

No. 11-16

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In The Supreme Court of The United States

REALCOMP II LTD.,

*Petitioner,*

v.

FEDERAL TRADE COMMISSION,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR THE  
SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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VOLUME 1 OF 2

## QUESTION PRESENTED

1. Whether Petitioner established that a policy supporting its real estate multi-listing service (MLS) did not violate the Federal Trade Commission Act and/or Sherman Antitrust Acts based on the fact that the procompetitive justifications for that policy far outweighed any ancillary restraints related to that policy?

Petitioner states, "Yes."

Respondent Commission states, "No."

The Court of Appeals for the Sixth Circuit held, "No."

# **PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 14.1(b), the following presents all parties appearing here and all parties who appeared before the United States Court of Appeals for the Sixth Circuit below: (I) The petitioner, Realcomp II Ltd., a Michigan corporation; and (II) The Federal Trade Commission.

Pursuant to Rule 29.6, Realcomp II Ltd. represents that “there is no parent or publicly held company owning 10% or more of [Realcomp II Ltd.’s] stock.”

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Petitioner Realcomp II Ltd. respectfully petitions for a writ of certiorari to review the opinion of the Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The Opinion of the Court of Appeals is reported at *Realcomp II Ltd. v. Federal Trade Commission*, 635 F.3d 816 (6<sup>th</sup> Cir. 2011). (Appx 1-42).

JURISDICTION

The Opinion of the Court of Appeals was decided on April 6, 2011. *Realcomp II, supra*. (Appx 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISIONS

Relevant statutory provisions in this case are 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.

## STATEMENT<sup>1</sup>

### The Realcomp MLS:

Realcomp II Ltd. ("Realcomp") is a cooperative organization that was founded in November 1993 by seven shareholder REALTOR® boards and associations ("associations"). (IDF 134-135 – Appx 208). The individual associations are comprised of real estate brokers and real estate agents in Southeastern Michigan that compete with one another to offer real estate brokerage services to consumers. (IDF 80, 137-138 – Appx 192, 208).

The principal service offered by Realcomp is a Multiple Listing Service ("MLS"), which is a database of information regarding properties for sale made available to subscribing participants of the MLS.<sup>2</sup> (IDF 14, 179 – Appx 175, 216). The MLS serves as a method for brokers and agents to

<sup>1</sup>References to the record(s) are abbreviated as follows:

OP6 = Opinion of the Sixth Circuit Court of Appeals – Appx 1-42.

OPC = Opinion of the Commission – Appx 43-146.

ORC = Order of the Commission – Appx 147-157.

ID = Initial Decision by Administrative Law Judge – Appx 158-457.

IDF = Initial Decision Finding by Administrative Law Judge – (found at Appx 172-328).

<sup>2</sup>While individual brokers and agents are members of the shareholder associations that comprise Realcomp, they are only subscribers to – or effectively customers of – Realcomp itself. As paid subscribers to the MLS, brokers and agents are then able to "participate" in the MLS by posting and viewing listings (along with receiving related benefits).

cooperate with one another to better serve buyers and sellers by sharing information through "an orderly and efficient marketplace" that provides "systematic and enforceable rules governing the sale of listed properties." (IDF 102-104 – Appx 199-200).

Participation in the Realcomp MLS is open to any real estate broker or agent that is a member of one of the shareholder associations who submits the requisite (I) office fee of \$75 per quarter per participating office and (II) individual usage fee of \$99 per quarter per participant (collectively "subscription" fees). (IDF 163, 176 – Appx 213, 215). Of course, Realcomp relies on these fees to "pay for the operation of the MLS." (IDF 603 – Appx 321). Participants agree to access the "benefits of the Realcomp MLS in accordance with Realcomp's bylaws, policies, rules and regulations." (IDF 162 – Appx 213). Beginning with about 7,000 participants, Realcomp has grown to approximately 14,000 participants (within about 2,200 real estate offices). (IDF 157-158, 230 – Appx 212, 226).

### Participating Brokers and Agents:

Generally, a residential real estate transaction involves two types of brokers: a "listing broker" who works for the seller; and a "cooperating broker" who works for the buyer. (IDF 18 – Appx 175). While many MLS participants operate as both "listing" and "cooperating" brokers, approximately 11% work "exclusively with buyer clients" and 9% work "exclusively with seller clients." (IDF 19 – Appx 176).

Participating listing brokers are entitled to post a seller "listing" (information on the seller's property) on the MLS. (IDF 21 - Appx 176). Meanwhile, participating cooperating brokers are entitled to search the MLS to assist client buyers. (IDF 31 - Appx 178). Because the MLS is a closed database for *paying* participants, the general public cannot list a home, and/or search for a home, on the MLS without assistance from a participating, *paying* Realcomp broker (or agent). (IDF 106, 114 - Appx 201, 203).

Given an MLS provides sellers with the ability to reach more cooperating brokers and cooperating brokers with the ability to provide buyers more listings, an MLS achieves greater value and "efficiencies in the provision of brokerage services" as more brokers use the MLS. (IDF 302, 308-309 - Appx 242, 244). As the number of participating cooperating brokers increases, "the shorter the expected time required to sell a home and/or higher the expected offer price and thus the greater the value of the MLS to listing broker" and their sellers. (IDF 301 - Appx 242). To encourage the participation of cooperating brokers, Realcomp requires that all listings on the MLS include "an offer of compensation" to the cooperating broker that the "listing broker must stand behind" (pursuant to Realcomp rules). (IDF 45, 200, 202, 204 - Appx 182, 220-221).

## ERTS and EA Listing Agreements:

Generally, there are two types of listing agreements: Exclusive Right to Sell ("ERTS") and Exclusive Agency ("EA"). (IDF 50 - Appx 183).

An [ERTS listing] is a listing agreement whereby the home seller appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner, or another broker. [IDF 51 - Appx 183-184].

An [EA listing] is a listing agreement whereby the listing broker acts as an exclusive agent of the home seller in the sale of property, but reserves to the seller a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold. [IDF 58 - Appx 185].

To have their listings posted on the MLS, Realcomp requires listing brokers to have contracts with home sellers. (IDF 186 - Appx 217). While it has never restricted any listings from being posted on its MLS, Realcomp requires participating listing brokers to identify the type of listing, (i.e., ERTS,

EA), and an offer of compensation to any cooperating broker. (IDF 40, 191-192, 433 – Appx 181-182, 218-219, 278).

As listing brokers are compensated in various ways (including commissions based on the selling price and/or upfront, flat-fees) by sellers, cooperating brokers are likewise paid by sellers (through the listing brokers).<sup>3</sup> (IDF 28, 30, 40 – Appx 178, 181). Traditionally, under an ERTS listing, the listing broker is paid a percentage of the home sale price, which the listing broker splits with any cooperating broker who procures a buyer (as the offer of compensation). (IDF 40, 53-55 – Appx 181, 184). Under an EA listing, the listing broker is typically paid a flat-fee and can potentially “save the cost of an offer of compensation to a cooperating broker” if the home is sold to an unrepresented buyer. (IDF 59-60 – Appx 185-186). Given home sellers using EA listings can retain a commission otherwise payable to a cooperating broker, such sellers “are in competition with cooperating brokers for buyers.” (IDF 608 – Appx 321-322).

#### Advertising on Public Websites and Data-Sharing:

In addition to its MLS, Realcomp offers advertising by transmitting certain listing

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<sup>3</sup>While the home seller is ordinarily responsible for the payment of brokerage commissions, the home buyer typically “bears part of the cost of the brokerage fee to the extent that some or all of the commission is passed on in the sale price of the home.” (IDF 30 – Appx 178).

information from the MLS to public websites including: Realtor.com; and (its own) MoveInMichigan.com. (IDF 114, 117-118, 210, 231 – Appx 203-204, 223, 227). It also provides this listing information to participating brokers through Internet Data Exchange (“IDX”) feeds that allow participating brokers to post the information on their own public websites as well. (IDF 119-120, 242 – Appx 204-205, 230-231). Given the majority of buyers and sellers prefer to search for homes before buying or selling, access to the above provides “additional exposure for sellers.” (IDF 220-221 – Appx 225).

Realcomp has also expanded its database through “data-sharing agreements” enabling Realcomp participants “to see listings from other multiple listing services in the area” without any additional cost. (IDF 250-251, 259 – Appx 231-233). However, the data-share participants that submit listings directly to Realcomp must pay \$125 per listing to have them posted on the MLS and IDX database. (IDF 265 – Appx 234).

#### The Website (and Associated) Policy(ies):

In 2001, Realcomp established a “Website Policy” preventing EA (and other non-ERTS) listings from being forwarded to the publicly accessible Realtor.com, MoveInMichigan.com and IDX feeds (via brokers sites). (IDF 349-350, 353 – Appx 256-258). (However, it was not enforced until 2004 after Realcomp also established a “Search Function



Policy”<sup>4</sup> and began requiring participants to designate listings).<sup>5</sup> (IDF 355, 410 – Appx 257, 272). However, the policies did not remove and/or otherwise restrict the availability of EA listings on the Realcomp MLS. (IDF 181, 433 – Appx 216, 278).

Limiting the “free distribution of information,” (i.e., advertising), to “buyers who do not intend to use the services of cooperating brokers,” the “Website Policy” effectively protected paying,

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<sup>4</sup>The “Search Function Policy” referred to a default setting established by Realcomp in 2003 that initially provided for all searches being configured to include only ERTS (and unknown) listings until the participating user made “one additional click of the mouse to see all listings” or changed the individual default setting. (IDF 361, 366-367 – Appx 259-260). However, this policy was rescinded pursuant to stipulation by Realcomp and the FTC on April 27, 2007 (prior to the hearing before the ALJ). (IDF 370, Attachment #1 – Appx 260, 445-457).

<sup>5</sup>To qualify as an ERTS listing for purposes of the “Web Site Policy” and “Search Function Policy,” a listing agent had to indicate that the listing was a “full service” (ERTS) listing under which the broker would provide the following services: “Arrange appointments for cooperating brokers to show listed property to potential purchasers”; “accept and present to the seller(s) offers to purchase procured by cooperating brokers”; “advise the seller(s) as to the merits of the offer to purchase”; “assist the seller(s) in developing, communicating, or presenting counteroffers”; and “participate on behalf of seller(s) in negotiations leading to the sale of listed property.” (IDF 66, 374 – Appx 187-188; ORC ¶ N – Appx 151). This “Minimum Service Requirement” was rescinded pursuant to stipulation on April 27, 2007. (IDF 370, Attachment #1 – Appx 262, 445-457). (A “limited service” listing is one in which a listing broker fails to provide one or more of the services provided in a “full service” listing). (ORC ¶ P – Appx 151-152).

participating cooperating brokers from subsidizing the cost that EA home sellers would otherwise have to incur to reach buyers that did not use cooperating brokers. (IDF 610-611 – Appx 322).<sup>6</sup> Indeed, EA sellers could still compete by paying a nominal fee to list on Realtor.com or through a dual listing. (IDF 265, 436, 442 – Appx 234, 278-280). In short, sellers using EA listings could obtain the same exposure for their listings by paying slightly more to have them sent directly to Realtor.com and/or to agents offering flat-fee ERTS listings. (IDF 478 – Appx 288-289).

#### The FTC Complaint and ALJ Decision:

On October 10, 2006, the Federal Trade Commission issued a Complaint claiming the “Website Policy” and “Search Function Policy” violated Section 5 of the Federal Trade Commission

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<sup>6</sup>In its effort to create “inferences” to support conclusions contradicting the factual findings of the ALJ, the Commission notes that Realcomp only offered procompetitive justifications after the FTC issued its Complaint. (OPC 29, n 23 – Appx 104). Although it was created subsequent to the Complaint, the Commission ignores *evidence* of a Realcomp (“Call to Action”) document that supported the Website Policy. (IDF 619 – Appx 324). While not labeled as “free riding,” this document spoke “implicitly to the central theme of the free rider justification when it describes Realcomp’s ‘services’ ... as being ‘in high demand by consumers’; advocates that Realcomp is being forced to potentially compromise the ‘purpose of the cooperative’; ... and states that ‘use of this website should be reserved specifically for the purpose of marketing properties represented by Realtors.’” (ID 122 – Appx 428). In short, this document recognized free-riding concerns.

("FTC") Act, 15 U.S.C. § 45.7 (OPC 3-4 – Appx 48-50). Following an eight day hearing that included testimony from eight witnesses, deposition testimony from twenty eight witnesses and over 800 exhibits, FTC Chief Administrative Law Judge ("ALJ") Stephen McGuire issued a December 10, 2007 decision finding that the challenged Realcomp policies did not violate Section 5 of the FTC Act. (OPC 3-4 – Appx 48-50).

Recognizing that the relevant product markets were "residential real estate brokerage services" and "supply of multiple listing services to real estate brokers" within the relevant geographic market of four Southeastern Michigan counties, the ALJ analyzed the challenged policies under the "traditional rule of reason analysis." (ID 127 – Appx 440-442). After concluding that the "Search Function Policy" was not anticompetitive, the ALJ determined the "Website Policy" did not unreasonably restrain trade and/or "substantially lessen competition." (ID 128 – Appx 442-443).

The ALJ also found that Realcomp had provided plausible procompetitive justifications for the "Website Policy" because it addressed (I) "a free rider problem by EA home sellers competing with

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<sup>7</sup>While the FTC claimed the "Minimum Service Requirement" also constituted a violation, the requirements for a full-service (FRTS) listing – as the FTC acknowledged – did not actually provide for a "separate access restriction." (ID 91 – Appx 355-356). Rather, the "Minimum Service Requirement" for a full-service listing was merely an integrated component of the "Website Policy" and "Search Function Policy." (ID 91 – Appx 356).

Realcomp brokers for buyers" and (II) "a bidding disadvantage problem that existed for Realcomp cooperating agents in competing with unrepresented buyers for EA listed homes." (ID 128 – Appx 443). Concluding the policy was "reasonably necessary to the competitive needs of the association and is narrowly tailored to that end," the ALJ ultimately concluded that the Realcomp policies did not violate Section 5 of the FTC Act. (ID 3, 129 – Appx 167, 443).

#### The Federal Trade Commission Decision:

After FTC Complaint Counsel appealed, the Federal Trade Commission ("Commission") eventually issued an October 30, 2009 "Opinion of the Commission" reversing the ALJ and concluding that the Realcomp policies violated 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. (OPC 2, 48 – Appx 44-45, 145-146). Concluding the Realcomp policies were "inherently suspect and, thus, presumptive unreasonable," the Commission then analyzed the procompetitive justifications offered by Realcomp. (OPC 28 – Appx 102-103).

With regard to the "free riding" problem, the Commission concluded that EA sellers did not receive a "free ride" because they paid fees to listing brokers (who in turn paid fees to Realcomp) and therefore, EA sellers were entitled to *all services* that Realcomp offered its *participant brokers*. (OPC 29-31 – Appx 104-110). In addition, the Commission rejected the "bidding disadvantage" justification.

While it recognized an unrepresented buyer "may have a cost advantage over" a buyer represented by a cooperating broker, it nevertheless concluded that this was "not a cognizable justification" simply because the policies restricted information dissemination. (OPC 32-34 – Appx 110-113).

The Commission entered an Order prohibiting "Realcomp from restricting nontraditional listings from the full range of services which it offers." (OPC 48 – Appx 144-146). In addition, the Order also prohibited Realcomp from adopting or enforcing any policy that restricted or interfered with the ability of Realcomp participants to enter into listing agreements with sellers or otherwise discriminate between traditional and non-traditional listings. (ORC 1-6 – Appx 147-157).

#### The Sixth Circuit Decision:

While Realcomp filed a Petition for Review of the Commission's Opinion and Order, the Sixth Circuit Court of Appeals denied the petition. (OP6 836 – Appx 41-42). It concluded, under a "full rule of reason analysis," that substantial evidence

... supports the Commission's findings that: 1) Realcomp's website policy gave rise to potential genuine adverse effects on competition due to Realcomp's substantial market power and the website policy's anticompetitive nature; 2) the website policy in fact caused actual anticompetitive effects; and 3)

Realcomp's proffered procompetitive justifications were insufficient to overcome a prima facie case of adverse impact. These findings establish that Realcomp's website policy unreasonably restrained competition in the market for the provision of residential real-estate-brokerage services in southeastern Michigan and the Realcomp MLS area. [OP6 836 – Appx 41-42].

Finding there was no "free riding" problem, the Sixth Circuit opined that (I) EA sellers received "no free services" because they compensated cooperating brokers for services they provided and (II) no compensation was provided to any cooperating broker when an unrepresented buyer purchased a home. (OPC 835 – Appx 38-40). It also opined that there was no "bidding disadvantage" problem because this was only an argument to insulate cooperating broker commissions. (OPC 835-836 – Appx 40-41).

#### Scope of Petition for Writ Of Certiorari:

While Realcomp maintains that its "Website Policy" neither gave rise to any "potential adverse effects on competition" nor "in fact caused actual anticompetitive effects" (of which the record is devoid), Realcomp has limited its petition to review of the procompetitive justifications for the "Website Policy." Specifically, the Sixth Circuit (and Commission) departed from the accepted and usual

course of antitrust proceedings related to procompetitive justifications by failing to weigh the plausible justifications offered by Realcomp against perceived anticompetitive effects of the "Website Policy" (designed to support the Realcomp MLS). Given this deviation, the related erroneous factual findings and misapplication of applicable authority, Petitioner requests review of the instant petition to remedy the foregoing.

### REASONS FOR GRANTING PETITION

1. Petitioner established that a policy supporting its real estate multi-listing service (MLS) did not violate the Federal Trade Commission Act and/or Sherman Antitrust Act because the procompetitive justifications for that policy far outweighed any ancillary restraints related to that policy.

"Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment." *Polk Bros., Inc. v. Forest City Enter., Inc.*, 776 F.2d 185, 188 (7th Cir. 1992). Thus, antitrust laws "permit horizontal entities to combine their skills to create a product that could not be created separately, and such ventures may employ reasonable restraints to make the joint venture more efficient." *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 399 (S.D.N.Y. 2001). An ancillary restraint is one that contributes to, and promotes, the success of "a cooperative venture that promises greater productivity and output." *Polk, supra* at 189.

When the "anticompetitive aspects" of an ancillary restraint are outweighed by its "procompetitive effects," the procompetitive justification warrants the ancillary restraint. See *Gerlinger v. Amazon.com, Inc.*, 311 F. Supp. 2d 838, 849 (N.D. Ca. 2004).

Meanwhile, an MLS is an "effective response to the pervasive market imperfections in the real estate industry." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1368 (5th Cir. 1980).

By serving as a central processing and distributing point for listings of real estate, [it] helps reduce "information and communication barriers" and ease "the built-in geographical barrier confronting buyer and seller." Further, it aids the market in its function as price-setter for properties and financing. It aids the seller by allowing him to give an exclusive listing to a broker, and thus to choose the agent with whom he prefers to deal, while nevertheless enabling him to place his listing in the hands of all [MLS] members to attempt to procure a buyer. The buyer benefits by gaining access to a wider selection of properties in a shorter time period than would be the case if he engaged a lone broker. The broker himself doubly benefits: he gains a larger inventory to

sell and gains broader exposure for his own listings. [*Id.* (citations omitted).]

Given that "the operation of a multiple listing services is not cost free," the service provider "must be allowed to recoup its costs of operations." *Id.* at 1368-1369. Therefore, "the antitrust laws must allow reasonably ancillary restraints necessary to accomplish these enormously procompetitive objectives." *Id.* at 1368.

A. Any Ancillary Restraint Associated With The "Website Policy" Was Far Outweighed By The Procompetitive Justification Of Addressing The "Free Riding" Problem Associated With Home Sellers That Compete With Cooperating Brokers By Utilizing Non-ERTS (Or EA) Listings.

"Free-riding is the diversion of value from a business rival's efforts without payment." *Chicago Prof'l Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 675 (7th Cir. 1992). Otherwise stated, competitors that

... take advantage of costly efforts without paying for them, that reap where they have not sown, reduce the payoff that the firms making the investment receive. This makes investments in design and distribution of products less attractive, to the ultimate detriment of consumers. Control of free-riding is accordingly an

accepted justification for cooperation. [*Id.* at 674 (citing *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808 (1988); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 104 S. Ct. 1464, 1469-1477, 79 L. Ed. 2d 775 (1984)); See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 212-213 (D.C. Cir. 1986).]

Likewise, "control of free riding is a legitimate" justification for ancillary restraint. *Polk Bros., supra* at 190 (citing *Monsanto, supra* at 1469-1477; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55-57, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)). Indeed, the "free ride can become a serious problem for a partnership or joint venture because the party that provides capital and services without receiving compensation has a strong incentive to provide less, thus rendering the common enterprise less effective." *Rothery Storage, supra* at 212-213. In short, Realcomp must preserve the incentive of its participants to contribute to the joint venture.

(1) Subsidization of Realcomp Benefits by Cooperating Brokers:

The MLS is a closed database for *paying* participants that achieves greater value and "efficiencies in the provision of brokerage services" as more brokers use it. (IDF 114, 302, 308-309 – Appx 202-203, 242-244). To obtain access to *benefits* of this database in accordance with Realcomp

"bylaws, policies, rules and regulations," a participating broker must pay the requisite *subscription fees (for offices and brokers)*. (IDF 163, 176 – Appx 213, 215). *Benefits* include the ability to list properties, view properties, data-sharing and advertising for certain listings. Given Realcomp relies on *both cooperating and listing* brokers to "pay for the operation of the MLS" and increase its efficiency (IDF 603 – Appx 321), it adopts rules to encourage participation of cooperating brokers. Indeed, around 11% of all brokers work "exclusively with buyer clients." (IDF 19 – Appx 176).

Individual home sellers (that are not Realcomp participants) do not pay any fees directly to Realcomp (IDF 606 – Appx 321) and therefore, do not pay for the operation, and/or entitlement to *benefits*, of the MLS. When home sellers use EA listings to save on "the cost of an offer of compensation to a cooperating broker" (or "capture for themselves the commission that they would otherwise pay at settlement"), these sellers have an incentive to act as their own cooperating broker (and find their own buyer). (IDF 59-60, 608 – Appx 185-186, 322-323). Therefore, home sellers using EA listings "are in competition with cooperating brokers for buyers." (IDF 608 – Appx 321-322).<sup>8</sup> While EA

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<sup>8</sup>When a home seller utilizes a traditional ERTS listing, the seller usually agrees to pay the listing broker a commission (based on a percentage of the sale) that is shared with a cooperating broker who procures a buyer. (IDF 40, 53-55 – Appx 181, 184). Under these circumstances, the seller *is resolved* to pay both the listing broker *and a cooperating broker* a commission and therefore, is *not* competing with cooperating brokers to procure a buyer.

sellers pay listing brokers a flat fee for *services*, this is not the equivalent of *subscription fees* entitling them to *benefits* of Realcomp. In short, providing EA sellers with all *benefits* of Realcomp creates a "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 – Appx 426).

Under the "Website Policy," Realcomp prevented EA (and other non-ERTS) listings from being forwarded to publicly accessible IDX feeds (via broker sites), Realtor.com, and MoveIn Michigan.com. (IDF 349-350, 353 – Appx 255-257). Therefore, the "Website Policy" prevented home owners with EA (or non-ERTS listings) – that were *competing with cooperating brokers* – from receiving *free advertising benefits* of Realcomp when the sellers were seeking to avoid the use of cooperating brokers. Otherwise stated, the "Website Policy" protected the Realcomp cooperating brokers from having "to subsidize the cost that EA home sellers would otherwise have to incur to compete for buyers who do not use cooperating brokers." (IDF 610 – Appx 322). In short, the "Website Policy" prevented EA home sellers from "free-riding" on *subscription fees* paid by cooperating brokers for Realcomp *benefits*.

(2) **Erroneous Rationale of the Commission and Sixth Circuit:**

Rejecting this “free rider” problem, the Commission concluded that EA home sellers did not engage in “free riding” because they paid a flat fee to the listing broker (who in turn pays the subscription fees to Realcomp). (OPC 30-31 – Appx 105-107). Otherwise stated, the Commission was mixing apples (flat service fees) and oranges (Realcomp subscription fees). Consequently, the Commission’s rationale was erroneous because: (I) Payment of subscription fees by listing brokers represents *only half* of the fees Realcomp relies on for its operation (as Realcomp relies upon cooperating brokers for the other half of subscription fees); and (II) Payment of service fees to listing agents for *services* is not equivalent to the subscription fees paid for Realcomp *benefits*.

First, Realcomp relies on fees paid by both listing and cooperating brokers to maintain its operation.<sup>9</sup> (IDF 603, 610 – Appx 321-322). In an ERTS transaction, a home seller agrees to pay a commission based on a percentage of the sale that *anticipates* compensating both a listing broker and cooperating broker. (IDF 40, 53-55 – Appx 181, 184). (Given the ERTS seller is *not competing* against the

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<sup>9</sup>While Realcomp recognizes brokers will work as both “listing” brokers and “cooperating” brokers on different transactions, (IDF 19 – Appx 176), an EA home seller is only competing with a cooperating broker on one individual transaction. Therefore, when reviewing the competition between an EA home seller and cooperating brokers, the analysis focuses on that single transaction (as opposed to all transactions of the broker).

cooperating broker, the ERTS seller anticipates paying *both* types of brokers that contribute (subscription) fees to the operation of Realcomp. In short, both listing and contributing brokers that invest in Realcomp are likely to benefit from this transaction and thus, it is in the interest of all Realcomp participants to promote such transactions. Meanwhile, an EA seller can seek to *avoid* paying fees to cooperating brokers that contribute to the operation of Realcomp and effectively “free ride” on the part of (subscription) fees paid by cooperating brokers. In short, Realcomp does not receive payment of any fees from the cooperating broker side of an EA transaction when the EA seller is acting as its own cooperating broker.

Second, the Commission effectively and inexplicably reasons that payment of a flat fee to an EA listing broker – *for any service* – entitles the EA seller to all *benefits* of Realcomp. (OPC 30-31 – Appx 105-107). Otherwise stated, the Commission reasons that EA home sellers are entitled to all *benefits* Realcomp offers without paying for them. While the evidence established EA sellers could compete with cooperating brokers by paying nominal fees to list on Realtor.com or through dual listings (IDF 265, 436, 442 – Appx 234, 280), the Commission effectively held that EA sellers are entitled to these benefits for free even though EA sellers are not paying the subscription fees paid by their *competing* cooperating brokers.<sup>10</sup> Consistent

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<sup>10</sup>To support its analysis, the Commission *infers* that Realcomp’s enforcement of its Website Policy was anticompetitive because the policy conflicted “with NAR’s by-

with *Chicago Prof'l Sports*, it is this "lack of charge" that "gives this the name free-riding." (See OPC 30 -- Appx 106 (citing *Chicago Prof'l Sports*, *supra* at 675)).

Like the Commission, the Sixth Circuit also inexplicably equates fees paid by EA home sellers to listing and/or cooperating brokers for *services* to the subscription fees paid by participating Realcomp brokers for *benefits*. (OP6 835 -- Appx 38-39). Basically, the Sixth Circuit reasons that EA home sellers are entitled to all *benefits* of Realcomp -- *to help compete against cooperating brokers* -- if they pay a *service* fee to a listing broker because they also pay cooperating brokers *service* fees whenever cooperating brokers procure buyers. (OP6 835 -- Appx 38-39). In short, this is "mixing apples and oranges." The "free ride" is not free *services* of brokers but rather free *benefits* of Realcomp that are being subsidized, in part, by cooperating brokers. It is these *benefits* -- not services -- that participating cooperative brokers of Realcomp "should not have to subsidize" as they should not have to "facilitate transactions that directly conflict with Realcomp members' business purpose." (IDF 611 -- Appx 322).

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laws and thereby violates Realcomp's own by-laws." (OPC 32, n 28 -- Appx 103, n.28). This particular inference by the Commission is particularly disturbing when the evidentiary record reflected that NAR only changed its policy after the FTC began its enforcement actions because NAR decided "it wasn't worth fighting about." (IDF 426-427 -- Appx 276). In short, the *fact* that NAR elected to avoid "fighting" the FTC does not create an inference of anticompetitive conduct.

### (3) Incentive to Cooperating Brokers:

While the Commission cited *Rothery Storage*, *supra* (for the proposition that one "policy concern is that free-riding can diminish the incentives to make such investments at all"), it curiously disregarded its analysis. (OPC 29 -- Appx 104-105). In that case, the defendants, "a nationwide common carrier of used household goods" and its carrier agents -- were accused of antitrust violations when the common carrier ("Atlas") refused to provide facilities or services<sup>11</sup> to any carrier agent that provided interstate carriage services under its own authority (in competition with Atlas). *Id.* at 211-213. Given that these carrier agents could use Atlas resources for their own interstate carriage services (for which Atlas received no revenue), Atlas responded that its policy alleviated this "free rider" problem. *Id.* at 213, 221-223. While the carrier agents paid Atlas for certain services (i.e., clearinghouse, written forms) and thus claimed they were not "free-riding," the court recognized "many of the services supplied as part of Atlas' arrangement with the carrier agents' arrangement resulted in Atlas subsidizing its competitors." *Id.* at 222. Otherwise stated, the court recognized that payment for certain *services* was not equivalent to payment for *all benefits* offered through the Atlas arrangement. Given that Atlas

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<sup>11</sup>Generally, Atlas coordinated and supported agent operations by setting rates, dispatching shipments, selecting routes, arranging backhauls, collecting revenues, paying agents, and providing other services. Atlas also provided national advertising, promotional forums, uniforms, and equipment. *Id.* at 212-213.



could find it essential to "decrease or abandon many such services," the court recognized this "free riding distorts the economic signals within the system so that the [process] loses effectiveness in serving customers." *Id.* at 222-223.

Similar to the "free riding" in *Rothery Storage*, the "free riding" problem in this case occurs when EA home sellers – competing with cooperating brokers of Realcomp for buyers – obtain the benefits of Realcomp without paying for them. While EA sellers may pay for *services* provided by listing (and even cooperating) brokers, they are not paying for the *benefits* offered by Realcomp to participants that pay subscription fees. Given these EA sellers are "free riding" on the subscription fees paid by cooperating brokers, participating brokers – including the 11% that work exclusively with buyers – have less of an incentive to support Realcomp (through subscription fees) and thereby cause Realcomp to "abandon or decrease" many of its benefits. Given the Website Policy restricted the benefits being provided to EA home sellers (competing with the cooperating brokers), this ancillary restraint remedied this free-riding.

B. Any Ancillary Restraint Associated With The "Website Policy" Was Far Outweighed By The Procompetitive Justification Of Addressing The "Bidding Disadvantage" Problem Faced By Buyers Represented By Cooperating Brokers Who Bid Against Unrepresented Buyers.

As the ALJ recognized, courts have accepted other "justifications which created operating efficiencies" when evaluating "procompetitive justifications." (ID 123 – Appx 370-371 (citing *Supermarket of Homes, Inc. v. San Fernando Valley Board of Realtors*, 786 F.2d 1400, 1407 (9th Cir. 1986); *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 783 F. Supp. 952, 963 (D. Md. 1992))).

(1) Disadvantage to Represented Buyers:

When buyers represented by cooperating brokers submit equivalent bids to those of unrepresented buyers for EA listed homes, the represented buyers are at a disadvantage because EA sellers "will subtract the value of the [broker] commission when comparing offers made by prospective buyers who use cooperating brokers against" those of unrepresented buyers. (IDF 629 – Appx 327-328). Given this economic disadvantage, buyers are less likely to use the services of cooperating brokers to acquire a home listed by an EA seller. (IDF 630 – Appx 328). Consequently, cooperating brokers representing buyers have less incentive to expose their clients to EA listings when their clients are less likely to successfully bid on such homes.<sup>12</sup> (IDF 631 – Appx 328).

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<sup>12</sup>Consistent with the factual findings of the ALJ, a cooperating broker's incentive to expose clients to EA listings is also diminished by the additional transaction costs that a broker is likely to face in the absence of a participating listing broker. (IDF 632 – Appx 328). Therefore, the Website Policy also worked to limit cooperating brokers' "exposure to legal liability

However, through adoption of the "Website Policy" that limited dissemination of non-ERTS (or EA) listings to the public, Realcomp restored cooperating brokers' incentive to expose their clients to non-ERTS listings (by giving cooperating brokers exclusive access to these listings). Given that the MLS is a closed database for participants (IDF 106, 114 – Appx 201, 203), cooperating brokers are better motivated to expose their clients to these listings, increasing quality of service, because their buyer clients are unlikely to get exposure to them elsewhere. Further, because the MLS database is unavailable to the public, cooperating brokers are more likely to utilize the database (rather than their own broker sites or other public websites).

**(2) Erroneous Rationale of the Commission and Sixth Circuit:**

In its Opinion, the Commission acknowledged the "bidding disadvantage" problem by noting that "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." (OPC 32 – Appx 111). However, it rejected this justification by concluding that elimination of this disadvantage merely propped up a commission structure that did not "increase output, or improve product quality, service or innovation." (OPC 32-33 – Appx 111-113). It also concluded that providing one competitor with a cost advantage over another did not make competition unfair. (OPC 32 – Appx 110-111).

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as a result of being forced to provide additional professional services." (ID 125 – Appx 435).

Contrary to the foregoing findings (that the Commission fails to support with any evidentiary citations), the Website Policy does "improve product quality, service or innovation" by motivating cooperating brokers to expose their clients to a broader group of listings, (i.e., ERTS and non-ERTS). By limiting exposure of EA listings to Realcomp participants on the closed MLS database, cooperating brokers recognize that EA listings are less likely available to the public (unless disseminated through other means) and therefore, clients are more likely to successfully bid. Therefore, cooperating brokers again have more incentive to contribute to Realcomp.

**CONCLUSION**

For the reasons provided above, Realcomp requests that this Court grant this petition and reverse the decisions of the Sixth Circuit Court of Appeals (and Commission).

Respectfully submitted,

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