35.

The Court's two most recent cases that explore this issue — *Indiana Federation* and *California Dental* — warrant further elaboration, because their teachings provide the foundation for our analysis in the present case. *Indiana Federation* concerned a group of dentists who agreed to withhold x-rays from dental insurance companies that requested their use in benefits determination. The Court applied a rule of reason analysis and concluded – affirming our finding – that the practice violated Section 1 of the Sherman Act. In applying the rule of reason, the Court condemned the practice on two alternative grounds, and implicitly acknowledged and endorsed the existence of a third possible route to condemnation under the rule of reason (albeit one not applicable to the facts it confronted). Thus, the Court outlined three distinguishable – but, as we shall see, not fully distinct – modes of analysis under the rule of reason.

First, the Court held that it was faced with a type of restraint that, by its very nature, required justification even in the absence of a showing of market power. 476 U.S. at 459-60. According to the Court, because the practice was "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," then "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id*. at 459 (quoting *Professional Engineers*, 435 U.S. at 692). Accordingly, the practice "require[d] some competitive justification even in the absence of a detailed market analysis." *Indiana Federation*, 476 U.S. at 460 (quoting *NCAA*, 468 U.S. at 110).[14] It is this form of analysis – assessment of "inherently suspect" restraints without proof of market power – that we explored in depth in our decisions in *Polygram* and *North Texas Specialty Physicians*, 140 F.T.C. 715 (2005), *aff'd, North*

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considered the defendants' proffered justifications for their practices, but ultimately rejected them and evaluated the practices using *per se* standards. The Court also has ruled that certain types of arguments are not cognizable as arguments for rule-of-reason treatment. These include the contention that the prices set by a cartel were "reasonable," *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); or that competition itself is contrary to the public interest, *Professional Engineers*, 526 U.S. at 695-96. *See generally* Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 Geo. L.J. 165 (1988).

[14] In *NCAA*, the Supreme Court confirmed that "[t]here was no need for [plaintiffs] to establish monopoly power in any precisely defined market * * * in order to prove the restraint unreasonable. * * * [N]o matter how broadly or narrowly the market is defined[,] [defendants'] restrictions have reduced output, subverted [consumer] choice, and distorted pricing. Consequently, unless the controls have countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power * * *." 468 U.S. at 110 n.42.

Texas Specialty Physicians v. FTC, 528 F.3d 346 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1313 (2009).[15] We will briefly recapitulate the steps of that analysis in Section V.C. below.

Second, the Court held that even if the restriction in question was "not sufficiently 'naked' to call this principle [of a restraint being anticompetitive by its very nature] into play, the Commission's failure to engage in detailed market analysis [was] not fatal to its finding of a violation of the Rule of Reason," because the record contained direct evidence of anticompetitive effect. 476 U.S. at 460. The Court reasoned that "[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as a reduction of output,' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects'." *Id*. at 460-61 (quoting 7 P. Areeda, ANTITRUST LAW ¶1511, at 429 (1986)). Significantly, the evidence that the Court accepted as direct proof of adverse effect did not involve elaborate econometric "proof that it resulted in higher prices," 476 U.S. at 462, but rather simply that in two localities, over a period of years, insurers were "actually unable to obtain compliance with their requests for submission of x rays." *Id.* at 460.

Third, the Court's discussion of the "proof of actual detrimental effects" prong of the analysis made clear by implication that the traditional mode of analysis – inquiring into market definition and market power to determine whether an arrangement has the potential for genuine adverse effects on competition – was still available, although not applicable to the case before it because the Commission had not attempted to prove market power. Although the Court did not explore this mode of analysis in detail, it did observe that "the purpose of the inquiries into market definition and market power is to determine whether an arrangement *has the potential* for genuine adverse effects on competition. *Id.* (emphasis added). Numerous lower courts have confirmed that the Court's conclusion in *Indiana Federation* that market power is "a surrogate for detrimental effects" logically compels the result that, if the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition. *See, e.g., United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel v. Christian Hospital*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewiston Hospital*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

California Dental dealt specifically with the abbreviated rule of reason analysis. That case concerned a professional association's ethical canon against deceptive advertising that, as interpreted and enforced by the association, effectively prohibited members from advertising price discounts in most cases, and entirely precluded advertising regarding the quality of services. The FTC and the Ninth Circuit had concluded that the restrictions resulting from this rule were tantamount to naked restrictions on price competition and output, 526 U.S. at 762-64, and therefore

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[15] Antitrust tribunals have used a variety of terms to address this approach, including "abbreviated," "truncated," or "quick look" analysis. *See California Dental*, 526 U.S. at 770-71 (collecting cases). For simplicity, we adhere to the "inherently suspect" terminology we used in *Polygram*.

applied an "abbreviated, or 'quick look' rule of reason analysis," and found them unlawful without a "full-blown rule of reason inquiry" or an "elaborate industry analysis." *Id.* at 763 (citing *NCAA*, 468 U.S. at 109-10 & n.39).

The Supreme Court agreed that restrictions with obvious anticompetitive effects, such as those in *Professional Engineers*, *NCAA*, and *Indiana Federation*, do not require a "detailed market analysis" and may be held unlawful under a rule of reason framework unless the defendants proffer some acceptable "competitive justification" for the practice. Such analysis is appropriate if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 468 U.S. at 769, 770. The Court found, however, that the particular advertising rules under review in that case might plausibly "have a procompetitive effect by preventing misleading or false claims that distort the market," particularly given the "disparities between the information available to the professional and the patient" and the "inherent asymmetry of knowledge" about the service. *Id.* at 771-72, 778. Thus, while "it is also * * * possible that the restrictions might in the final analysis be anticompetitive[,] * * * [t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.* at 778.

While the Court accordingly called, in that case, for a "more sedulous" market analysis, *id.* at 781, it took pains to add that its ruling did "not, of course, necessarily * * * call for the fullest market analysis. * * * [I]t does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination." *Id.* at 779. Rather, the Court stated, "[w]hat is required * * * is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Id*. at 781. The Court further warned against undue reliance on labels and categories: "The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like 'per se,' 'quick look,' and 'rule of reason' tend to make them appear." *Id.* at 779. Even a term like "spectrum" or "sliding scale," the Court warned, deceptively "suggests greater precision than we can hope for * * *." *Id.* at 780 (quoting Areeda, *supra*, ¶1507, at 402).

The latter warning is particularly apt in this case, where the traditional mode of analysis – requiring a proof of market power (in addition to the anticompetitive nature of the restraint) in order to draw an indirect inference that the challenged practice has anticompetitive effects – is even more straightforward than the direct mode of "proof of actual detrimental effects" on competition, *Indiana Federation*, 476 U.S. at 460 (quoting Areeda, *supra*, ¶1511, at 429), because respondent has conceded that it possesses market power in the relevant market. *See* Transcript of Oral Argument (Apr. 1, 2008), at 72-73.

In this Opinion, we analyze respondent's conduct under each of these modes of analysis, and we explore the case law in more detail in the section devoted to each. It is important to note, however, that we could reasonably select just one of these modes of analysis and, if such a methodology supported a finding that the Policies are unlawful, it would be unnecessary for us to engage in the other versions of the rule of reason analysis. For example, if we conclude that the Policies are "inherently suspect" and have not been justified, we could condemn them without proof of market power or actual effects, as we did in *Polygram.* Alternatively, where market power is conceded and the Policies are shown to have "the potential for genuine adverse effects on

competition," *Indiana Federation*, 476 U.S. at 460, we could condemn them on that ground, without any need to establish actual marketplace effects. Finally, if we conclude that actual marketplace effects have been shown, as in *Indiana Federation* itself, that would be a basis for condemnation regardless of whether market power is shown. Here, for completeness, we address all three of these modes of analysis. Moreover, and perhaps more significantly, although it is convenient to treat each of these modes of analysis separately, the Court's decisions, particularly *California Dental*, also make clear that all of these forms of analysis are simply different means to pursue the same "essential inquiry * * * – whether or not the challenged restraint enhances competition." 526 U.S. at 780 (quoting *NCAA*, 468 U.S. at 104). Further, the fact that the inherently suspect nature of the restraint, the indirect evidence, and the direct evidence all lead to the same result reinforces our conclusion that the restraints at issue are anticompetitive.

C. Analysis of the Realcomp Policies Under *Polygram*'s "Inherently Suspect" Framework

As we discussed above, "not all trade restraints require the same degree of fact-gathering and analysis." *Polygram*, 136 F.T.C. at 327 (citing *Standard Oil Co.*, 221 U.S. 1, 65 (1911)). Indeed, "*BMI, NCAA*, and [*Indiana Federation*] indicated that the evaluation of horizontal restraints takes place along an analytical continuum in which a challenged practice is examined in the detail necessary to understand its competitive effect." *Polygram*, 136 F.T.C. at 336; *see also California Dental*, 526 U.S. at 781 ("What is required * * * is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint"). Thus, in *Polygram*, we held that in a limited but significant category of cases – when "the conduct at issue is inherently suspect owing to its likely tendency to suppress competition" – our "scrutiny of the restraint itself * * * without consideration of market power" is sufficient to condemn the restraint, unless the defendant can articulate a legitimate justification (*i.e.* a "cognizable" and "plausible" procompetitive benefit) for that restraint. 136 F.T.C. at 344-45. *See also North Texas Specialty Physicians v. FTC*, 528 F.3d at 362 (physicians group's collective negotiations of fee-for-service contracts "bear a very close resemblance to horizontal price fixing" such that inherently suspect analysis was appropriate).

We also noted in *Polygram* that "inherently suspect" conduct "ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary condemnation." 136 F.T.C. at 344-45. Apparently misconstruing this language – and, perhaps more importantly, judging a lack of urgency for application of the *Polygram* framework in light of the ALJ's uncontested finding that Realcomp possessed substantial market power (*see* Oral Argument Tr., at 9) – complaint counsel in this case disclaimed reliance on this mode of analysis, on the basis that courts have not had much experience with the particular restraint at issue here, albeit acknowledging that they have had a great deal of experience with closely analogous restraints. Complaint counsel is mistaken in this regard. First, our *Polygram* language was not intended to set up a threshold bar on this mode of analysis in cases where the exact challenged restraint had not been previously analyzed and adjudged to be anticompetitive. Such a bar would in fact run counter to the teachings of the Supreme Court, in cases such as *Indiana Federation* and *California Dental*, regarding the flexibility of the rule of reason analysis. Indeed, the Supreme Court in *Indiana Federation* applied the "quick look" analysis to a restraint that courts had not precisely seen before. Furthermore, as complaint counsel acknowledged, when Realcomp's challenged policies are viewed,

as they should be, as restraints on discounters' advertising and on the dissemination of information to consumers regarding discounted services, there is ample judicial (and Commission, *see supra*, note 1) experience as to their competitive impact. We discuss such experience in more detail below.

At any rate, we are not bound by complaint counsel's apparent concession, both because deciding the proper legal framework in any case is the province of the Commission, and because respondent has had a full opportunity to litigate over whether the challenged restraint was "inherently suspect," and in fact did so before the ALJ and the Commission (*see, e.g.*, Complaint ¶¶25-26; RPFF 280, 287-288; Respondent's Post-Hearing Reply Brief (Aug. 17, 2007), at 10-34; Answering Brief of Respondent (Feb. 29, 2008), at 44-45).

1. Realcomp's Policies are Inherently Suspect

Accordingly, applying *Polygram*'s "inherently suspect" framework, we conclude that Realcomp's Policies and related requirements can reasonably be characterized as "giv[ing] rise to an intuitively obvious inference of anticompetitive effect." *California Dental*, 526 U.S. at 781.[16]

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[16] The ALJ appeared to question whether the *Polygram* framework had gained enough acceptance among the federal courts to supply a suitable basis for application in the case before us. ID 89. We do not understand either his doubts or his apparent belief that those doubts were permissible considerations for his decision. To begin, none of the cases the ALJ relied on to question *Polygram* is contrary to that decision.

In *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004), the Sixth Circuit confirmed that – as the Supreme Court made clear in *California Dental* and consistent with our analysis in *Polygram* – an "extensive market and cross-elasticity analysis is not necessarily required" in order to use an "abbreviated or 'quick-look' analysis." *Id.*, 388 F.3d at 961; *accord*, *California Dental*, 526 U.S. at 769-71; *Polygram*, 136 F.T.C. at 344-45. The court declined to rely on an abbreviated or "quick look" analysis in the *Worldwide Basketball* case because it found that the contours of the product market at issue in that case were not "sufficiently well-known or defined to permit the court to ascertain * * * whether the challenged practice impairs competition." 388 F.3d at 961. This is not inconsistent with *Polygram*, in which the Commission and the D.C. Circuit recognized that judicial experience and familiarity with a class of restraints may be important factors in deciding whether to utilize an "inherently suspect" analysis. *See, e.g., Polygram v. FTC*, 416 F.3d at 36-37.

Similarly, in *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 512 (4th Cir. 2002), the Court of Appeals declined to use an abbreviated rule of reason analysis because of the plausibility of defendants' proffered justifications. Again, this is not inconsistent with the *Polygram* framework, in which, if and when the defendant "advances * * * cognizable and plausible justifications" for the challenged conduct, the plaintiff must "make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition." 136 F.T.C. at 345, 348. And likewise, in *Brookins v. Int'l Motor Contest Ass'n*, the Court of Appeals held that an auto racing governing body's rule modification, which resulted in the exclusion of a particular

As we detail below, both accepted economic theory and past judicial experience with analogous restrictions support our finding that "the experience of the market has been so clear about the principal tendency" of these restrictions so as to enable us to draw "a confident conclusion" that – absent any legitimate justification advanced by Realcomp – competition and consumers are harmed by Realcomp's challenged Policies. *Id.* We need not rest our decision solely on such analysis, however, for, as we discuss in the next section, the application of a rule of reason analysis encompassing consideration of market power and competitive effects yields the same judgment as to Realcomp's Policies.

a. The Nature of Realcomp's Policies

Realcomp is an entity composed of horizontal competitors. IDF 285-286. The formation and existence of this collaboration among rivals are not at issue in this case. Antitrust doctrine recognizes that multiple listing services produce genuine efficiencies and improve economic performance in the sale and purchase of homes. *See, e.g.*, *Realty Multi-List,* 629 F.2d at 1356. As a centralized information sharing service, an MLS provides benefits to consumers by facilitating the matching of home buyers and home sellers. Without the Realcomp MLS, home buyers and cooperating brokers in Southeastern Michigan, and home sellers and their agents, would have to rely on a variety of less comprehensive sources of information, including newspaper ads, television advertising, sales flyers, and word-of-mouth advertising.

The existence of a legitimate joint venture does not preclude antitrust scrutiny of all measures the venture undertakes. An association composed of horizontal rivals may adopt reasonable rules to control its membership and to determine the services it will provide its members.

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supplier's product, could not be condemned summarily because, in the absence of evidence of the body's collusion with rival suppliers, the plaintiff's exclusion was merely "the incidental result of defining the rules of a particular game." 219 F.3d 849, 854 (8th Cir. 2000). *Accord, Polygram*, 136 F.T.C. at 328, 347-48 n.42 (recognizing that restraints that are "ancillary" to legitimate collective conduct may constitute, or be linked to, cognizable procompetitive justifications for challenged restraints).

Polygram reflects a careful interpretation of decisions by the Supreme Court and the Courts of Appeals since the mid-1970s. The D.C. Circuit in *Polygram* and the Fifth Circuit in *North Texas Specialty Physicians* emphasized the soundness of the FTC's interpretation in upholding the Commission's decision. *See also Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring) (citing *Polygram* favorably). These appellate decisions provide reliable indications that the federal courts regard the analytical approach of *Polygram* as sound. And of course, as a matter of administrative law, "once the agency has ruled on a given matter, * * * it is not open to reargument by the administrative law judge[.]" *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (Ruth Bader Ginsburg, J.) (citation omitted). ALJs thus are "entirely subject to the agency on matters of law." Antonin Scalia, *The ALJ Fiasco – A Reprise*, 47 U. Chi. L. Rev. 57, 62 (1979).

Yet it may not use the collaboration as a means to impose inappropriate limits on individual competitive initiative. *See, e.g., NCAA*, 468 U.S. at 99; *Professional Engineers*, 435 U.S. at 692-93, 696; *Major League Baseball*, 542 F.3d at 338-40 (Sotomayor, J., concurring). The issue in this case is whether Realcomp has adopted policies that unreasonably hinder the ability of some competitors to advertise, and disseminate information about, their service offerings.

The ALJ's Findings of Fact establish that Realcomp sent full-service listings, but not exclusive agency listings, to MLS-approved websites. IDF 349-360, 380-387. Realcomp also excluded EA listings from the default results of its internal search function. IDF 361-371. Realcomp's rules and policies, thus, discriminated against members who offer a product that creates "price pressure" against the offerings of other members. IDF 99. In our view, as discussed below, these policies improperly constrain competition and impede the emergence of a new business model that has considerable benefits for consumers.

b. The Market Context: Threats to the Traditional Full-Service Brokerage Business Model Posed By Emerging Lower-Priced Brokerage Models and By Consumers' Use of the Internet

Realcomp's adoption of the challenged practices took place amid market changes that threatened to upset, and perhaps, topple, the traditional, commission-based system for compensating real estate service providers. The rigidities of the traditional fee structure – an unchanging six percent commission that was split evenly between the listing and cooperating brokers – and consumer demand for a more flexible and less costly one, had induced some brokers to offer alternative fee structures. IDF 69, 73, 100. The EA listing, with its fixed fee and its relinquishment of the cooperating broker's portion if the seller procured a buyer independently, was the most dramatic experiment of this kind. Equally important was the development of the Internet as a conduit of information about listings. IDF 92. The posting of real estate offerings on the web greatly increased the ability of sellers and buyers to collect information without the assistance of a broker.

Real estate brokers understood that these developments had the capacity to upset the traditional business model. In a paper issued in 2003, the National Association of Realtors said that limited service brokerages have "the potential to change the competitive landscape of residential real estate brokerage." CX 533-040; IDF 88. NAR went on to observe that, even though some limited service brokers "may not currently command significant market share * * * their significance goes beyond size. They may be serving a customer need that is not currently being served by the dominant players. In addition, they may play a larger role in selected markets or may serve a particular consumer segment better than the dominant models." CX 533-038; IDF 88.

The ALJ found that brokers offering limited services, such as brokers with EA listings, compete for new listings with brokers offering traditional full services. IDF 81. He also found that limited service brokerages "put price pressure on full service brokerage commissions," which typically are fixed at six percent. IDF 99-101, 53-55. The "price pressure" to which the ALJ referred – which limited service brokers would normally exert absent Realcomp's restraints – promised to be a significant force in the future development of the real estate services sector in

Southeastern Michigan. This price pressure is especially significant given the lack of price competition that currently exists among traditional full service brokers. There is little economic evidence that competition among traditional service brokers has led to significant reductions in the amount of brokerage commissions paid; most studies of full service brokerage show substantial rigidity in percentage brokerage rates. CX 498-A-11.[17]

The pricing pressure imposed by the newly emerging business model intensified with the expanded use of the Internet as a means for sellers and buyers to directly perform research and acquire knowledge that previously had been the province of real estate professionals. Realcomp understood that the Internet could play a major role in accelerating the development of the limited service brokerage business model. As the ALJ found, the Internet is increasingly important to competition in the marketing and sale of homes. IDF 218-223, 428. Full-service brokers could no longer rely on being the sole conduit of information regarding the availability of homes for sale. The ALJ found that Realcomp disseminated certain information on its MLS by feeding it directly or indirectly to "Approved Websites," including NAR's Realtor.com and MoveInMichigan.com, and the Realcomp IDX participant websites. IDF 210, 224. He found that as of January 2007, 82 percent of agents were licensed to brokers who said they would participate in Realcomp's IDX, and that for the 91 percent of firm websites that contain searchable property listings, the IDX feed is how these firms obtain listings other than their own. IDF 121, 249. Additionally, he found that Realcomp's promotional activities have emphasized the competitive benefits of these Approved Websites. IDF 222-23, 234-35, 247.

c. The Anticompetitive Tendency of Realcomp's Policies: Penalizing Lower-Priced Competitors By Restricting the Availability of Competitively Significant Information to Consumers

In sum (and as documented by the sources cited in the preceding paragraphs), the full-service real estate brokers who constituted a majority of Realcomp's members perceived the possible expansion of limited service brokerage, in combination with consumers' direct access to MLS listings via Internet websites, to pose extremely serious threats to their traditional business model. In this setting, Realcomp adopted the policies at issue in this case, which singled out the new limited-service brokerage business model and put it at a considerable competitive disadvantage, particularly in the context of the increasing competitive importance of certain key Internet websites to disseminate listing information to consumers. Through the Realcomp Policies, rival real estate firms agreed to limit the advertising of exclusive agency listings and to deny consumers information

[17] The actual amount of brokerage commission paid in dollar terms also has closely tracked changes in housing prices. For example, it is reported that between 1991 and 2004, commission rates declined from 6.1 percent to 5.1 percent of the sale price, an apparent decrease of 16 percent. However, during this same period, the average brokerage commissions paid in dollar terms actually increased by 30 percent in response to housing price increases of 55 percent. CX 498-A-11; *see also* U.S. Department of Justice & Federal Trade Commission, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY, at 38-42 (Apr. 2007) (available at http://www.ftc.gov/reports/realestate/V050015.pdf).

and service options that such consumers desire. The circumstances surrounding the establishment of the policies, and Realcomp's evident aim of retarding the emergence of a new business model, underscore the exclusionary impact of those policies. The policies would have their effect by limiting access to an input – *i.e.* full exposure on the approved websites – necessary for limited service brokers to compete effectively.

Seen in the context in which they arose, the restraints in question raise serious competitive concerns. In restricting the ability of the limited-service, lower-cost brokers to have the same level of exposure on the increasingly popular Internet websites as the full-service brokers, it is easy to see how "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 770. Although not exactly the same conduct, the Realcomp Policies do bear a "close family resemblance," *Polygram v. FTC*, 416 F.3d at 37, to conduct that courts previously have treated with acute suspicion and, at times, have condemned without an assessment of the defendant's market power, or indeed without an opportunity for the defendant to offer any mitigating justifications. As we noted in *Polygram*, "[r]estrictions on truthful and nondeceptive advertising harm competition, because they make it more difficult for consumers to discover information about the price and quality of goods or services, thereby reducing competitors' incentives to compete with each other with respect to such features." 136 F.T.C. at 354-55.

In *Indiana Federation*, the Supreme Court condemned an agreement to deny insurers information about patient x-rays, even absent proof of market power, when there was no evidence of a procompetitive justification. 476 U.S. at 459-64. The Court also did not require proof of actual anticompetitive effects, such as higher prices, because the agreement was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence." *Id.* at 461-62. In the Court's view, "even if the desired information were in fact completely useless," competitors were "not entitled to pre-empt the working of the market by deciding for [themselves] that [their] customers do not need that which they demand." *Id.* at 462. *See also Professional Engineers,* 435 U.S. at 692-93 (condemning "[o]n its face" restriction on the availability of information regarding costs of engineering services as "imped[ing] the ordinary give and take of the market place").

When restrictions on advertising are aimed exclusively at rival discounters, with the effect of punishing their discounting behavior, some courts accordingly have treated them as if they were direct and naked restrictions on price or output. In *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217, 1219-20 (7th Cir. 1993), the plaintiff alleged that the defendants, rival "marine dealers in the same market who compete with Denny's to sell boats to Indiana consumers," had excluded plaintiff from two annual trade shows "because its policy was to 'meet or beat' its competitors' prices at the shows." The district court granted defendants' summary judgment because plaintiff failed to "make a sufficient showing of a potential market-wide impact resulting from defendants' actions." *Id*. at 1219 (internal quotation marks omitted). The Court of Appeals reversed. It held that, should it be proven at trial on remand, a "[c]oncerted action by dealers to protect themselves from price competition by discounters constitutes horizontal price fixing," which

can then be condemned without any further market inquiry as "*per se* an unreasonable restraint of trade." *Id.* at 1221, 1220.

Restrictions on rivals' modes of operations also have been found anticompetitive without extensive market analysis. In *Detroit Auto Dealers Ass'n v. FTC,* 955 F.2d 457 (6th Cir.1992), the Sixth Circuit upheld the FTC's ruling that the restraint at issue – an agreement among competitors to restrict their showrooms' hours of operation – was anticompetitive. *Id.* at 469-72.[18] The court found "legal basis and support for * * * the Commission's conclusion that hours of operation in this business is a means of competition [among dealers], and that such limitation [on hours of operation] may be an unreasonable restraint of trade." *Id.*, 955 F.2d at 472. Significantly, the Sixth Circuit affirmed "the Commission's conclusion on restraint of trade despite lack of [direct] evidence of increased prices" (*id.* at 472 n.15; *see also id.* at 471 n.13) or reductions in output (*see id*. at 470) – without requiring proof of a relevant market or market power.[19] Like the restraint at issue in the present case – and like the x-ray restriction in *Indiana Federation* – the auto dealers' concerted

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[18] The *Detroit Auto Dealers* panel majority, while affirming the Commission's conclusion that the auto dealers' limitation on showroom hours was an unlawful restraint of trade, expressed reservations about the Commission's "inherently suspect" mode of analysis because it perceived that analysis to "arise[] from a *per se* approach" and believed that a rule of reason analysis should have been used instead. 955 F.2d at 470-71. Judge Ryan, in a separate opinion concurring in part and dissenting in part, agreed with the panel majority's affirmance of the FTC's bottom-line conclusion, but disagreed with the majority's characterization of the FTC's analytical framework. Judge Ryan stated that, in his view, the Commission "did not use a *per se* analysis" and that there was no need for it to have "conducted a full rule of reason analysis in this case." 955 F.2d at 474 (Ryan, J., concurring in part and dissenting in part); *see also id.* at 475 ("Under a *per se* analysis, the agreement would have been invalid without any consideration of its procompetitive effects. The FTC, however, did consider the efficiency justifications offered by the respondents before concluding that the agreement had an anticompetitive effect."). It is also significant that *Detroit Auto Dealers* was decided prior to the Supreme Court's 1999 *California Dental* decision, and prior to the D.C. and Fifth Circuit decisions holding that the FTC's "inherently suspect" analytical framework was fully consistent with *California Dental* and other recent Supreme Court decisions. *Polygram v. FTC*, 416 F.3d at 373-75; *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 359-363 (5th Cir. 2008). *See also Mass. Board of Registration in Optometry*, 110 F.T.C. 549, 602-04 (1988) (followed in *Detroit Auto Dealers Ass'n*, 111 F.T.C. 417, 493-94 (1989), as well as in *Polygram* and *North Texas Specialty Physicians*).

[19] By contrast, in the present case, it is undisputed that Realcomp has market power, ID 84-85; *see infra* Section V.D.1; and there is substantial evidence that Realcomp's restrictive policies have had anticompetitive effects such as price increases and reductions in output. *See infra* Section V.D.2.

agreement to restrict showroom hours had the effect of limiting the availability of competitively relevant information to consumers or raising the cost of obtaining such information.[20]

Further, Realcomp's policies directly limited the publication and distribution of EA listings and, in effect, operated as a restraint on advertising. Courts have long treated agreements among competitors to restrict advertising as posing serious dangers to competition and as having a great capacity to affect prices. *See, e.g., California Dental*, 526 U.S. at 773 (in ordinary markets, such as the one here, "[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [rivals] to compete on the basis of price") (citations omitted) (first alteration original); *Morales v. Trans World Airlines*, 504 U.S. 374, 388 (1992) ("it is clear as an economic matter that * * * restrictions on fare advertising have the forbidden significant effect upon fares"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) ("Advertising * * * serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system"); *Polygram v. FTC*, 416 F.3d at 37 ("agreements restraining autonomy in pricing and advertising 'impede the ordinary give and take of the market place'") (quoting *Indiana Federation*, 476 U.S. at 459); *Denny's Marina*, 8 F.3d at 1221 (exclusion of discounting rival from popular trade shows constitutes horizontal price-fixing).

Our examination of the nature of the restriction leads us to find that the Realcomp Policies create significant competitive hazards. By their nature, the Realcomp Policies tend to impose a significant impediment to access to limited service listings by contributing brokers seeking homes on behalf of buyers on the MLS, and by buyers directly seeking homes through public websites. Realcomp's Website Policy and related requirements prevented the dissemination of limited service listings by Realcomp on its Approved Websites, whose benefits Realcomp regularly emphasized. These measures have the further inherent tendency to reduce the "price pressure" that limited service brokerage has exerted on the full-service brokerage commission structure. By favoring ERTS

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[20] The Commission had found that the auto dealers' agreement "raises the opportunity cost to consumers of car shopping. This increase in costs encourages consumers to spend less time comparing prices, features, and service, and thereby reduces pressure on dealers to provide the prices, features and services consumers desire." 111 F.T.C. at 495; *see also Indiana Federation*, 476 U.S. at 457, 461-62 ("The Federation's collective activities resulted in the denial of the information the customers requested in the form that they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. * * * A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence."). *Compare* IDF 220, 349, 447 ("The majority of home buyers and sellers want to be able to search for homes on the Internet before they buy or sell." But Realcomp's "Website Policy * * * prevent[s] Exclusive Agency, Limited Service and MLS Entry Only listings from being sent" to the "four categories of websites [that home buyers visited] much more than any others[.]").

listings, the Realcomp Policies bolster those contracts' imposition of a requirement that sellers must pay for a cooperating broker whether one is used or not. D. Williams Tr. 1189-90. Realcomp's minimum service requirements then add to and increase the price floor of ERTS listings by setting a minimum level of brokerage services that the listing broker must offer under ERTS listings. CX 498-A-044-45. Realcomp's Search Function Policy and related requirements prevented default access to limited service listings on its MLS.

The Realcomp Policies are, in essence, an agreement among horizontal competitors to restrict the availability of information that consumers can use to evaluate the prices and other features of competing providers' offerings, the effect of which is to make such information more difficult and costly to obtain. Such practices have been found to be particularly problematic where, as here, the incumbent providers are restricting such dissemination of information so as to impede the marketplace participation by relatively new entrants offering low-cost or discounted products or services. *See, e.g., Realty Multi-List, supra* (preventing MLS participation by real estate brokers who did not maintain full-service office open during customary business hours);[21] *Denny's Marina, supra* (excluding discounter from popular trade shows). Realcomp's Policies restrict (albeit not destroying entirely) the ability of low-cost, limited service brokerages to get their listings included on heavily used public websites, thereby making it more difficult and costly for them to participate fully in the marketplace. As a result, these policies tend to alleviate downward pricing pressure on traditional brokers' commission-based pricing model. We accordingly conclude, under the first step of our *Polygram* analytical framework, that the Realcomp Policies are inherently suspect and, thus, presumptively unreasonable.

2. Realcomp's Proffered Justifications

Next, the *Polygram* framework requires our consideration of whether Realcomp can overcome this presumption of unreasonableness by showing that the practice has "some countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services." *Indiana Federation*, 476 U.S. at 459; *see also Chicago Professional Sports, L.P.*, 961 F.2d 667, 674 (7th Cir. 1992) (justification must provide "some explanation connecting the practice to consumers' benefits"). If such justifications are both "cognizable" and "plausible," then Respondents may be able to justify their practice and

[21] As we discuss in Section V.D.1., below, *Realty Multi-List* relied on both the nature of the restraints at issue and the market power of the MLS, under what the Court of Appeals termed a "facial reasonableness" standard. As the *Polygram* "inherently suspect" framework we apply here eschews the requirement of market power, we cite that decision here only inasmuch as it discusses the nature of restraints that aim at punishing the discounting behavior of rivals in the real estate brokerage services market.

further examination would be warranted.[22] Otherwise, "the case is at an end and the practices are condemned." *Polygram*, 136 F.T.C. at 345.

Realcomp argues that the Policies are justified because they eliminate two inefficiencies that arise from EA listings: (1) "free-riding" from home owners who opt to list their homes using EA listings and who then compete with cooperating brokers to find buyers for their home; and (2) a "bidding disadvantage" faced by buyers who use cooperating brokers when bidding against an unrepresented buyer for a home listed under an EA agreement. We reject both of those arguments.

As an initial matter, we note that both the "free riding" and "bidding disadvantage" arguments appear to be post-hoc rationalizations rather than actual reasons for the policies' adoption.[23] Even apart from this consideration, we find both proffered defenses without merit.

a. Free Riding

For free riding to occur, there must be a product or service that is consumed by an individual or entity who does not pay for that product or service. For example, if certain retailers invest in showrooms staffed with knowledgeable personnel to provide information to consumers and thus promote the sale of a brand of merchandise, other retailers who sell the same brand but refrain from such investments may get a "free ride" on those investments if consumers can get the information from the retailers that make the investment and then buy the product at a lower price from the retailers who do not. The policy concern is that free-riding can diminish the incentives to make such investments at all. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 222-23 (D.C. Cir. 1986) (Bork, J.). In principle, measures to control free-riding are widely recognized as cognizable justifications under the antitrust laws. *See, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984); *Business Electronics, Inc. v. Sharp Electronics, Inc.*, 485 U.S. 717, 731 (1988).

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[22] We also acknowledged in *Polygram* that a defendant can avoid liability by showing "why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question." 136 F.T.C. at 345; *cf. California Dental*, 526 U.S. at 773 (noting that the professional context of the advertising restrictions there may ameliorate their presumptively anticompetitive nature, "'normally' found in the commercial world"). There is no record evidence here, however, that the market for real estate brokerage services in Southeast Michigan exhibited any such ameliorative characteristics, and Realcomp has not made any arguments to us along those lines.

[23] The Board Resolutions adopting the Policies did not mention such "free-riding" or "bidding disadvantage" problems. CX 100, CX 32-005-06, CX 8-007. Realcomp offered those justifications long after the Board approved the Policies and after the FTC issued the Complaint in this matter. IDF 618-619. None of the Realcomp Governors knows why the Board adopted the Website Policy and Search Function Policy. CX 37 (Bowers Dep.), at 26, 28, 32; CX 43 (Hardy Dep.), at 100, 102-03, 117-118, 122; CX 40 (Elya Dep.), at 64-65, 70, 83; CX 38 (Gleason Dep.), at 20-25, 58.

In this case, Realcomp argued (and the ALJ agreed) that the Website Policy is designed to prevent EA home sellers from free-riding by advertising their MLS listing on Realcomp's Approved Websites, but then selling their homes without the assistance of a cooperating broker who is a member of Realcomp, thus avoiding payment of a commission to the Realcomp member. The ALJ concluded that, without the website restrictions, home sellers with EA agreements "would free ride on the Realcomp members who invest and participate in the MLS through the payment of dues and who otherwise undertake to support the cooperative endeavor of the MLS." ID 121.

This conclusion is erroneous, for the simple reason that there was no "free ride" at all here.[24] A simple way to see this is to ask what investments, and by whom, were being free-ridden upon. Was Realcomp, the provider of the MLS service, being free-ridden upon? Clearly not, because Realcomp charges membership fees for its services. The EA home seller makes use of the MLS only by virtue of retaining the services of a listing broker who is a Realcomp member. JX 1-04, 07 (Joint Stipulations of Fact Nos. 19, 55). Sellers who use EA listings pay fees to their listing brokers, and their listing brokers (like any other listing broker in the Realcomp MLS) pay dues and fees to Realcomp. Realcomp charges identical dues and fees to all of its members, regardless whether they offer their clients EA or ERTS listings. JX 1-05 (Joint Stipulations of Fact No. 36). Thus, the seller of an EA listed property does not have "free" access to Realcomp's services. Rather, both EA sellers and ERTS sellers must make payments to listing brokers who, in turn, pay Realcomp for participation in the association.[25] Accordingly, the contention that EA sellers are "free riders" is erroneous. *Cf. Chicago Professional Sports L.P. v. Nat'l Basketball Ass'n*, 961 F.2d 667, 675 (7th Cir. 1992) ("What gives this the name *free*-riding is the lack of charge. * * * When payment is possible, free-riding is not a problem because the 'ride' is not free. Here lies the flaw in the [defendant's] story. It may (and does) charge members for value delivered"); *Toys "R" Us v. FTC*, 221 F.3d 928, 938 (7th Cir. 2000) ("the manufacturers were paying for the services TRU furnished, * * * and thus these services were not susceptible to free riding").

The lack of free-riding on Realcomp's services is and should be the end of the matter, because the only efficiency-enhancing joint activity advanced here was the creation and operation of the MLS, and the justifiability of any restriction must be tested by whether the restriction was reasonably necessary to achieve that end. *See* Federal Trade Commission and U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, § 3.36(b) (April 2000). The ALJ, however, seemed to think that cooperating brokers were somehow being free-ridden upon,

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[24] "A free ride occurs when one party to an arrangement reaps benefits for which another party pays, * * * [and] the party that provides capital and services [does so] without receiving compensation." *Rothery*, 792 F.2d at 212-13.

[25] Indeed, EA brokers pay the same amount of Realcomp dues as full-service brokers, but they do not receive the same level of services as Realcomp offers its other members. CX 415 (Nowak Dep.), at 43. For example, EA broker member dues help pay for Realcomp's MoveInMichigan.com website, though EA broker Realcomp members do not get to have their listings included on it. *Id.* at 55. It could be said that full-service Realcomp members "free ride" on the dues paid by limited service Realcomp members.

suggesting that Realcomp's restrictive policies are necessary to ensure "the incentives of [cooperating] brokers to show and promote EA properties to their buyer-clients." ID 121. Realcomp made no attempt to meet its burden of showing that such a reduction of incentives took place, and indeed the theory is implausible on its face. Under both ERTS and EA listings, when a cooperating broker brings in the buyer, that cooperating broker is entitled to the same level of compensation, IDF 200, 201, 204, creating ample incentive to show and promote EA properties. Moreover, Realcomp's Policies tolerate the practice of allowing an ERTS seller to retain the entire six-percent commission when the buyer is obtained without the services of a cooperating broker.[26] Because the ERTS listing broker presumably would prefer to have the full six-percent commission rather than split the six percent half and half with a cooperating broker, the listing broker has an incentive to complete the transaction without a cooperating broker if possible. For the ALJ's theory to work, therefore, a cooperating broker would have to have more to fear from an EA seller – an amateur – seeking to find a buyer without a cooperating broker than from a listing broker – a seasoned professional – given exactly the same three-percent incentive to do so. The record contains no such evidence.

If Realcomp gets the same fees from EA listings and ERTS listings, and cooperating brokers get the same three-percent commission from EA listings and ERTS listings, who actually loses from EA listings? Two categories of people come to mind: the listing broker who signs an EA contract for less compensation than an ERTS contract would have provided, and the listing broker who insists upon an ERTS contract and loses a listing as a result. But neither broker is providing a service that is being free-ridden upon. The listing broker who signs an EA contract is providing brokerage services for which he is being compensated in exactly the manner for which he bargained. And he bargained for it because he knows that improved technology – the Internet – causes many buyers to come forward on their own, obviating the need for some of the services for which either he or a cooperating broker used to get paid three percent. And the listing broker who insists upon an ERTS contract and loses a listing as a result provides no services at all, and by definition cannot be free-ridden upon. In other words, these two categories of listing brokers are not losing money through free-riding; they are losing money through competition.

The courts are quite familiar with – and have consistently rejected – efforts to dress up as a "free-riding justification" what is in fact an effort to protect a less-demanded, higher-priced product from competition by a lower-priced product that consumers may prefer more strongly. *See NCAA*, 468 U.S. at 116-17; *see also Premier Elec. Construction Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 370 (7th Cir. 1987) ("A group of firms trying to extract a supra-competitive price therefore hardly can turn around and try to squelch lower prices – as the

[26] Realcomp's rules do not require that a Realcomp cooperating broker be involved in any transaction facilitated through the Realcomp MLS or through Realcomp's feed of listings to the public websites. D. Williams Tr. 1224-25; JX 1-05 (Stipulations of Fact Nos. 29-32).

[defendants] may have done – by branding the lower prices 'free riding'!").[27] Realcomp's purported "free-riding" justification is no more complicated than that.

We find that the underlying rationale for the Website Policy is to not to ensure the continued efforts of cooperating brokers, but to reduce "price pressure" on commissions.[28] Accordingly, Realcomp's purported "free-riding" justification is entirely without merit.[29]

b. The Bidding Disadvantage

Realcomp also claims that its Policies are justified because they eliminate a "bidding disadvantage" faced by a buyer represented by a cooperating broker when bidding against an unrepresented buyer for a home sold under an EA listing. This argument is not a cognizable justification under the antitrust laws, and we accordingly reject it.

Insofar as buyers bid against each other for a home, they compete with each other. The antitrust laws protect that competition, and the fact that one competitor (*i.e.* one with no cooperating broker) may have a cost advantage over another does not make the competition unfair. To the contrary, it is regarded as an efficiency to which the low cost competitor is entitled. *C.B. Trucking, Inc. v. Waste Mgmt.,Inc.*, 137 F.3d 41, 45 (1st Cir. 1998); *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1080 (1st Cir. 1993). An EA seller has a preference for a buyer not bound to a cooperating broker, because the same nominal sale price will yield a higher net price. An ERTS seller does not share that preference, because he must pay the full six-percent commission, whether or not there is a cooperating broker. Thus, by eliminating the bidding disadvantage for a buyer represented by a cooperating broker, Realcomp's Policies serve to prop up a commission structure that raises the cost of selling a home. The net effect of the Policies is to diminish the possibility of

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[27] When a powerful group of competitors imposes restrictions that "increase its rivals' costs of doing business, the better to eliminate a source of competition," the members of the group may benefit both by "enabl[ing] the members to capture more of the market" and by "rais[ing] the market price to its own advantage" and to the disadvantage of consumers. *Premier Elec. Construction*, 814 F.2d at 368 (citing T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986)).

[28] The fact that Realcomp established the challenged Policies between 2002 and 2006, when the market share for limited service brokerages was increasing more than fivefold, also supports an inference that the Policies were anticompetitive, not procompetitive, in purpose. IDF 90-91. The inference we draw is reinforced by Realcomp's continued enforcement of its Website Policy, even though that Policy conflicts with NAR's by-laws and thereby violates Realcomp's own by-laws. IDF 418-423.

[29] We thus reject the ALJ's purported "findings of fact" – more accurately characterized as inferences drawn from the evidence – regarding Realcomp's free-riding argument. IDF 601-619.

brokerage commissions falling substantially below the de facto price floor created by the structure of the cooperative payment system that governs ERTS brokerage contracts. CX 498-A-046.[30]

As with Realcomp's free-riding argument, eliminating the so-called "bidding disadvantage" does not allow Realcomp or its members to "increase output, or improve product quality, service or innovation." *Polygram*, 136 F.T.C. at 346. In *Cantor,* the court rejected the defendant's justification for its policy – restricting dissemination of information through yard signs – because, rather than promoting competition, the practice made it easier for less diligent brokers to attract buyers and earn a commission. *Cantor v. Multiple Listing Serv. Of Dutchess County, Inc.*, 568 F. Supp. 424, 430-31 (C.D.N.Y. 1983). For the same reason, we reject Realcomp's bidding disadvantage justification.

Rather than saving the Policies from condemnation, Realcomp's argument reinforces the conclusion that they have an anti-competitive effect. The Policies do not enhance competition. They serve to prevent the cost of selling a home from dropping below the prevailing six-percent commission rate, and they hinder the exchange of information which Realcomp's creation was supposed to facilitate.[31] The Policies may protect brokers' commissions and the established commission-based business model, but they impede competition. "[T]he antitrust laws * * * were enacted for 'the protection of *competition*, not *competitors*'." *Brunswick Corp. v. Pueblo*

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[30] For example, one discount limited service broker, Craig Mincy of MichiganListing.com, advertises the potential savings of EA listings versus full-service listings through an example of the sale of a $300,000 home. Mincy, Tr. 374 (illustrated by DX 4). Under a traditional full-service ERTS listing at 6% commission, a seller would pay a commission of $18,000, even if there is no cooperating broker involved in the transaction. Mincy, Tr. 375-376 (illustrated by DX 4). In contrast, under the MichiganListing.com EA listing, the EZ-Listing, the seller would only pay $495 if there is no cooperating broker involved, a savings of $17,505. In the event a cooperating broker is involved, a seller using the EZ-Listing would pay $9,495 (the $495 fee to MichiganListing.com and a three percent, or $9,000, commission to the cooperating broker), for a savings of $8,505. Mincy, Tr. 376-377. Mr. Mincy puts this example on his website to "show the general public they don't necessarily have to pay six percent to sell their home." Mincy, Tr. 377-378.

[31] *See Professional Engineers*, 435 U.S. at 693 ("the anticompetitive purpose and effect of * * * agreement" to withhold price information is "confirm[ed]" by expectation that it would "tend to maintain the price level"); *Indiana Federation*, 476 U.S. at 461-62 ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned"); *Detroit Auto Dealers*, 111 F.T.C. at 495 (competitors' agreement to limit showroom hours "raises the opportunity cost to consumers" of obtaining comparative information "and thereby reduces pressure on dealers to provide the prices, services, and features consumers desire").

Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Realcomp's "bidding disadvantage" argument must, therefore, fail.[32]

Accordingly, under *Polygram*'s "inherently suspect" framework, we conclude that the Realcomp Policies are unreasonable and in violation of both Section 1 of the Sherman Act and Section 5 of the FTC Act.

We next consider whether a more elaborate rule of reason analysis, encompassing considerations of market power and effects, provides an alternative basis (*i.e.* regardless of whether Realcomp's policies are inherently suspect) for our conclusion that those policies are anticompetitive.

D. Analysis of the Realcomp Policies Under A Rule of Reason Encompassing Consideration of Market Power and Anticompetitive Effects

As we noted above, under the circumstances of this case, we need not rely solely on the nature of the challenged restraints in order to determine whether Realcomp's Policies violate the antitrust laws. In this section, we evaluate those policies under a more fulsome rule of reason analysis – and reach the same conclusion. Under this framework, a plaintiff must show that the challenged restraints have resulted in, or are likely to result in, anticompetitive effects, in the form of higher prices, reduced output, degraded quality of products or services, retarded innovation, or other manifestations of harm to consumer welfare. Should the plaintiff carry its burden of showing actual or likely anticompetitive effects, the respondent – in order to avoid condemnation – must come forward with legitimate countervailing justifications.

As we indicated in Section V.B., *supra*, a plaintiff can carry out its affirmative case in either of two ways. It may make an indirect showing based on a demonstration of defendant's market power, which when combined with the anticompetitive nature of the restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects. Or, plaintiff can provide direct evidence of "actual, sustained adverse effects on competition" in the relevant markets, which would be "legally sufficient to support a finding that the challenged restraint was unreasonable" – whether or not plaintiff has made any showing regarding market power. *Indiana Federation*, 476 U.S. at 461. *See Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff has "two independent means by which to satisfy the adverse-effect requirement" – direct proof of "actual adverse effect on competition" or "indirectly by establishing * * * sufficient market power to cause an adverse effect on competition"); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects"); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (same).

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[32] Accordingly, we reject the ALJ's purported "findings of fact" – more accurately characterized as conclusions or inferences drawn from the evidence – regarding Realcomp's "bidding disadvantage" argument. IDF 629-632.

The ALJ found that Realcomp possessed substantial market power in the relevant markets, and Realcomp does not contest this finding.[33] In the ordinary case, the market definition/market power measurement exercise provides the most complex, resource-intensive element of what is called the "full rule of reason" analysis that courts and commentators describe as the most elaborate variant of the Section 1 analytical continuum. In this matter, the often contentious and sometimes problematic issue of the respondent's market significance is resolved conclusively. The ALJ's uncontested finding that Realcomp has substantial market power eliminates the urgency to decide which variant of the rule of reason governs our assessment of whether Realcomp violated Section 5 of the FTC Act. This finding of market power, coupled with our earlier determination that the tendency of the challenged policies was to suppress competition, provide "indirect" evidence that those policies have or likely will have anticompetitive effects.

We also find that there is sufficient direct proof of actual detrimental effects on competition resulting from Realcomp's restrictive policies. Complaint counsel's economic expert witness, Dr. Darrell Williams, conducted a time-series analysis comparing the share of EA listings in the Realcomp MLS before and after the implementation of the challenged policies, and found significantly fewer discount listings after the policies at issue were implemented. Dr. Williams also conducted a benchmark study comparing the share of EA listings in a number of multiple listing services in geographic areas with and without listing restrictions similar to Realcomp's, and found significantly fewer discount listings in areas where the MLS imposed website restrictions similar to Realcomp's. Lastly, Dr. Williams's regression analysis, controlling for several variables, provides clear demonstration of the correlation between restrictive website policies such as Realcomp's and the minimization of EA listings.

Thus, under this fuller rule of reason analysis, we find ample support in the record for a conclusion that Realcomp's policies are anticompetitive and – unless Realcomp can establish a legitimate countervailing justification for them – unreasonable restraints of trade, in violation of Section 1 of the Sherman Act and Section 5 of the FTC Act.

1. Indirect Evidence of Anticompetitive Effects: The Significance of Realcomp's Market Power in the Rule of Reason Analysis

The ALJ ultimately interpreted the conduct at issue differently than we do. Yet his Opinion reflects an evident awareness that Realcomp's conduct posed noteworthy competitive hazards. Judge McGuire wrote:

> With respect to the Website Policy, and the requirement that in order to be considered an ERTS listing, an agent must provide minimum brokerage services, the nature of the restraint is such that it is likely to be anticompetitive. Such conclusion,

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[33] Even if the ALJ's reading of the courts of appeals decisions in *Worldwide Basketball*, *Continental Airlines*, and *Brookins*, to require complaint counsel here to delineate a relevant market and measure the respondent's market power, were correct (*see supra*, note 16), his finding of substantial market power satisfies those decisions as well.

> though not intuitively obvious, necessarily requires an expanded inquiry into whether competition was, in actuality, unreasonably restrained.

ID 97. Examining, as we have, the context in which Realcomp developed the challenged Policies and accounting for their apparent purpose, we agree that the nature of the Policies is such that they were likely to be anticompetitive. A fuller inquiry into the behavior in question reinforces that assessment.

As we discussed above, a crucial element of assessing indirect evidence of anticompetitive effects – the fuller inquiry to which the ALJ refers – is the examination of Realcomp's position in the relevant market. The ALJ found that Realcomp possessed substantial market power in two relevant markets in Southeastern Michigan: the market for residential real estate brokerage services and the market for multiple listing services, which is a vital input into the brokerage services market. Realcomp does not dispute these findings in this appeal.

Complaint counsel argues that the finding of market power, coupled with a determination that the nature of the challenged policies was to suppress competition, support an inference of actual or likely adverse competitive effects. We agree, and both case law and the commentary support that proposition. *See, e.g., Law v. NCAA*, 134 F.3d at 1019; *Tops Markets*, 142 F.3d at 96; *Levine v. Central Florida Medical Affiliates, Inc*., 72 F.3d 1538, 1551 (11th Cir. 1996); *Brown Univ.*, 5 F.3d at 669; *see also* American Bar Association, Section of Antitrust Law, 1 ANTITRUST LAW DEVELOPMENTS, at 65 (6th ed. 2007); American Bar Association, Section of Antitrust Law, MONOGRAPH NO. 23, THE RULE OF REASON, at 161-63 (1999). The ALJ's contrary conclusion, ID 97, constitutes an error of law.

The importance of market power as a tool for assessing the likely competitive effect of a concerted practice is also demonstrated in cases involving the real estate sector. A prominent example is *United States v. Realty Multi-List, Inc., supra*, where the court applied a "facial unreasonableness" standard, which "allows the courts to reach and void on its face any significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination's legitimate needs." 629 F.2d at 1370. There was no evidence of an actual "pricing effect" in *Realty Multi-List*. Nonetheless, the Court of Appeals found "facially unreasonable" the rules of the defendant MLS, which, among other things, denied to non-members information in the MLS database and other members' listings information. *Id*. at 1357, 1370. The court found that the rules harmed broker competition between non-members and members and also harmed real estate buyers and sellers. *Id*. at 1371-72. As the court explained, as a result of those rules, "the public is denied the incentive to competition * * *." *Id.* at 1371.

Other courts as well have held unlawful policies or practices of a combination of real estate brokers having market power that deny access to an MLS or to other information respecting services that consumers desire. *Thompson v. Metropolitan MultiList, Inc.*, 934 F.2d 1566 (11th Cir 1991), for example, held that an organization of real estate brokers controlling an MLS, whose rules excluded certain competitors' access to the MLS, violated the Rule of Reason. *Marin County Board of Realtors v. Palsson*, 549 P.2d 833 (Cal. 1976) held the same thing. And, in *Cantor*, the court held

that an organization of real estate brokers controlling an MLS, whose rules prohibited certain competitors from using yard signs that were not MLS-branded yard signs, also violated the Rule of Reason. 568 F. Supp. at 430-31. As the court observed in *Realty Multi-List*, "there exists the potential for significant competitive harms when the group, having assumed significant power in the market, also assumes the power to exclude other competitors from its pooled resources." 629 F.2d at 1370. *See also United States v. VISA U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) (joint venture rules prohibiting members from competing "with the others in a manner which the consortium considers harmful to its combined interests" was anticompetitive behavior). Realcomp's Policies similarly restrict competition by denying consumers a service they desire: access to EA listings with full public website exposure through the Realcomp MLS.

In light of Realcomp's acknowledged market power, and the facially restrictive nature of the policies at issue, no more is required, under the rule of reason, to support our conclusion that the Policies are unreasonable because they will predictably result in harm to competition.[34] The record evidence provides additional support for that conclusion, however, by detailing the mechanisms by which the Policies affect the workings of the market. Those Policies: (1) significantly restricted access by consumers to limited service brokerage listings on public websites; (2) effectively limited the reach of listings disseminated on the MLS itself, at least until the Search Policy was changed, and thereby (3) caused a reduction in the "pricing pressure" on the six-percent commissions typically charged by full-service brokers. These adverse effects on competition were established by the ALJ's findings respecting the importance of the Internet in general and the Approved Websites in particular to home buyers and sellers who want access to listings on public websites, *e.g.*, IDF 218-219; by the ALJ's findings that Realcomp's Policies severely restricted consumers' access to limited service listings on public websites, *.e.g.*, IDF 349-350; by the testimony from limited service brokers about how Realcomp's Policies place them at a severe competitive disadvantage versus other geographic areas where the local MLS has no similar restrictions, *e.g.*, D. Moody Tr. 531-533; CX 526 (Groggins Dep.), at 29-31; CX 422 (Aronson Dep.), at 74-76; G. Moody Tr. 821-823, 825-826; Kermath Tr. 741; and by the ALJ's findings that limited service listings exerted "price pressure" on the full-service brokerage commission structure, IDF 99-101.

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[34] Thus, even if we accepted the ALJ's findings in total, we would still reverse his decision. Because the ALJ found that Realcomp had market power, ID 97, and that the Website Policy restricting the distribution of discount listing to public web sites was "likely to be anticompetitive," *id.*, those findings establish a *prima facie* case of illegality, *see, e.g., United States v. Brown Univ.*, 5 F.3d at 668-69, which Realcomp has failed to rebut. As discussed above, the justifications Realcomp offers are neither cognizable nor plausible. *See supra* Section V.C.2. Moreover, in light of these findings, the ALJ erred in requiring further proof regarding actual anticompetitive harm as an additional element of proof. *See also Indiana Federation*, 476 U.S. at 460 (quoting Areeda, *supra*, ¶1511, at 429)*; United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel v. Christian Hospital*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewiston Hospital*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

The ALJ found that the Search Function Policy did not harm competition because users of the Realcomp MLS could override the default settings. The ALJ found that, until April 2007, by virtue of Realcomp's Search Function Policy and its Minimum Service Requirement, the default setting for Realcomp's MLS was such that all searches were automatically configured to include only full-service listings so that members wishing to view limited services listings needed to specifically select those listings or to select the button labeled "select all listings." IDF 361, 363, 374. The relevant question, however, is not whether Realcomp's Policies *completely* excluded discount brokers from advertising their listings on the MLS, but whether they tended to stifle competition. The Policies did so.[35] Realcomp data and broker testimony show that many brokers did not override the default search parameters.[36] On this point we rely upon the record evidence showing what brokers actually do.

For example, Realcomp data show that cooperating brokers viewed and emailed EA listings far less frequently than ERTS listings. CX 498-A-036. Realcomp kept statistics for each listing within the Realcomp MLS showing the number of times a Realcomp MLS user viewed the detailed report for that listing. CX 228-06. Dr. Williams determined, based on Realcomp's data, that between January 2004 and October 2006, ERTS listings were viewed, on average, 5.1 times per day, whereas EA listings were viewed only 3.2 times per day. CX 498-A-036; CX 517; CX 518. Realcomp also calculated that Realcomp MLS users viewed residential and condominium ERTS listings on average a total of 201 times per month, whereas they viewed EA residential and condominium listings an average of 94 times per month. CX 228-06-07.

Realcomp also kept statistics for each listing within the Realcomp MLS showing the number of times Realcomp MLS users sent out a listing via email, either as an individual listing or part of a group of listings. CX 228-06. Based on Realcomp data, Dr. Williams ascertained that in 2006, ERTS listings were sent via email from the Realcomp MLS an average of 6.9 times per day-on-market, whereas EA listings were sent via email an average of only 1.9 times per day-on-market. CX 498-A-036-037; CX 519; CX 520. Furthermore, Realcomp calculated that Realcomp MLS users emailed residential and condominium ERTS listings on average a total of 286 times per month, whereas residential and condominium EA listings were emailed on average a total of one time per month – less than 0.4 percent as often. CX 228-06-07.

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[35] While we do not necessarily reject the ALJ's very limited factual findings regarding the impact of the Search Function policy (IDF 361-371, 455-462), we note that he inexplicably omitted the extensive record evidence cited and summarized in the following paragraphs regarding the exclusionary impact of this Policy. For the reasons set forth in the text, we disagree with and disavow the conclusion he expressed in the section heading accompanying those "findings of fact" ("Discount Brokers Are Not Excluded by the Search Function Policy"). ID 58.

[36] This is hardly surprising. Realcomp's restrictive practice was aimed at discount *listing* brokers. While cooperating brokers could override the default search criteria, there was nothing that discount listing brokers could do to ensure that the cooperating brokers did so. Thus, the default setting was equally effective in punishing discount brokers whether it relied on the cooperating brokers' inertia, or on some other, more technologically advanced, weapon of exclusion.

Furthermore, brokers testified that they received complaints from consumers who had been told by brokers that their EA listed homes were difficult to find in the MLS. RRPF 931, 933-35, 964, 986, 1042, 1048. Testimony from EA brokers reinforces this evidence. In her experience as a broker, Denise Moody of Greater Michigan Realty observed that her customers' limited service listings are viewed far less often by other Realcomp members and emailed to potential buyers less frequently than her customers' ERTS listings. D. Moody Tr. 531-533. Limited Service brokers also testified that they heard from other agents looking on the MLS that they could not find their customers' listings, and that this was because of Realcomp's Search Function Policy. CX 526-29-31 (Groggins Dep.). Limited Service brokers also received complaints from customers whom other agents told that their listings were not on the Realcomp MLS. *See, e.g.,* CX 422-62-63, -74-76 (Aronson Dep.); RX 67-06; RX 73-01.[37]

Craig Mincy, the owner of MichiganListing.com (*see supra*, note 30) testified that, when he was a full-service broker, he was not aware that Realcomp's default search screen excluded EA listings, and that he only became aware of it later when, as he began offering limited service listings, a customer informed him that the customer's listing was not on Realtor.com. Mincy Tr. 390-92.[38] Mr. Mincy believes that he missed properties when doing searches on behalf of buyers, in part due to Realcomp's Search Function Policy. *Id*. at 393, 400. Mr. Mincy also testified that he receives half a dozen calls per week from Realcomp brokers who, because of Realcomp's Search Function Policy, did not find his MichiganListing.com EA properties listed on the Realcomp MLS. *Id*. at 401-402. He testified that he has had no similar calls from Realcomp brokers regarding his ERTS listings or his listings in other MLSs. He only receives these calls regarding his limited service listings in Realcomp. *Id*. at 405-406.[39]

This evidence supports our finding that the Realcomp Search Function Policy was a significant factor accounting for the results we have described. One of complaint counsel's industry experts testified that he has "never heard of this kind of decline by agents choosing saying [sic] I'm not going to look at that listing because it's Exclusive Agency * * * and everything I've ever

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[37] Greater Michigan Realty gets calls "weekly" from customers with listings in Realcomp who indicated they have been contacted by another Realtor who claims that the customer's listing can't be found or "didn't show up" on the MLS system. In the Realcomp area, this type of customer complaint is "one of the most significant challenges" that Greater Michigan Realty faces. G. Moody Tr. 821-823, 825-826; CX 443-002. AmeriSell Realty's broker-owner Jeff Kermath testified that he receives complaints from clients in the Realcomp service area "several times per week" that other Realtors "can't find the listing" on the MLS. Kermath Tr. 741.

[38] The only way Realcomp members find out about the Search Function Policy is through one training class at the very beginning of their membership. CX 36 (Kage IHT), at 94.

[39] Realcomp's Board of Governors received a request to change the default setting because brokers did not realize that default searches only resulted in ERTS listings. CX 35 (Kage Dep.), at 133-38; CX 250-02-03. One Realcomp Governor voted to change the default because he wanted the default to include all available listing types. CX 415 (Nowak Dep.), at 44-45.

understood in my entire career is that cooperating brokers want to see every single home that's available on that MLS." Murray Tr. 194, 195-96. Realcomp's Search Function Policy places limited service listings at a disadvantage similar to being excluded from Realcomp altogether. RX 154-A-32; Murray Tr. 196-199.[40] This evidence bolsters our conclusion that the Search Function Policy, in tandem with the Minimum Service Requirement, likely had anticompetitive effects.

Turning to the Website Policy, although the MLS continues to be the most important tool for advertising real estate listings, the Internet has raised the importance of advertising on public Realtor websites. Unlike the Search Function Policy, which merely made it more difficult for EA listings to advertise effectively on the Realcomp MLS, the Website Policy barred discount brokers – and continues to bar them – from using Realcomp to advertise on public websites altogether.

Realcomp's Website Policy completely excludes limited service listings from Realcomp's highly promoted "MoveInMichigan.com" real estate company site, which Realcomp describes to consumers as "one of the most comprehensive Real Estate listing sites in all of Southeastern Michigan," CX 15, and from "ClickOnDetroit.com," the leading local website in southern Michigan. CX 222-009-010; IDF 234-235. Realcomp does not inform consumers that MoveInMichigan.com only includes ERTS listings (CX 150), so they are unaware that it is incomplete. Limited service brokers have no other way to place their listings on those websites, which are two of the top four public websites used by consumers in the relevant market. Kage Tr. 936-37, 989; CX 36 (Kage IHT), at 48-49 (brokers using these listings cannot post on MoveInMichigan.com or ClickOnDetroit.com because Realcomp has an exclusivity agreement for those websites); IDF 238, 387.

Access to the majority of Realcomp's member IDX websites (another one of the top four public website sources for consumers' use in the relevant market) is also restricted severely. Even dual listing on other MLSs, such as MiRealSource, does not allow brokers to display EA listings on MoveInMichigan.com or most Realcomp member IDX websites. Murray Tr. 236-237; RX 154-A-065; CX 36-190; IDF 387.

The ALJ found that Realcomp's Website Policy and related requirements curbed access by consumers to limited service listings on all of Realcomp's Approved Websites, including Realtor.com. IDF 349-350. As for Realtor.com, NAR's own site and the fourth of the major sources of consumer websites in the relevant market, sellers who list with Realcomp still can get their listings on Realtor.com, notwithstanding Realcomp's restrictive policies, but only if limited service brokers "dual-listed" their listings on both the Realcomp MLS and another MLS that did not impose similar public website restrictions. IDF 436. This alternative imposes extra costs on the

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[40] The Search Function Policy also affects other aspects of the Realcomp MLS, including Comparative Market Analyses. CX 251-253. The Realcomp training book regarding Comparative Market Analysis does not tell Realcomp members how to include all listing types in their analysis. *Id.* At least some Comparative Market Analysis reports generated by brokers through the Realcomp MLS default to ERTS listings. CX 253.

listing broker and added burden on any broker assisting such a customer (*i.e.* matching listing numbers that do not correspond to one another). IDF 437, 443-444.

Further, the dual listing alternative, which can provide some of the access that Realcomp's policies would otherwise restrict, is not costless, either in terms of time or money.[41] As we noted in *Polygram*, restrictions on advertising likely harm consumers by raising their search costs and reducing sellers' incentives to lower prices. 136 F.T.C. at 354-55. Preventing discount listings from appearing on publicly available websites imposes costs on competitors who must seek out alternatives to Realcomp's IDX feeds and imposes costs on consumers, who must hunt through several sources of home listings in order to include EA listings in their home buying decisions.

The ALJ found that the Policies did not have an anticompetitive effect because they did not completely exclude discount brokers from the Realcomp MLS, but merely restricted access to some of its services. He attempted to distinguish this case from *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985), on that ground. ID 94. Like the ALJ's emphasis on the lack of price effects, his emphasis on the lack of exclusion from Realcomp and from its MLS was an error of law; for complete exclusion is not the standard of liability here.[42] In *Northwest Wholesale Stationers*, the Supreme Court stated that a combination of competitors with market power need not exclude other competitors from their association in order to restrain trade unreasonably under Section 1. 472 U.S. at 295, n.6 ("Northwest's activity is a concerted refusal to deal with Pacific on substantially equal terms. Such activity might justify *per se* condemnation if it placed a competing firm at a severe competitive disadvantage.").

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[41] We reject the ALJ's finding that discount brokers must incur only "nominal" costs for dual-listing in Realcomp and another MLS in order to circumvent Realcomp's restrictive Website Policy. IDF 442-443. This finding is flatly inconsistent with the testimony of the witnesses that the ALJ cites in support of that proposition. *See, e.g.,* Mincy, Tr. at 417-419 (testifying that, over the course of a year, his company had to devote a total of about two full person-weeks maintaining "dual listings" in another MLS as well as Realcomp in order to circumvent Realcomp's restrictive Website Policy – time that took away from his ability to market services and expand his business, and that his listings still had less exposure than Realcomp ERTS listings due to being excluded from the IDX websites and updated less effectively); Sweeney, Tr. 1312, 1340 ("Q: And I would assume, then, your staff has to enter listings twice? A: Yes, that's actually a bigger cost is the administrative hassle of entering the listings in both systems. * * * It's not just the double entry, * * * it's the maintenance, every time there's a price change, you have to do it in two systems, any time there's any change whatsoever at least reported in the system, you have to do it twice. Yes, that is a burden. An administrative burden.").

[42] The ALJ's "findings of fact" that discount brokers are not *entirely* excluded from the Realcomp MLS, IDF 428-433, and that there are measures they can take to obtain listings on Realtor.com and other websites, IDF 434-454, are thus irrelevant, even if they may not be entirely inaccurate. Similarly, the fact that some discount brokers are managing to compete, IDF 463-472, is irrelevant and has no bearing on the exclusionary impact of Realcomp's restrictive practices (*i.e.*, how much *more* effectively competitive the market would be in the absence of those policies).

Similarly, in *Palsson*, the California Supreme Court made it clear that the problem with the exclusionary rules there was not that the MLS rules excluded competitors, but that they operated to "narrow consumer choice" and "hampered" non-members from competing "effectively." 549 P.2d at 842-43. The same thing was true in *Thompson*, where the court held that the MLS rule limiting membership to members of a real estate board violated the Rule of Reason, not because the rule excluded some Realtors but because it operated both to injure consumers by preventing the excluded brokers' listings from being "distributed as widely as possible," and to injure competition among brokers. 934 F.2d at 1580. And the challenged rule in *Cantor* was held illegal under the Rule of Reason because it deprived discount brokers from using an effective means of advertising their services, which had the same two anticompetitive effects. *See* 568 F. Supp. at 430. Thus, as a matter of law, there is liability under the Rule of Reason cases insofar as Realcomp's Policies operated to narrow consumer choice or hinder the competitive process.[43]

The ALJ's own findings and the uncontroverted evidence described above establish both of those effects. More specifically, those findings establish that (1) because of its database of listings, the Realcomp MLS is the most effective tool for the sale of residential real estate in Southeastern Michigan; (2) brokers offering limited service and brokers offering traditional, full-service brokers' services compete with one another for new listings; (3) limited service brokers' services potentially cost less than the services of brokers offering only full-service listings (they not only unbundle the services offered but also unbundle the commission structure); (4) limited service brokers' listings consequently exert "price pressure" on full-service brokers' listings; (5) Realcomp's Website Policy, coupled with its Minimum Service Requirement, severely restricted consumers' access to limited service listings because, as a result of those policies, the listings were not available on the most popular websites; and (6) Realcomp's Search Function Policy, coupled with its Minimum Service Requirement, impeded even brokers from accessing limited service listings on the Realcomp MLS because of the default settings. *See, e.g.*, IDF 76-77, 81, 88, 97, 100-101, 106-108, 114, 121, 210, 249, 349-50, 361, 363-64, 428, 430.

Each of these findings enjoys significant evidentiary support. For example, the impact on brokerage commissions of limited and full-service offerings is illustrated by the MichiganListing.com advertisement described above, *supra* note 30. The substantial "pricing pressure" exerted by limited service brokers on full-service brokers is supported, *inter alia*, by NAR's description of that phenomenon. *See supra* (text accompanying note 9); CX 403-007. The impact of the Website Policy is demonstrated by the testimony of Realcomp's witness, Mr. Sweeney, that brokers whose listings are not accessible in the Realcomp Approved Websites are at "a severe competitive disadvantage." Sweeney Tr. 1344-47. The impact of the Search Function

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[43] Of course, the point of policies that punish discounters need not be to drive them out of business entirely; all that is necessary is to detect and punish deviations enough to bring a sufficient number of discounters back into the fold to sustain the price at supracompetitive levels. *Cf.* U.S. Dep't of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (rev'd April 8, 1997), § 2.1 ("Detection and punishment of deviations ensure that coordinating firms will find it more profitable to adhere to the terms of coordination than to pursue short-term profits from deviating, given the costs of reprisal.").

Policy is established by the statistics respecting the computer use of the Realcomp MLS to access limited service and full-service offerings. *See supra* (text accompanying notes 35-40). And the impact of all of the Policies combined is reflected in the testimony of limited-service brokers, who described the complaints they received from consumers who could not access Realcomp MLS limited-service offerings on the public websites. *See supra* (text accompanying notes 40-41); *see, e.g.*, CX 422-62-63, -74-76 (Aronson Dep.); CX 526-029-31; RX 67-06; RX 73-01. In the ALJ's full Rule of Reason analysis, none of these findings, or the evidence supporting them, is mentioned. *See* ID 97-119.

This is not a case in which the Commission's reversal of the ALJ is based on indifference to his findings of fact and conclusions of law. To the contrary, the result in this case is based almost exclusively on his findings[44] and our conviction that, based on those findings and examination of his conclusions, those conclusions were erroneous, as a matter of law.

Given the market structure and competitive dynamics of the residential real estate industry, we find that Realcomp's Website Policy, the Search Function Policy, and the Minimum Service Requirement harmed competition and created a likelihood that valuable rivalry among real estate service providers would be suppressed. The Website Policy excluded discount listings from being advertised on websites available to the general public. The Search Function Policy significantly reduced the exposure of non-ERTS listings to brokers searching the MLS, while the Minimum Service Requirement limited the arrangements that discount brokers could make and still claim ERTS status. The latter requirement enhanced the discriminatory effects of the Website and Search Function policies. As a group these Policies improperly constrained competition between discount listings and full-service listings.

The ALJ concluded otherwise. He advanced several reasons to explain his view that, despite his recognition that the Website Policy was likely on its face to cause competitive harm, ID 97, the Policies did not injure competition. We believe that this reasoning slights the importance of Realcomp's market power in assessing the significance of its conduct. In our view, Realcomp's substantial market power, coupled with the clear tendencies of its restrictive policies to harm competition, establishes a basis for inferring actual or likely anticompetitive effects and, consistent with the case law, suffices to require Realcomp to provide reasonable justifications for the challenged restrictions, which, as we discuss above, it failed to do. We nonetheless also consider the other means by which a plaintiff may establish its prima facie case under the rule of reason – by direct evidence of anticompetitive effects.

2. Direct Evidence of Anticompetitive Effects

We examine in this section the direct evidence of effects provided by complaint counsel, and we address the reasons advanced by the ALJ for his conclusion that complaint counsel's showing on the issue of competitive effects was wanting. Specifically, we examine the ALJ's findings that, first, the testimony of Realcomp's economic expert showed that the Realcomp policies did not

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[44] *But see supra*, note 4.

adversely affect the market share of limited-service offerings or the sale prices or days-on-the-market of homes listed (IDF 482-600; ID 105-119); second, the challenged Policies did not prohibit limited-service brokers or agents from joining Realcomp (IDF 163-64, 185, 433; ID 94); third, the Policies did not exclude the listings of limited-service brokers from the Realcomp MLS itself (ID 95, 100-01); fourth, with specific reference to the Website Policy, access to the Approved Websites was not a major consideration in light of the accessibility of limited-service listings in Realcomp's MLS itself and possible listings by limited-service brokers and agents on Realtor.com and on other websites such as Google and Trulia (ID 101-102); and, fifth, the presence of four growing or successful EA brokers in the relevant market was "inconsistent with Complaint Counsel's theory that EA brokers have been competitively impaired," ID 98.

The ALJ concluded that the economic analyses performed by the FTC's expert were unpersuasive and had little probative value in showing that Realcomp's Policies adversely affected competition.[45] This conclusion appears to reflect an inadequate grounding on the ALJ's part in some of the technical matters for which adjudicators at an expert agency charged with handling competition matters should be expected to develop expertise.

For example, the ALJ accepted Dr. Eisenstadt's testimony that Dr. Williams's regressions were flawed because they failed to include several relevant variables, including zip code level data and MSA level data. But this critique is not supported by the underlying regression model or data. The relevant information was in fact captured with the county level explanatory variables (in other words, the additional variables, while relevant, are not independent). Indeed, county level data vary more than MSA or zip code level controls and, arguably, provide more detailed information. Therefore, adding the MSA level variables when county level data already have been factored in would decrease the number of degrees of freedom in the analysis, thus inflating the variance of the estimated parameters, without providing any more helpful information. Dr. Williams explored this relationship and correctly concluded that including both MSA and county level controls will introduce inefficiencies in the model, which "make[s] no economic sense," and would have resulted in inaccurate and meaningless results. CX 560-06.

There were other errors in the ALJ's decision as well, which we discuss below. In reviewing the record *de novo*, we find that the economic evidence provided by the FTC's economic expert and other record evidence support the proposition that Realcomp's Polices harmed competition.

Dr. Darrell Williams, the FTC's economic expert, conducted three analyses to determine how Realcomp's Policies affected competition: (1) a time-series analysis that compared the share of EA listings in the Realcomp MLS before the adoption of the Policies with the share of EA listings after their adoption; (2) a benchmark study that compared the share of EA listings in multiple listing services in geographic areas with and without listing restrictions similar to Realcomp's; and (3) a regression analysis to determine the correlation between restrictive listing policies and the share of EA listings.

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[45] *See* ID 61-75 (IDF 482-600) (inferences or conclusions regarding the economic and econometric testimony mischaracterized as "findings of fact"); ID 105-119.

Dr. Williams's time-series analysis showed that the monthly average share of EA listings in the Realcomp MLS fell from about 1.5 percent in May 2004 before the Policies were both in place and enforced, to about 0.75 percent in October 2006. IDF 487. With this drop, EA listings lost half of their toehold in the market. Noting that Realcomp's expert testified that the drop was at most one percentage point (IDF 482), the ALJ characterized the drop as "not significant." ID 61. In doing so, he confused the reduction in absolute percentage points with the relevant rate of change that showed non-traditional arrangements losing their toehold in the market.

The ALJ also discounted the results of the time-series analysis on the ground that the study did not account for other economic factors that might have caused the share of EA listings to fall. ID 103-04, 106. In anticipation of this criticism, Dr. Williams had performed two studies to compare Realcomp with MLSs in nine other Metropolitan Statistical Areas (MSAs). Six of these (the Control MSAs) had no restrictions throughout the period for which data was collected.[46] Of the other three (the Restriction MSAs), two had had policies, throughout the period for which data was collected, that prevented EA listings from being included in MLS feeds to public websites and the MLS's IDX;[47] the other (Boulder, Colorado) adopted such restrictions during the period under consideration. IDF 491-496.

Dr. Williams performed a statistical analysis comparing the share of EA listings in the Control MSAs with the Restriction MSAs (including Realcomp's MSA). IDF 512-513. The ALJ faulted Dr. Williams's selection of Control and Restriction MSAs. According to the ALJ, the selection of the Control MSAs was flawed by its inclusion of MSAs that were dissimilar from Detroit (the MSA which includes the relevant geographic market).

The ALJ determined that if Dr. Williams had correctly identified the economic and demographic factors that determine the share of EA contracts at the MSA level, then one would expect that the shares of EA listings in the Control MSAs would also be very similar. IDF 526. This conclusion is erroneous. Even if the seven variables used as criteria to select the control sample were perfect predictors of the percentage of EA listings, this would not imply that the percentages in each MSA would be equal or nearly equal to each other because the values of the seven explanatory variables are not equal. CX 560-05. Realcomp's expert, Dr. Eisenstadt, himself acknowledged that the values of the seven variables used as sample selection criteria vary across MLSs in the control sample, *see* RX 161-08, ¶13, so it's not clear why the ALJ would nonetheless expect the shares of EA listings in those Control MSAs to be "very similar." The fact that the Restriction MSAs all had very low shares of EA listings, despite different demographics, supports a conclusion that restrictive policies caused the reduction in EA shares. If these MSAs had few common characteristics other than restrictive multiple listing policies, yet all had low EA shares, it would be logical to conclude that the restrictive policies caused the lower shares.

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[46] Charlotte, North Carolina; Dayton, Ohio; Denver, Colorado; Memphis, Tennessee; Toledo, Ohio; and Wichita, Kansas.

[47] Williamsburg, Virginia and Green Bay/Appleton, Wisconsin.

Realcomp's expert, Dr. Eisenstadt, testified that a comparison of Detroit to Dayton (one of the Control MSAs) revealed the flaw in Dr. Williams's analysis. According to Dr. Eisenstadt, because Dayton and Detroit are demographically similar, any anticompetitive effect of the Policies should be readily evident from a comparison of those two markets. Dr. Eisenstadt testified that the evidence did not bear this theory out: Dayton had a 1.24 percent share of EA listings, in comparison to Detroit's 1.01 percent share, a difference which the ALJ deemed insignificant. Comparing differences in absolute percentage points when the numbers are very low masks the magnitude of the difference. What is less than a quarter percentage point difference in absolute terms in this case in fact translates to a 19 percent difference between the two populations, a difference that we do not consider insignificant.

The ALJ also pointed to the statistics regarding the city of Boulder as further evidence that the Restrictions had no anticompetitive effect. The multiple listing service in Boulder operated both with and without restrictions during the time period studied by Dr. Williams. EA listings had a 2.03 percent share in the Boulder MLS in the period without restrictions and a 0.98 percent share in the period after restrictions were adopted. The ALJ once again characterized the decline in share as insignificant by comparing absolute percentage points, amounting to 1.05 percentage points. As we have discussed, when the numbers are very low, the rate of change in the EA share reveals the extent to which non-traditional arrangements have been losing their toehold in the market. In this case, EA listings in Boulder fell by 51 percent after the restrictions were adopted. Dr. Eisenstadt testified that there was a downward trend during the last three months of the pre-restriction period, and that if these last three months were used as a benchmark, the reduction in the share of EA listings would be even smaller than one percentage point (in absolute terms).[48] But a one percentage point drop in the share of EA listings in Boulder translates to a 49 percent decline in the market share of those listings; a half-percentage point drop equals a 25 percent decline in market share. We consider either of these declines to be competitively significant.

Finally, it is important to note the difficulty of proving, through evidence of this sort, a substantial loss of competition in cases involving new entrants who gain and then lose a toehold in a market. As demonstrated above, the magnitude of any effect is likely to be small in absolute market share terms, given the already small numbers to begin with. But, as the D.C. Circuit pointed out in *United States v. Microsoft*, the relevant question in dealing with emerging competition is not whether the new entrant would actually have developed into a viable substitute for the dominant product, but whether "the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power * * *." 253 F.3d 34, 79 (D.C. Cir. 2001). The court in *Microsoft* concluded that "it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will * * *." *Id.* The *Microsoft* court therefore did not require a showing of actual harm but only asked whether exclusionary acts designed to quash nascent competition, when undertaken by a firm with a large market share, were sufficient for a finding of a violation. Although the *Microsoft* court

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[48] The actual size of the decline in these three months is unknown. During his testimony, Dr. Eisenstadt referred to an exhibit not admitted in evidence but did not state the actual size of the decline in his testimony. *See* Eisenstadt Tr. 1412-1414.

was analyzing a monopolization claim under Section 2 of the Sherman Act, we believe that the principle is equally applicable to this case.

In conclusion, we find unpersuasive the ALJ's rejection of complaint counsel's econometric evidence of anticompetitive effects. But even if we were to agree with the ALJ that the economic evidence was at best inconclusive, the inferences reasonably drawn from the other record evidence discussed in part V.D.1. above amply corroborates the conclusions of Dr. Williams that, by "inhibit[ing] the ability of nontraditional brokers to compete effectively," thus "reduc[ing] the choices available to consumers of brokerage services," and "protect[ing] the de facto price floor that supports the level of real estate brokerage commissions," CX 498-A-07, Realcomp's Policies have had a substantial restrictive effect on competition for real estate brokerage services in Southeastern Michigan.

Notwithstanding such conclusion, defendants generally may be able to defeat a finding of liability if their practices can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive." *Northwest Wholesale Stationers*, 472 U.S. at 294. The requisite beneficial effect ordinarily is one that stems from measures that increase output or improve product quality, service, or innovation. *Polygram*, 135 F.T.C. at 345-46.

As we discussed above in connection with our analysis under the *Polygram* "inherently suspect" analysis, however, Realcomp's proffered justifications fail to satisfy those standards. We rejected Realcomp's "free riding" claim as implausible on its face, and its "bidding disadvantage" argument as not cognizable under the antitrust laws. Accordingly, Realcomp has failed to overcome the anticompetitive effects of its Policies with any legitimate, procompetitive justifications.

VI. Remedy

Complaint counsel has proven that Realcomp violated Section 5 of the Federal Trade Commission Act by adopting anticompetitive policies that prohibited information on Exclusive Agency listings and other forms of nontraditional listings from being transmitted from its MLS to public real estate websites, and restricted their display in the Realcomp MLS's search results. Realcomp's Policies, adopted by a group of competing real estate brokers, are collective agreements that stifle competition from nontraditional listings.

The Commission has wide discretion in its choice of a remedy for violations of Section 5 of the FTC Act. *FTC v. Nat'l Lead Co*., 352 U.S. 419, 428 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946). The Commission's remedy must be reasonably related to the violation. *FTC v. Ruberoid Co*., 343 U.S. 470, 473 (1952); *Jacob Siegel*, 327 U.S. at 613. Complaint counsel's proposed remedy, which we adopt here (with minor changes to paragraphs I.A, I.K, I.L, I.N, I.P, I.Q, and II), requires Realcomp to cease and desist from adopting or enforcing any policy, rule, practice or agreement that interferes with the ability of its broker members to enter into EA listings or other forms of nontraditional listings. The Order is consistent with the relief accepted in settlement of recent similar cases, and will remedy Realcomp's illegal conduct while at the same time allowing Realcomp to continue to provide the competitively enhancing services of its MLS and public data feeds.

Paragraph I of the Order defines terms used within the Order. Paragraph II prohibits Realcomp from engaging in behavior that discriminates against nontraditional listings. Realcomp may not, under the Order, treat nontraditional listings in a discriminatory manner. Specifically, Realcomp may not, among other things, prevent its members from offering or accepting EA listings; prevent its members from cooperating with brokers that offer or accept EA listings; or prevent the publication of EA listings on its MLS or public websites to which Realcomp provides data. Realcomp may, however, adopt policies relating to matters that are reasonably ancillary to its legitimate objectives, such as the payment of dues and participation requirements.

Paragraph III of the order requires Realcomp to amend its rules and regulations to conform to the Order, within 30 days after the date the Order becomes final. Paragraph IV requires Realcomp, within 90 days after the date the Order becomes final, to inform its members of the amendments required under Paragraph III, and to provide each of its members with a copy of the Order. Paragraph IV also requires that the Order be placed on Realcomp's publicly accessible website and to remain accessible for five years from the date it becomes final.

Paragraph V requires Realcomp to notify the Commission of any proposed dissolution, acquisition, merger or consolidation of Realcomp, or of any other change that might affect its compliance obligations. Paragraph VI requires Realcomp to file written reports setting forth the manner and form in which it has complied with the Order.

Paragraph VII provides that the Order will remain in effect for a period of ten years.

VII. Conclusion

We hold that Realcomp violated Section 5 of the Federal Trade Commission Act and we reverse the Initial Decision. We enter the attached Order, which, among other things, prohibits Realcomp from restricting nontraditional listings from the full range of services which it offers. Realcomp is required to amend its rules and regulations within thirty days after the Order becomes final, to inform each Realcomp member of the changes to its rules and regulations, and to provide a copy of the Order to each Realcomp member. The Order incorporates the parties' Joint Stipulation Regarding Respondent's Search Function Policy, in which Realcomp agreed to repeal its Search Function Policy.

Date of Decision: October 30, 2009