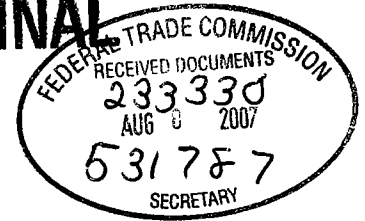


ORIGINAL



**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**


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

**PUBLIC
Docket No. 9320**

JOINT MOTION FOR THE ADMISSION OF DOCUMENTS

Pursuant to Section 3.22(a) of the Commission's Rules of Practice and the Court's July 10, 2007 Order on Complaint Counsel's Motion for *In Camera* Treatment, Complaint Counsel and Respondent Realcomp II Ltd. ("Realcomp," and collectively, the "Parties") jointly move for the introduction of RX 154-A, CX 498-A, and CX 557-A into the public record as public versions of RX 154, CX 498-514, and CX 557-559, respectively. Pursuant to the May 29, 2007, Joint Stipulation Re Designated Deposition Testimony, the Parties also jointly move for the portions of the deposition transcript of Mr. Whitehouse designated in JX 3, to be entered into evidence as CX 421. Finally, the Parties jointly move for the introduction into the record of DX 12, demonstrative exhibits used in the rebuttal testimony of Complaint Counsel's economic expert, Dr. Darrell Williams. A Proposed Order is attached.

Respectfully submitted,



Scott L. Mandel
Steven H. Lasher
Webb A. Smith
Stephen J. Rhodes
Kirsten M. McNelly
Emily L. Matthews



Sean Gates
Peggy Bayer Femenella
Joel Christie
Linda Holleran
Christopher Renner

Counsel for Respondent Realcomp II, Ltd.

Foster, Swift, Collins & Smith, P.C.
313 South Washington Square
Lansing, MI 48933-2193
smandel@fosterswift.com
(517) 371-8185
Facsimile: (517) 371-8200

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
601 New Jersey Avenue, NW
Washington, D.C., 20580
sgates@ftc.gov
(202) 326-3711
Facsimile: (202) 326-3496

Dated: August 8, 2007

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

**DECLARATION OF CHRISTOPHER RENNER IN SUPPORT OF JOINT MOTION
FOR THE ADMISSION OF DOCUMENTS**

I, Christopher Renner, make the following statement:


1. I am an Attorney in the Bureau of Competition of the Federal Trade Commission. I serve as Complaint Counsel in this matter.
2. Pursuant to Section 3.45(b) of the Commission's Rules of Practice, 16 C.F.R. §3.45(b), I submit this declaration to bring before the Court public versions of the documents granted *in camera* status by the Court's July 10, 2007, Order on Complaint Counsel's Motion for *In Camera* Treatment.
3. Pursuant to Section 3.24(a)(2) and 3.24(a)(3) of the Commission's Rules of Practice, 16 C.F.R. §§3.24(a)(2) and 3.24(a)(3), I also submit this declaration for the purpose of bringing before the Court documents and deposition transcripts described in the accompanying Joint Motion for the Admission of Documents.
4. The documents attached to this declaration are true and correct copies of the following:

Tab Number	Document Title	Document Date
Tab 1	RX 154-A, Expert Report of Stephen H. Murray (Public Version)	3/30/07
Tab 2	CX 498-A, Expert Report of Dr. Darrell Williams (Public Version)	4/3/07
Tab 3	CX 557-A, Rebuttal Expert Report of Dr. Darrell Williams (Public Version)	5/1/07
Tab 4	CX 421, Excerpts of the Deposition of Douglas Whitehouse	2/22/07

Tab Number	Document Title	Document Date
Tab 5	DX 12, Demonstrative Exhibits from Rebuttal Trial Testimony of Dr. Darrell Williams	6/28/07

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on July 12, 2007.



Christopher Renner

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

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

Docket No. 9320

**[PROPOSED] ORDER GRANTING JOINT MOTION FOR THE ADMISSION OF
DOCUMENTS**

On July 12, Complaint Counsel and Respondent Realcomp II Ltd. (“Realcomp,” and collectively, the “Parties”) jointly moved for the admission into the public record of redacted copies of documents subject to the Court’s July 10, 2007, Order on Complaint Counsel’s Motion for *In Camera* Treatment. The Parties also jointly moved for the admission into evidence of designated portions of the deposition of Douglas Whitehouse as CX 421, as designated in JX 3 and as contemplated by the Parties’ May 29, 2007, Joint Stipulation Re Designated Deposition Testimony. Finally, the Parties jointly moved for the admission into the record of DX 12, demonstrative exhibits used in the rebuttal testimony of Complaint Counsel’s economic expert, Dr. Darrell Williams.

The motion is GRANTED. RX 154-A, CX 498-A, and CX 557-A are hereby entered into the public record as redacted copies of RX 154, CX 498-514, and CX 557-559, respectively, that pursuant to the Court’s July 10, 2007 Order have had *in camera* material redacted. The portions of Mr. Whitehouse’s deposition designated in JX 3 are hereby entered into evidence as CX 421. DX 12 is hereby entered into the record.

ORDERED:

Date:

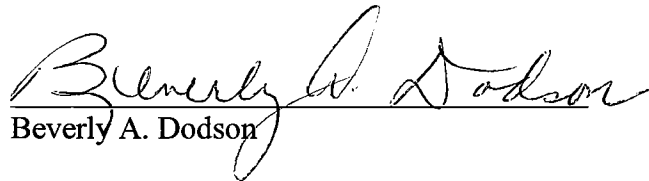
Stephen J. McGuire
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that on August 8, 2007, I caused a copy of the attached public version of *Joint Motion For The Admission Of Documents* to be served upon the following persons:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
By Hand Delivery

Scott Mandel, Esq.
Foster, Swift, Collins & Smith, P.C.
313 South Washington Square
Lansing, MI 48933-2193
By Electronic Transmission and Overnight Courier


Beverly A. Dodson

PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of

REALCOMP II LTD.,

a corporation.

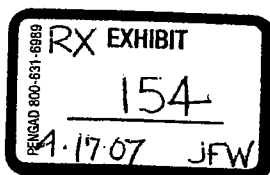
Docket No. 9320

EXPERT REPORT OF STEPHEN H. MURRAY

I. INTRODUCTION

1. I am the President and Editor of REAL Trends, a leading trends and research company in the residential brokerage industry, and have served in that role since the founding of REAL Trends in 1987. I am also the President of Murray Consulting, Inc., a leading consulting firm to residential real estate brokerage firms, multiple listing services ("MLSs"), Realtor Associations and related organizations, and have served in that role since its founding in 1987. I have spoken in front of hundreds of residential real estate brokerage firms ("brokerages"), and state and national conventions of real estate professionals on topics ranging from trends in the industry to the valuation of brokerages. I have consulted with brokerages, in all regions and of all sizes, brands and types, on the use of MLSs by realty firms and on the use of the Internet by realty firms, sales professionals and housing consumers. I have provided consulting advice to over 1,700 different clients, including brokerages, MLSs and Realtor Associations.

2. Specifically, I have served as a consultant on 32 assignments related to MLSs



since 1990. For example, I have worked on MLS governance issues, technology and pricing models. My work with brokerages and MLSs over the past twenty years has given me a significant understanding of the relationships between MLSs and brokerages, between MLSs and real estate sales professionals and the changing role of the MLS with the advent of the Internet. I also have studied MLS policies and how they can affect the workings of the market.¹

3. I have provided brokerage valuation, merger and acquisition advisory services; senior management consulting, including strategic planning, operations and financial review; demographic analysis of local, regional and national markets; information on trends in technology; individual planning services for Associations of Realtors® and MLS strategic planning; and other related services. The variety of this consulting experience has provided me with an understanding of the relationships between brokerages and their sales associates, how brokerages interact with each other in the course of day-to-day brokering of properties, and how all of these activities relate to the creation of brokerages and firm profitability.

4. Significantly, I have worked with “traditional,” full-service brokerages, as well as non-traditional firms. For example, I have done consulting work for Zip Realty, E-Realty, Help-U-Sell, Equi-Save Realty, New Homes Realty, Expert Realty and several other non-traditional firms that do not operate on a national level. These firms provide flat-fee, limited service and/or online discount brokerage services. I have also interviewed and spoken with a wide variety of these types of brokerages in connection with articles for the REAL Trends’ monthly newsletter,

¹ Notably, a large majority of the MLSs in the United States are affiliated with the National Association of Realtors® (“NAR”), which has implemented MLS Rules and Policies that must be followed by each of the affiliated MLSs. Niersbach Dep. at 10:12 - 11:2, 35:20 - 37:7, 73:2 - 73:11. Realcomp is also affiliated with NAR, and is compliant with NAR’s MLS Rules and Policies (with the exception of NAR’s 2007 IDX Policy). Kage IH at 27:17 - 27:24.


and I have featured these firms at REAL Trends' annual spring and fall conferences.² Through these interactions, I have learned how their financial models work, the strategic and operational plans they have deployed and many other facets of their operations.

5. I also have had specific consulting assignments in southeastern Michigan with such firms as Real Estate One, Coldwell Banker Schweitzer, Weir Manuel & Snyder, Max Broock Realtors, Century 21 – Town & Country, The Michigan Real Estate Group and several RE/MAX affiliates. These consulting services ranged from company valuations, merger and acquisition advisory services, strategic and business planning, and trends analysis.

6. In addition, I have been involved in numerous publications related to the real estate industry. For example, I have published: the REAL Trends' monthly newsletter, which discusses updates and current events in the real estate industry; the *REAL Trends 500*, which ranks the nation's leading brokerages since 1987, and, since 2001, also publishes operating and financial reports on these firms; and the results of national housing consumer research since 2002 and other industry studies since 2000. These research reports and publications have studied how home buyers and sellers (*i.e.*, "housing consumers") demand and utilize all aspects of residential brokerage services as well as the different operating models of brokerages.

7. For example, in a Murray Consulting report to the National Association of Realtors® ("NAR"), "From Homogeneity to Segmentation," I predicted for the leading trade association in the real estate industry how alternative brokerage models, such as limited service brokers, would continue to multiply in the years ahead and provide a wide array of services to meet the requirements of consumers. [REDACTED]

² These conferences are comprised of the real estate industry's senior leadership, including, among others, brokers, MLSs and Realtor Associations that operate at the local, regional and national level, and discuss trends and strategies in the marketplace.



8. A full and complete copy of my Curriculum Vitae, listing my experience, publications and testimony as an expert witness in regard to the valuation of brokerages, is attached to this report as Exhibit A. In reaching my conclusions, I have relied on my over 20 years of consulting experience in the real estate industry, leading industry studies, and discovery produced in the Realcomp II Ltd. ("Realcomp") litigation. A full and complete list of the materials I have relied on is attached to this report as Exhibit B. I am being compensated at a rate of \$300/hr for my testimony, plus related costs and expenses.

II. ASSIGNMENT & SUMMARY OF OPINIONS

9. I have been asked to provide a report explaining certain aspects of the residential real estate industry and the growth of non-"traditional" business models. I have also been asked to explain the significance of participation in the MLS and Internet marketing, particularly IDX feeds, to being able to compete effectively in the market of residential real estate brokerage services for real estate brokers (and their agents) within Realcomp's service area. I have also looked at certain policies of Realcomp as to how they affect brokerages, sales professionals and consumers in the normal conduct of the marketing, purchase and sale of residential properties in southeastern Michigan.

10. Access to the Realcomp MLS is significant to a real estate broker's ability to

compete effectively because access to the local MLS provides significant benefits to brokers and to their clients, including providing exposure of sales for home and rules governing how brokers will work and cooperate. Realcomp's "Search Function Policy," however, sets as a search default to exclude Exclusive Agency, Limited Service and MLS-Entry Only listings (those types of listing agreements most often used by brokers offering limited services) from property searches on the Realcomp MLS. There appears to be evidence that these types of listings are then not viewed or e-mailed as often as the full service, Exclusive Right to Sell listings. If so, brokers whose listings are not displayed on the Realcomp MLS would be competitively disadvantaged in their ability to sell their client's homes as well as in obtaining new seller/clients once this "Search Function Policy" was disclosed to potential clients.

11. Marketing homes on certain key types of Internet websites – including MLS public websites, Realtor.com, and brokerage firm and agent 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. Realcomp provides free access to these websites for brokers using full service, Exclusive Right to Sell listings, but not for Exclusive Agency, Limited Service or MLS-Entry Only listings. It is very difficult from a cost and practical perspective, and in many cases impossible, for brokers to otherwise gain access to these key websites outside of Realcomp. This "Website Policy" thus competitively disadvantages brokers using these types of listings in terms of their ability to sell their client's home (because of the less exposure) and in obtaining and expanding their business once the "Website Policy" is disclosed to potential clients.

III. INDUSTRY BACKGROUND

A. Overview of the Residential Real Estate Industry³

12. Residential real estate brokerage services represented at least a \$65.7 billion industry in 2005.⁴ Real estate brokerage services provided to the seller in a typical residential real estate transaction will include some or all of the following tasks:

- a. Determining the initial asking price of the home, as well as subsequent changes to the asking price;
- b. Entering the home on the MLS;
- c. Holding open houses;
- d. Scheduling showings with potential buyers;
- e. Marketing the home through lawn signs, local newspapers, real estate magazines, *etc.*;
- f. Marketing the home through the Internet;
- g. Accepting and presenting offers for the sale of property;
- h. Reviewing sales contracts and advising the seller on any offers to purchase the property;
- i. Negotiating with buyers, including assisting the seller to develop, communicate and present counter-offers; and
- i. Managing paperwork and contracts received from and sent to potential buyers.⁵

³ There are two main segments of the real estate industry: residential and commercial brokerage services. Most brokers specialize in either residential or commercial brokerage services as there are a number of significant differences between the two industries. *See* Elya Dep. at 8:3 - 8:6 (testifying that brokers need to specialize between commercial and residential brokerage services); Cooper Dep. at 17:17 - 17:24 (same). For example, residential brokerage is more structured in process from listing to close and typically includes the presence of an MLS system, which is rare in the commercial brokerage industry. In addition, commercial brokerage firms do not have systematic cooperation and compensation agreements, which are prevalent in residential brokerage. Commercial real estate transactions also generally involve a far higher level of complexity due to tenant issues, financing, zoning and ownership issues.

⁴ *REAL Trends 500* (Murray Consulting 2006). The *REAL Trends 500* reports have been relied on by firms such as Realogy, Zip Realty and HomeServices, and have been used as a benchmark for measuring total commission revenues. They have also been relied on by the Government Accountability Office, *see Real Estate Brokerage: Various Factors May Affect Price Competition (2006)*, FTC 0000335, at 341 - 342.

13. The vast majority of homeowners employ a real estate broker to provide some or all of these services.⁶ In fact, studies consistently show that for the past 10 years, approximately [REDACTED] of all residential real estate sellers in the United States employed the assistance of a real estate broker.⁷ Data collected by the National Association of Realtors® from Realcomp's geographic area is generally consistent with these national numbers.⁸

14. Homes that are marketed without the assistance of a broker are commonly referred to as "For Sale By Owner" ("FSBO") properties. Even though the seller may choose to not work with a real estate broker, it is not uncommon for FSBO sellers to work with buyers who are represented by a broker.⁹ Importantly, as described in more detail below, FSBO sellers cannot list their homes on the MLS.¹⁰

15. Sellers who choose to sell their home themselves (FSBO's) may do so for a variety of reasons. Surveys have shown that FSBO sellers are most often motivated by a desire

⁵ CX 373, *2006 NAR Profile of Home Buyers & Sellers*, at NARFTC 0002065; CX 78, *The Critical Role of the REALTOR in the Real Estate Transaction*, at 2 - 6 (Realcomp website list of broker services). See also Murray Consulting & Harris Interactive, *Real Estate Consumer Service Model Assessment for Sellers*, at 54 (2005) ("*Alternative Models*"). The *Alternative Models* study was conducted in partnership with Harris Interactive, a globally recognized research firm. In addition to the 1,300 survey replies, focus groups were conducted to augment the survey research.

⁶ For purposes of this report, the term "brokerage" is used to describe a residential real estate firm. There are separate licensing requirements for real estate brokers and real estate sales associates or agents, who must be supervised by brokers and generally work directly with buyers and sellers of housing. However, for purposes of this report, unless otherwise noted, I will use the term "broker" to refer to both real estate brokers and agents.

⁷ CX 373, *2006 NAR Profile of Home Buyers & Sellers*, at NARFTC 0002067 (showing that no more than 18% of home sellers sold their homes as a "For Sale By Owner" since 1995); [REDACTED]

⁸ Survey Responses to *2006 NAR Profile of Home Buyers & Sellers*, received from zip codes beginning with 480-, 481-, 482-, 483, and 484- (showing that 4% of sellers sold their home as a FSBO).

⁹ CX 373, *2006 NAR Profile of Home Buyers & Sellers*, at NARFTC 0002084 (finding 18% of FSBO sellers sold their home to a buyer who was represented by an agent); see also Nowak Dep. at 9:25 - 10:10; Burke Dep. at 42:9 - 42:23. Likewise, it is not uncommon for brokers working on behalf of sellers to complete a home sale with a buyer who is unassisted by a broker. See, e.g., Kersten Dep. at 45:22 - 46:3; Elya Dep. at 55:8 - 56:2.

¹⁰ Baczkowski Dep. at 88:21 - 88:24; Nowak Dep. at 26:11 - 26:13.

to save the cost of a commission.¹¹ In addition, according to survey data, a large percentage of FSBO sellers may know their buyer (the data show this to be the case in approximately 40% of FSBO transactions) and, therefore, may not even need most brokerage services.¹²

16. Many homeowners, however, find the experience of selling their home to be stressful. Specifically, 72% of all recent sellers have stated that selling their home was a stressful experience, and 67% of all future sellers have stated that they thought selling their home would be a stressful experience.¹³ In addition, FSBO sellers are faced with several challenges when selling their home on their own, including not having their listing included in an MLS.¹⁴ The majority of homeowners thus choose to take advantage of the experience of real estate brokers.¹⁵

B. Real Estate Brokers and the Typical Brokered Real Estate Transaction

17. A typical brokered real estate transaction, *i.e.* one involving the use of real estate brokers, will involve a “Listing Broker” and a “Cooperating Broker.” A “Listing Broker” is hired by the seller as its exclusive agent to help sell the house and find an appropriate buyer. The seller and the Listing Broker will enter into a “listing agreement” that spells out the nature of the relationship between the seller and the Listing Broker. It will usually include the “listing period,” or length of contract; the compensation to be paid to the Listing Broker; and the “offer of

¹¹ CX 373, *2006 NAR Profile of Home Buyers & Sellers*, at NARFTC 0002083; *Alternative Models*, at 47.

¹² CX 373, *2006 NAR Profile of Home Buyers & Sellers*, at NARFTC 0002078 (approximately 40% of FSBO sales in 2006 were between previously acquainted buyers and sellers).

¹³ Murray Consulting, *Room for Improvement: Perspectives of Real Estate Consumers and the Professionals Who Serve Them*, at 7 (2002) (“*Room For Improvement*”). The *Room for Improvement* study was also conducted in partnership with Harris Interactive, and was based on 3,400 survey responses and focus group research.

¹⁴ See CX 373, *2006 NAR Profile of Buyers & Sellers*, at NARFTC 0002084; Taylor Dep. at 37:10 - 38:7.

¹⁵ In contrast to individual home sellers who typically have owned or sold a home only three times in the past, the typical broker completes 12 transactions each year. CX 373, *2006 NAR Profile of Buyers & Sellers*, at NARFTC 0002064; *The 2005 NAR Member Profile*, NARFTC 0003887, at 3912. In addition, in order to be licensed, brokers must understand basic principles of real estate pricing and agency, contract, property and real estate law. Cooper Dep. at 5:17 - 6:9.

compensation” that will be paid to any Cooperating Broker. Listing Brokers may be paid in a variety of ways, including a flat fee paid up-front (at the time the listing agreement is signed), a commission based on a percentage of the selling price of the home to be paid at the time of “closing” (when a buyer successfully purchases the home), or a combination of these methods.

18. The Listing Broker will typically offer some or all of the services associated with a real estate transaction discussed above.¹⁶ One of the first steps a Listing Broker typically takes to market the home to potential buyers is to enter the property listing into the local MLS.¹⁷

19. An MLS is a database of information about properties for sale (exclusive of FSBOs) that can be viewed and searched by all other local brokers who practice in the area and participate in the MLS. The “listing” in the MLS will include details about the home, such as the number of bedrooms, baths and square footage, as well as an “offer of compensation.” The offer of compensation is the amount of money or commission percentage that will be paid to any “Cooperating Broker” who is the “procuring cause” of the sale of the home.¹⁸

20. “Cooperating Brokers” work with buyers interested in purchasing a home. They may provide a variety of services to potential buyers, such as identifying and discussing homes of interest, accompanying buyers in home visits, and negotiating a contract with the Listing Broker or directly with the seller. Cooperating Brokers will be considered the “procuring cause” of a sale when they find the buyer who successfully buys the home.¹⁹

¹⁶ Cooper Dep. at 11:11 - 12:14.

¹⁷ Kersten Dep. at 24:10 - 24:20. See also CX 100, *Realcomp II Ltd. Rules and Regulations*, revised October 2006, at RC 1340 (“Realcomp Rules”) (Realcomp rule that listings must be entered within 48 hours).

¹⁸ Niersbach Dep. at 42:24 - 43:11; CX 100, *Realcomp Rules*, at RC1339, 1346 - 1347.

¹⁹ Niersbach Dep. at 42:24 - 43:11 (procuring cause is the “unbroken causal series of events that results in the successful transaction”); Nead Dep. at 109:3 - 109:8 (to be the procuring cause, a broker must “have started the chain of events that led the buyer to purchase, an uninterrupted chain of events that led the buyer to purchase this particular property.”); CX 86, *Procuring Cause Factors*, at 1 (procuring cause means “the sale would not have occurred but for the broker’s efforts”).

21. There are two types of Cooperating Brokers: "Selling Brokers" and "Buyer's Brokers." Selling Brokers work with buyers, but technically owe a fiduciary duty to the seller of the property by being a "sub-agent" of the Listing Broker. Selling Brokers are paid for their work by whatever amount is provided for in the MLS Listing's "offer of compensation" for the home their buyer purchases.

22. A Buyer's Broker is a real estate broker who represents the interests of a buyer instead of a seller.²⁰ This type of agency relationship is often, but not always, memorialized in a separate written agreement between the buyer and the broker, and appears to be common in southeastern Michigan.²¹ Buyer's Brokers may be compensated by the buyer or by the "offer of compensation" listed in the MLS, or both, depending on the terms of their agreement.²² Buyer agency agreements allow Cooperating Brokers to protect their interests in receiving a certain amount of compensation for their work because the buyer is typically responsible for ensuring that the Buyer's Broker is compensated, even though the payment is most commonly from the

²⁰ Cooper Dep. at 15:22 - 15:24.

²¹ CX 373, *2006 NAR Profile of Home Buyers & Sellers*, at NARFTC 0002046 (finding 64% of home buyers had an agency relationship with their agent). See also Nead Dep. at 11:25-12:7 (describing office policy of Coldwell Banker Preferred that agents will always enter into buyer's agency agreement); Elya Dep. at 10:25-11:10 (Realty Executives uses buyer's agency agreements at least 95% of the time they work with buyers); Whitehouse Dep. at 32:21 - 33:3 (Hannett Wilson & Whitehouse uses buyer's agency agreements at least 50% of the time they work with buyers); Cooper Dep. at 15:12 - 15:18 (John Cooper's brokerage entered into buyer's agency agreements with over 75% of their buyer clients). Michigan requires brokers to explain the type of agency relationship that they have with their clients. Gleason Dep. at 14:8 - 16:3. Buyer's brokers therefore only have to disclose their agency relationship to their buyer/customer; they do not need to enter into a separate written agreement. Gleason Dep. at 15:6 - 15:12.

²² Nowak Dep. at 7:3 - 8:3.

offer of compensation offered by the seller or the Listing Broker.²³ Buyer's agency agreements may also be exclusive, meaning that the broker gets paid no matter who finds the home.²⁴

23. Most real estate brokers do not specialize as either Listing Brokers or Cooperating Brokers, and a broker's role often will vary from transaction to transaction.²⁵ It is also possible for a single broker to act as a dual agent of both the seller and the buyer, which is permissible under Michigan law as long as the agency relationship is disclosed to both parties.²⁶

C. Types of Listing Agreements

24. Generally, the most common type of listing agreement is an "Exclusive Right to Sell" listing, which requires the seller to pay the Listing Broker if the house is sold during the listing period, regardless of who sells the home.²⁷ Traditionally, a broker with an Exclusive Right to Sell contract will provide a full range of real estate brokerage services and charge a commission that is typically between five and six percent of the sales price of the home.²⁸ One

²³ CX 373, 2006 NAR Profile of Home Buyers & Sellers, at NARFTC 0002046 (finding that 65% of brokers who represented only the interests of the buyer were paid by the seller, as compared to only 18% who were paid by the buyer only); Nowak Dep. at 8:4 - 8:10.

²⁴ Whitehouse Dep. at 34:17 - 34:25; Elya Dep. at 11:11 - 12:3.

²⁵ Cooper Dep. at 16:24 - 17:8.

²⁶ Taylor Dep. at 83:14 - 86:6. In addition, a broker may act as a "transaction coordinator," which occurs when a broker assists a buyer and seller, who have at least reached an agreement in principle on the sale of the home even if the price and terms of the offer are not yet confirmed. A transaction coordinator does not have an agency relationship with either party, and thus will refrain from giving advice to either party, but will assist the buyer and seller in completing the transaction and filling out all necessary paperwork. Nead Dep. at 10:14 - 11:2; Whitehouse Dep. at 36:17 - 36:21.

²⁷ *Realcomp II Ltd.'s Answer to Complaint*, ¶ 8 ("Realcomp Answer") (admitting definition of Exclusive Right to Sell Listing).

²⁸ CX 373, 2006 NAR Profile of Home Buyers & Sellers, at NARFTC 0002075 (finding that 83% of sellers represented by broker received a broad range of brokerage services); *Realcomp Answer*, ¶ 8; *Realcomp II Ltd.'s Responses and Objections to Complaint Counsel's First Request for Admissions*, ¶ 4 ("Realcomp Admissions"); *Real Trends 500* (2006) (providing information on average commissions). See also Hardy Dep. at 37:21 - 38:3 (testifying that the average commission charged to sellers by Century 21 Today agents is over 5%); Cooper Dep. at 8:22 - 9:9 (testifying to a standard commission of 6% charged to sellers by John Cooper's brokerage); Nowak Dep. at 12:9 - 12:17 (describing Prudential Great Lakes Realty's suggested commission rate of 6%).

feature of an Exclusive Right to Sell listing is that even if the seller finds a buyer without any assistance from the Listing Broker, a commission will be due to the Listing Broker.²⁹

25. There is no minimum services requirement inherent in an Exclusive Right to Sell listing.³⁰ However, under Realcomp Rules, a listing must provide at least the five following minimum services to be considered an Exclusive Right to Sell listing:

- a. Arrange appointments for cooperating brokers to show listed property to potential purchasers;
- b. Accept and present to the seller(s) offers to purchase procured by Cooperating Brokers;
- c. Advise the seller(s) as to the merits of the offer to purchase;
- d. Assist the seller(s) in developing, communicating, or presenting counteroffers; and
- e. Participate on the seller(s) behalf in negotiations leading to the sale of listed property.³¹

26. A second type of listing agreement is an “Exclusive Agency” listing. In an Exclusive Agency listing, the seller is required to pay the Listing Broker if any broker finds the buyer, but it does not require the payment of a commission if the seller finds the buyer on his or her own.³² Brokers offering more limited services or unbundled services at a lower fee (e.g., allowing sellers to pick which services they would like to purchase at a flat fee – such as \$500 for

²⁹ Exclusive Right to Sell listings may have carve-outs where the Listing Broker will agree not to be paid a commission – even though it is an Exclusive Right to Sell listing -- if the home is sold by the owner to certain designated persons (such as a family member) or within a certain amount of time (such as 10 days from the signing of the listing agreement). Kage Dep. at 9:21 - 10:15 (testifying to Realcomp rules allowing a seller to specify certain individuals in an Exclusive Right to Sell listing that the property may be sold to without requiring the payment of any kind to the Listing Broker); CX 100, *Realcomp Rules*, at RC1348; Kersten Dep. at 29:23 - 30:21.

³⁰ See CX 175, *Exclusive Right to Sell Contract of the Michigan Association of REALTORS®*; Rademacher Dep. at 27:20 - 28:12 (describing CX 175 as the Exclusive Right to Sell contract used by members of the Livingston Association of REALTORS®.)

³¹ CX 100, *Realcomp Rules*, at RC1340 - 1341; Hardy Dep. at 112:2 - 112:5; Elya Dep. at 72:20 - 73:2.

³² *Realcomp Answer*, ¶ 9; Aronson Dep. at 5:19 - 6:14, 9:23 - 12:5; Hepp Dep. at 121:23 - 122:12, 128:3 - 128:13.

listing the home in the MLS; \$100 for helping run an open house, *etc.*) frequently do so under an Exclusive Agency listing.³³ Brokers providing limited services, often through “Limited Service” listings or “MLS-Entry Only” listings, may charge an up-front fee for the services selected by the seller or a discounted commission based on the sale price of the home, or a combination of both.³⁴

27. Although industry participants may use different, although similar definitions for “Limited Service” listings, for purposes of this report, I will use Realcomp’s definition.³⁵ In its Rules and Regulations, Realcomp defines “Limited Service” listings as a “listing agreement under which the listing broker will NOT provide one, or more, of the following services:

- a. Arrange appointments for cooperating brokers to show listed property to potential purchases [*sic*] but instead gives cooperating brokers authority to make such appointments directly with the seller(s);
- b. Accept and present to the seller(s) offers to purchase procured by cooperating brokers but instead gives cooperating brokers authority to present offers to purchase directly to the seller(s);
- c. Advise the seller(s) as to the merits of offers to purchase;
- d. Assist the seller(s) in developing, communicating, or presenting counteroffers; or
- e. Participate on the seller(s) behalf in negotiations leading to the sale of listed property.”³⁶

28. Realcomp defines “MLS Entry-Only” listings as listings where the Listing Broker enters the property onto the MLS, but provides none of the services identified in the above

³³ See Aronson Dep. at 29:8 - 29:23; D. Moody Dep. at 16:11 - 22:9.

³⁴ See, e.g., Mincy Dep. at 9:13 - 12:8; *Alternative Models*, at 25.

³⁵ Realcomp’s definition, which is borrowed from the NAR Model MLS rules, is used by other MLSs as well. See CX 381, *2006 NAR Handbook on Multiple Listing Policy*, at NARFTC 0000529 - 0000530.

³⁶ CX 100, *Realcomp Rules*, at RC1341.

paragraph.³⁷ Brokers and sellers may voluntarily enter into any of these types of listing agreements.³⁸

29. Brokerages offering these more limited services are often referred to as “Limited Service Brokers,” or collectively as “Alternative Brokerage Models.” For purposes of this report, I will use the term “full services” to mean that the broker is providing at least the five services identified in Paragraphs 25 and 27.

30. It is important to understand that a Listing Broker who is a Realcomp member (and who must therefore follow all of Realcomp’s rules and regulations) must be involved with each of these listing agreements, and that any listing placed on the MLS must provide an offer of compensation to any Cooperating Broker who produces a buyer who purchases the listed property.³⁹ The Realcomp MLS system displays the type of listing agreement and the amount of the offer of compensation to Cooperating Brokers so that it is transparent to all brokers working with buyers who are interested in the property.⁴⁰ Under MLS rules, Listing Brokers are responsible for ensuring that Cooperating Brokers (who are the procuring cause of the sale) are paid their compensation pursuant to the offer of compensation listed in the MLS.⁴¹

³⁷ CX 100, *Realcomp Rules*, at RC1341. Again, this definition is taken from the NAR Model rules and is used by other MLSs as well. See CX 381, *2006 NAR Handbook on Multiple Listing Policy*, at NARFTC 0000530.

³⁸ Cooper Dep. at 11:15 - 13:21. Exclusive Right to Sell, Exclusive Agency, Limited Service and MLS-Entry Only listings are all allowed under Michigan’s licensing laws for brokers. See Cooper Dep. at 11:15-12:24; Nowak Dep. at 28:13 - 38:16. These types of listings also comply with NAR’s ethical code of conduct. See Cooper Dep. at 13:6 - 13:9.

³⁹ *Realcomp Admissions*, ¶¶ 1-3; see also Nowak Dep. at 40:24 - 41:1; Burke Dep. at 60:2 - 60:4.

⁴⁰ CX 100, *Realcomp Rules*, at RC1341 (requiring disclosure in the MLS of the type of listing agreement in place between the seller and the Listing Broker), and at RC1346 (requiring disclosure of cooperative compensation offered by the Listing Broker in the MLS).

⁴¹ See CX 100, *Realcomp Rules*, at RC1346 (citing Listing Broker’s “obligations to compensate any Cooperating [Broker] as the procuring cause of sale”); Taylor Dep. at 124:2 - 124:12. All commission disputes are arbitrated at the brokers’ local association of realtors board. Kage IH at 97:24 - 98:9.

D. Growth of Alternative Brokerage Models

31. Until the growing popularity of the Internet in the late 1990's and early 2000's, most residential real estate transactions were done through "traditional" brokerages that provided a full range of services to sellers and buyers. The vast majority of listings were done through an Exclusive Right to Sell agreement, although there were also some Exclusive Agency agreements. While there have always been FSBO sales and some discount realty offerings, the emergence of listing agreements that were identified as "Limited Service" or "MLS - Entry Only" is a fairly recent phenomenon and have mainly arisen concurrently with the rise of the Internet.

32. These Alternative Brokerage Models offer a low-cost alternative to consumers of residential real estate brokerage services. They generally offer a "menu of services from which price conscious consumers can select only those services they feel they require."⁴² This option generally appeals to home sellers who are cost-conscious and are willing to conduct some aspects of the real estate transaction without any broker assistance.⁴³ Limited Service Brokers therefore give consumers the option to save money on brokerage fees if they are willing to, for example, show the property or hold open houses.⁴⁴ In addition to these cost savings, some Limited Service Brokers customize their service offerings to meet an individual client's needs.⁴⁵

33. Based on my own experience, I have seen the number and variety of Alternative Brokerage Models multiply from the late 1990's, with most of the growth from small, local

⁴² *The Future of Real Estate Brokerage: Challenges and Opportunities for REALTORS* ("Future of Real Estate Brokerage"), NARFTC 0003656, at 3695; see also *Alternative Models*, at 25.

⁴³ *Future of Real Estate Brokerage*, at NARFTC 0003662; CX 403, *Change is Relentless: An Examination of Key Trends Shaping the Real Estate Industry in 2003* ("Change is Relentless"), at NARFTC 0004232; *Room for Improvement*, at 46 (finding that sellers will do more of the work, but want a significant reduction in the price of the commission to do so).

⁴⁴ *Future of Real Estate Brokerage*, at NARFTC 0003696.

⁴⁵ *Future of Real Estate Brokerage*, at NARFTC 0003696.

firms. There were also some national Limited Service Brokers that grew faster during this time period than they had in the years preceding 1996. Alternative Brokerage Models were estimated to constitute 2% (or less) of the entire housing market in 2003.⁴⁶ By 2005, studies showed that Alternative Brokerage Models had grown to approximately 15% in 2005.⁴⁷ For example, while Limited Service Brokers such as Assist2Sell and Help-U-Sell have been around since the 1970's, they experienced rapid growth from 2000-2006. These two firms alone grew from less than 300 offices to more than 1,400 offices in that period.⁴⁸

34. This development was fueled primarily by both the growth of the housing market and the growth of the Internet. Generally, the housing boom had the effect of shortening the time houses spent on the market and generally raising housing values, which also raised real estate commissions substantially in dollar terms, even while commission rates fell to some extent.⁴⁹ These price increases created greater opportunity for limited service, lower priced firms.⁵⁰ In addition, consumers began to question the price of brokerage services that only a few years ago cost thousands of dollars less for the same services (due to the then-lower price of their home). This forced "full service" brokerages to do more to prove their value to consumers and gave

⁴⁶ *From Homogeneity to Segmentation*, NARFTC 0001905, at 1927 (estimating that Alternative Brokerage Models accounted for less than 2% of all home sales in 2003).

⁴⁷ *Alternative Models*, at 41 (showing sellers selecting models using Flat Fee, Discount, Fee-For-Service, and MLS Listing Only as comprising 15% of housing market in 2005); CX 373, *2006 NAR Buyer & Seller Profile*, at NARFTC 0002075, 2078 (showing that Alternative Brokerage Models constituted approximately 15% of the housing market).

⁴⁸ Murray Interview with Steve Ozonian, Chairman and CEO, Help-U-Sell (Feb. 12, 2007).

⁴⁹ *Real Trends 500* (Murray Consulting 2006); *Real Estate Brokerage: Various Factors May Affect Price Competition*, at FTC 0000337 - 388, 341 - 342.

⁵⁰ For example, on a national average transaction on an existing home in 2006 (Average existing home price, \$268,500 (Economics Department, NAHB - December 2006)), a traditional Listing Broker who received a 3% commission would receive over \$8,000, versus Help-U-Sell which frequently charges a flat fee of between \$1950 - \$3500. Four years earlier when the average price of an existing home that was sold in the country was approximately \$208,400, the difference between the cost of traditional brokerage services and limited service brokerages would have been much less.

Limited Service Brokers an opportunity to grow their business.⁵¹ Further, the housing boom meant that it generally required less effort for sellers to market and sell their homes, which may have increased the attractiveness to consumers of a lower-service, lower-priced brokerage model.⁵²

35. The growth of the Internet also helped spur the growth of Alternative Brokerage Models. The Internet afforded Limited Service Brokers the ability to reach greater real estate professional and housing consumer audiences through electronic feeds of property listings to real estate websites, e-mail marketing, and search engine optimization tools.⁵³ For the first time, the ability to transmit information about listings to consumers was not relegated to mail, fax, newspaper advertising and home books (*i.e.* magazines or soft-cover books that advertise property listings). Also, many firms established Automated Response Systems that allowed consumers to register to receive information direct from a brokerage firm about new listings that became available. This, in turn, enabled firms to establish a real estate brokerage at lower costs than before. In addition, the Internet has allowed many of today's consumers to be much more knowledgeable about the real estate market than in the past, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]⁵⁴

⁵¹ See generally *Alternative Model*, at 41 - 42, 75 - 76 (showing various brokerage models of what was initially selected vs. finally selected, and that sellers would consider using limited service options the next time they sold their home); *Consumer Tsunami*, at 90 (showing sellers wanting to get the best "net amount" from the sale of the home).

⁵² See generally *Alternative Models*, at 41, 54 - 56 (finding that Limited Service Brokers represented 15% of the market and that sellers expected fewer services from Limited Service Brokers).

⁵³ Search engine optimization refers to the practice of optimizing a website's ranking on major internet search engines such as Google and Yahoo!. See Dawley Dep. at 54:20 - 55:6.

⁵⁴ See generally [REDACTED], Goldberg Dep. 21:15 - 21:21 (discussing that consumers are becoming more sophisticated).

36. Several industry publications have suggested that Limited Service Brokers have leveraged an “unexploited or underserved segment” in the market-place in order to gain a foothold: a demand for low-service marketing, particularly from consumers who may consider selling their properties as a FSBO.⁵⁵ These reports have concluded that, “[the Alternative Brokerage] model represents an additional choice for consumers who may be willing to perform some but not all of the tasks involved in selling a home,” and may be able to capture consumers who otherwise would not use brokerage services at all.⁵⁶ These publications are consistent with industry studies that I have performed in the 2002-2006 time period.⁵⁷

37. Although Limited Service Brokers may appeal to sellers who otherwise may choose to sell their home themselves, data and evidence produced in this case suggest that Alternative Brokerage Models put price pressure on traditional brokerage firms.⁵⁸ For example, in its *Future of Real Estate Brokerage* study, the National Association of Realtors® concluded that Limited Service Brokers have “the potential to change the competitive landscape of residential real estate brokerage,” and that they will “put continuing pressure on broker and agent commissions.”⁵⁹ [REDACTED]

⁵⁵ CX 375, *REALTOR Consumed Services Outlook White Paper*, at NARFTC 00001695 (“Consumed Services”); *Future of Real Estate Brokerage*, at NARFTC 0003662, 3696.

⁵⁶ See *Future of Real Estate Brokerage*, at NARFTC 0003662, 3696. (“[Alternative Brokerage] model may be able to capture the FSBO client who would otherwise not choose to use a real estate brokerage.”); CX 375, *Consumed Services*, at NARFTC 0001687, 1694.

⁵⁷ See, e.g., *Room for Improvement*, at 46; *Alternative Models*, at 75 - 76; [REDACTED].

⁵⁸ See CX 303, *Online Marketing: Agents Sound off About How to Combat Discounters*, at DCW 0243 - 0246 (article regarding price pressure from discount brokers); CX 304, *Different levels of Service* (listserv entry regarding commission pressure from flat fee brokers).

⁵⁹ *Future of Real Estate Brokerage*, at NARFTC 0003695; CX 403, *Change is Relentless*, at NARFTC 0004224 (“Online brokerage models or low-service market discounters will put continuing pressure on broker and agent commissions.”); see also CX 375, *Consumed Services*, NARFTC 0001696 (“The rise of the Internet has seen the emergence of [Alternative Brokerage Models] as a significant competitor to full-service brokerages.”).

[REDACTED]⁶⁰ This is true in southeastern Michigan as well, as exemplified by the deposition testimony of Douglas Whitehouse, a partner in the Hannett, Wilson & Whitehouse brokerage firm in southeastern Michigan:

Q: So you would agree that full service brokers are in competition with discount brokers, right?

A: Absolutely. We're in competition with every brokerage.

Q: And they have to find ways to resist the pressure from discount brokers, right?

A: I would say so, yes.

Q: One of the things discount brokers are putting pressure on is the commission rates, right?

A: Um-hum. Yes.⁶¹

[REDACTED]

[REDACTED]⁶²

38. Limited Service Brokers have been able to apply price pressure on full service brokerages [REDACTED]

[REDACTED]⁶³ In a study from 2005, 69% of all sellers were aware of various Alternative Brokerage Models that were available.⁶⁴ [REDACTED]

⁶⁰ [REDACTED]

⁶¹ Whitehouse Dep. at 25:15 - 25:24.

⁶² [REDACTED]

⁶³ See *Alternative Models*, at 29; [REDACTED]

⁶⁴ *Alternative Models*, at 28.

[REDACTED]⁶⁵

39. As discussed above, Alternative Brokerage Models grew through the early 2000s, and survey data shows that they represented 15% of all house sales in 2005.⁶⁶ In 2006, one survey showed that these services still represented approximately 15% of all house sales, however a second survey showed that their market share had dropped to eight percent.⁶⁷ [REDACTED]

[REDACTED]

[REDACTED] While Limited Service Brokers may be a less attractive option in a slowing housing market than they otherwise would be in a strong housing market, they are likely to still be an attractive option in markets where sellers may not have the equity in their home to afford a traditional commission due to low home price appreciation.⁶⁸ As one industry publication concluded,

Alternatively, higher unemployment rates may increase the demand for a lower cost service.... if home prices have declined, sellers may prefer the less expensive [Limited Service Brokers] where they can perform some of the work themselves to sell the house rather than use a full-service brokerage model, which they might have chosen in the past.⁶⁹

The lack of equity in the housing market in southeastern Michigan (due to poor economic

⁶⁵ [REDACTED]

⁶⁶ *Alternative Models*, at 41.

⁶⁷ [REDACTED] CX 373, *2006 NAR Profile of Buyers & Sellers*, at NARFTC 0002075, 2078 (based on charts that limited services represented 17% of all brokerage services, and that FSBOs represented 12% of home sales).

⁶⁸ See generally CX 375, *Consumed Services*, at NARFTC 0001696; *Future of Real Estate Brokerage Services*, at NARFTC 0003697.

⁶⁹ *Future of Real Estate Brokerage Services*, at NARFTC 0003697.

conditions and low home price appreciation)⁷⁰ may therefore provide a fertile ground for the growth of Limited Service Brokers.

V. REALCOMP RULES & OPERATIONS

40. Realcomp operates an MLS in southeastern Michigan. In addition to operating as a clearinghouse for brokers to list and view available homes for sale on its database, Realcomp allows brokers to display MLS listings on their own websites through a mechanism known as an Internet Data Exchange, or "IDX". In other words, Realcomp provides a feed of MLS listing information to its broker-members, such as Weir Manuel Realty, who then post the listings on their own website, thereby allowing consumers to search for available properties for sale on the Weir Manuel website. In addition, Realcomp submits its MLS listings to public real estate websites, including Realtor.com and its own MLS public website, MoveInMichigan.com. MoveInMichigan.com is the exclusive provider of real estate listings to Clickondetroit.com, a public website operated by WDIV Channel 4, a local Detroit television station.

41. In rendering my opinions in this matter, I have relied on my understanding of the following rules and policies of Realcomp:

- a. In the Realcomp MLS, each listing specifies the type of listing agreement (*i.e.*, Exclusive Right to Sell, Exclusive Agency, Limited Service, and MLS-Entry Only) in place between the seller and the Listing Broker, enabling the Realcomp members to know generally the services that may be provided by the Listing Broker to the seller.⁷¹

⁷⁰ See Mincy Dep. at 23:1 - 24:7, 55:14 - 56:6 (discussing downturn in southeastern Michigan real estate market beginning in 2005); Hepp Dep. at 35:19 - 39:4 (noting that Michigan is today a "difficult market" for home sellers).

⁷¹ See, e.g., Kage IH at 121:4 - 121:10; CX 277, *RealSolutions, Solutions and Strategies for MLS Subscribers, June 2003*, at RC893 (requiring disclosure of listing type "ensure[s] that cooperating brokers are made aware of the extent

- b. There is no requirement in Realcomp's rules that a Listing Broker who submits a property to the Realcomp MLS pursuant to an Exclusive Right to Sell listing be compensated by the seller, or the buyer, or at all.⁷²
- c. Every listing in the Realcomp MLS must contain a blanket unilateral offer of compensation to a Cooperating Broker who procures a buyer for the listed property.⁷³ The offer of compensation is "unconditional" except that the Cooperating Broker must be the procuring cause of the sale.⁷⁴ Realcomp does not, and MLSs as a general matter may not, regulate the form or amount of compensation offered by the Listing Broker to Cooperating Brokers (requiring only that there is an offer of compensation).⁷⁵
- d. Realcomp has no rule requiring that a sale made through its MLS involve a Cooperating Broker.⁷⁶ If a Cooperating Broker is involved, however, there is nothing in Realcomp's rules prohibiting that Cooperating Broker from contacting the Listing Broker prior to the time an offer to purchase is written and attempting to negotiate an increase in the cooperative compensation offered on that property,

of the services the listing broker is providing, and any potential for cooperating brokers being asked to provide additional services to the listing brokers' clients, prior to initiating efforts to show or sell the property."); Kage IH at 200:2 - 201:24.

⁷² *Realcomp Admissions*, ¶ 7.

⁷³ *Realcomp Admissions*, ¶¶ 1-3; Nowak Dep. at 14:22 - 14:25; 15:6 - 15:14; Kage Dep. at 33:2 - 34:11 (discussing CX 219); CX 219, *RealSolutions, Solutions and Strategies for MLS Subscribers*, at 1 (providing that "[l]isting commissions [for Cooperating Brokers] are a requirement of [listing in] the MLS.").

⁷⁴ CX 100, *Realcomp Rules*, at RC1346 (providing that offers of compensation "are unconditional except that entitlement to compensation is determined by the Cooperating Broker's performance as the procuring cause of sale (or lease)...").

⁷⁵ CX 100, *Realcomp Rules*, at RC1342. ("Further, the MLS shall not fix, control, recommend, suggest, or maintain the division of commissions or fees between Cooperating Participants or between Participants and non-participant(s).").

⁷⁶ *Realcomp Admissions*, ¶ 17.

regardless of whether the property is listed in the MLS pursuant to an Exclusive Right to Sell, Exclusive Agency, or any other form of listing agreement.⁷⁷

- e. If a broker can demonstrate that they were the procuring cause of a sale, they are entitled to receive the compensation offered by the Listing Broker in the MLS listing.⁷⁸ The Listing Broker, and not the seller, is responsible for paying the award.⁷⁹
- f. FSBO properties cannot appear on the Realcomp MLS.⁸⁰ Each property marketed on the Realcomp MLS must be the result of a signed listing agreement between a broker and a seller, and be submitted to the MLS by a broker who participates in Realcomp.⁸¹
- g. Unless the seller specifically opts-out, each member of the Realcomp MLS is required to submit all of their listings for the sale of real property within Michigan to the MLS.⁸²
- h. All Realcomp members who submit a listing for publication in the Realcomp MLS agree to be bound by the rules of the MLS with respect to that transaction.⁸³ The Realcomp MLS Rules and Regulations state the Listing Broker must compensate the Cooperating Broker who is the procuring cause of sale unless it is determined through arbitration that “through no fault of the Listing Broker and in

⁷⁷ *Realcomp Admissions*, ¶¶ 19-20.

⁷⁸ *Kage IH* at 97:24 - 98:9.

⁷⁹ *Taylor Dep.* at 124:2 - 124:12.

⁸⁰ *Baczkowski Dep.* at 88:21 - 88:24; *Nowak Dep.* at 26:11 - 26:13.

⁸¹ *Realcomp Admissions*, ¶ 5; *Kage Dep.* at 97:21 - 98:19; *Nowak Dep.* at 26:14 - 26:16; *Burke Dep.* at 42:2 - 42:4.

⁸² *CX 100, Realcomp Rules*, at RC1340 - 41; *Burke Dep.* at 25:5 - 25:14; *Nowak Dep.* at 26:17 - 26:21.

⁸³ *Kage Dep.* at 17:5 - 17:18; *CX 210, Realcomp II Ltd. Application for Participation*, at RC1393; *CX 100*,

the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the Listing Broker to collect a commission pursuant to the listing agreement.”⁸⁴

- i. Every Realcomp member pays the same membership dues and fees for access to the MLS, the right to post listings on the MLS, and the services of the MLS, regardless of the type of listing agreements they enter into with sellers.⁸⁵
- j. Realcomp does not include information specifying the type of listing agreement in place between the seller and the Listing Broker among the data that it transmits to the public real estate websites.⁸⁶ Thus, a buyer searching for homes in Realcomp’s geographic area on the Internet does not know whether the seller is represented under an Exclusive Right to Sell listing, an Exclusive Agency listing, or any other sort of listing agreement.⁸⁷

42. The particular policies that are being examined are two Realcomp rules and/or policies. The first policy is referred to as a “Search Function Policy.” Realcomp adopted an automatic default in its MLS system to search for only those listings designated as an Exclusive Right to Sell listing (or unknown).⁸⁸ A Realcomp broker who wants to see all listings on the Realcomp MLS must manually change the search parameters each time he or she runs a new search so as to see listings that are designated Exclusive Agency, Limited Service or MLS Entry

Realcomp Rules, at RC1340; *Realcomp Admissions*, ¶ 6.

⁸⁴ CX 100, *Realcomp Rules*, at RC1346, 1355 – 56 (emphasis added); Kage Dep. at 37:24 - 38:9.

⁸⁵ *Realcomp Admissions*, ¶ 28; Kage Dep. at 22:4 - 22:19. Notably, as discussed in Paragraphs 42 and 43, Realcomp, through its Rules and Policies, does not extend all of its services to all types of listing agreements.

⁸⁶ *Realcomp Admissions*, ¶ 9.

⁸⁷ *Realcomp Admissions*, ¶ 10.

⁸⁸ Kage IH at 72:7 - 72:17.

Only.⁸⁹

43. The Second Policy being examined is referred to as the “Web Site Policy” and it has two components:

- a. First, Realcomp will not distribute Exclusive Agency, Limited Service or MLS Entry Only listings to public real estate websites that advertise information on property listings, including Realtor.com, MoveInMichigan.com, and ClickonDetroit.com;⁹⁰
- b. Second, Realcomp will not include Exclusive Agency, Limited Service, or MLS Entry Only listings in its IDX feed of Realcomp listings to participating Realcomp broker websites, called “IDX Websites” (e.g., www.weirmanuel.com).⁹¹

IV. SIGNIFICANCE OF THE MLS IN BROKERS’ ABILITY TO COMPETE EFFECTIVELY

44. As mentioned earlier, the MLS is a single, comprehensive source of information about homes for sale within a given geographic area (exclusive of FSBO’s) that can be viewed and searched by all other brokers who practice in the area and participate in the MLS.⁹² The general public cannot list their home on the MLS – or search the MLS for a home – without using a real estate broker who is a member of the particular MLS.

45. The MLS allows brokerage firms to “better serve” their clients by providing a platform where brokers can share information on properties that they have listed for sale, publishing offers of compensation to Cooperating Brokers, and by creating rules governing how

⁸⁹ Kage IH at 72:15 - 74:1 (describing search default to Exclusive Right to Sell listings (and unknown)).

⁹⁰ CX 100, *Realcomp Rules*, at RC1341; Kage Dep. at 9:12 - 9:20.

⁹¹ CX 100, *Realcomp Rules*, at RC1361; Kage Dep. at 13:25 - 14:11.

⁹² Niersbach Dep. at 130:14 - 130:22.

brokers will work and cooperate.⁹³ The MLS is the only marketing tool that provides rules for an orderly transaction between brokers representing buyers and sellers, and it is the only system for publishing unilateral offers of compensation.⁹⁴

46. As one industry publication has noted, “For consumers, one of the real estate industry’s greatest assets is the multiple listing service as a source of accurate up-to-date information on local real estate market.”⁹⁵ In fact, the MLS is a “potent tool” that serves buyers and sellers equally.⁹⁶ For home buyers, the MLS allows the Cooperating Brokers that they work with to perform one computer search to gain access to all or almost all of the listings of MLS participants in order to find homes that meet their housing needs.⁹⁷ Listings on the MLS are particularly appealing to Cooperating Brokers because each listing carries with it an offer of compensation to brokers who successfully procure a buyer that is backed by the rules of the MLS.⁹⁸

47. For home sellers and the Listing Brokers they work with, the MLS provides their home with exposure to the thousands of Cooperating Brokers who are working with buyers in

⁹³ *Respondent’s Responses and Objections to Petitioner’s First Set of Interrogatories*, at 4 (“the purpose of a multiple listing service is to provide a means by which authorized participants make blanket unilateral offers of compensation to other authorized participants, and a mechanism for enhancing cooperation among participants.”); CX 380, *Discussion Paper: Future of the MLS*, at NARFTC 0003725 (2006).

⁹⁴ Niersbach Dep. at 27:2 - 27:9; 48:1 - 48:24.

⁹⁵ CX 403, *Change is Relentless*, at NARFTC 0004226.

⁹⁶ CX 380, *Discussion Paper: Future of the MLS*, at NARFTC 0003725.

⁹⁷ Taylor Dep. at 43:6 - 43:10; CX 100, *Realcomp Rules*, at RC1340. Brokers in southeastern Michigan have described the experience of a seller opting out of listing their home on the MLS as rare. See Cooper Dep. at 64:6 - 64:8 (Q.: “In over thirty years of practicing real estate, you’ve never had a listing that wasn’t on the MLS? A.: That is correct.”); Taylor Dep. at 41:11 - 42:14.

⁹⁸ Kage Dep. at 34:16 - 38:9 (discussing CX 220, *Straight Talk February 2007: The Purpose of an MLS*, and identifying the blanket unilateral offer of compensation associated with each listing in the MLS as one of the “most important” features of an MLS that distinguishes it from other methods of publicizing listing data).

their home search.⁹⁹ Before the MLS, home sellers generally had their listings available only to the buyers who contacted their own broker or brokerage company. Having their listings on their local MLS therefore dramatically increases the Listing Broker's marketing reach.¹⁰⁰

48. In addition, the ability of a Listing Broker to expose a property on the MLS is important to their ability to compete against other brokers in obtaining a listing agreement with a potential client who is looking to sell a home. Although some consumers are not aware of the MLS, most consumers understand the importance of the MLS and want their homes listed on the MLS. In a 2005 study, over 72% of sellers using brokers to sell their home reported that they expected to have their home listed on the MLS.¹⁰¹ [REDACTED]

[REDACTED]¹⁰²

49. The significance to brokers of participating in the MLS is reflected in the fact that 88% of all sellers in 2006 reported that their homes were listed on an MLS.¹⁰³ In fact, the first thing brokers typically do after agreeing to represent a new client is, if acting as a Listing Broker, post the seller's property on the MLS, or if acting as a Cooperating Broker, search the MLS for homes matching the buyer's criteria.¹⁰⁴

⁹⁹ Baczkowski Dep. at 20:10 - 21:1; Cooper Dep. at 29:1 - 29:8.

¹⁰⁰ As several real estate professionals in southeastern Michigan have testified in this case, "all real estate is local." Elya Dep. at 15:12 - 16:17; Cooper Dep. at 29:1 - 29:6, 64:23 - 64:24; *see also* Taylor Dep. at 6:15 - 7:14, 10:12 - 11:3; Baczkowski Dep. at 40:12 - 41:1. Because "all real estate is local," it is important for brokers to belong to their local MLS so that they can reach the local brokers practicing in their area. *See* Taylor Dep. at 15:22 - 16:25, 17:1 - 17:5.

¹⁰¹ *Alternative Models*, at 56 (75% all sellers using traditional model expected to have their home listed on the MLS, and 72% of sellers using alternative brokerage models expect to have their home listed on the MLS).

¹⁰² [REDACTED]

¹⁰³ CX 373, *2006 NAR Profile of Buyers & Sellers*, at NARFTC 0002075.

¹⁰⁴ Sweeney Dep. at 36:6 - 36:13 (testifying that one of the first things a broker does at his firm is to enter listing into MLS in order to expose the listing "to the largest number of people possible so that we can procure a buyer. That's our responsibility to the seller."); Sweeney Dep. at 36:6 - 36:19 (testifying that the first thing typically done when representing a buyer, after learning of their housing needs, is to search the MLS).

50. The MLS is a significant tool in a broker's ability to compete effectively because it exposes a seller's home to the thousands of brokers participating in the MLS who may be working with buyers interested in purchasing that home.¹⁰⁵ Exposure of a home for sale to potential buyers is "key" to being able to match a willing seller and a willing buyer.¹⁰⁶ As described by one broker in southeastern Michigan, a listing on the MLS provides "the best exposure" for a property.¹⁰⁷ Providing less exposure for a home can have significant detriments. As recognized by one broker in southeastern Michigan, less exposure of a home:

It means less price, more marketing time, more expenses involved, lower price on your home, more days on the market, more carrying costs; in other words, it's more expensive for everybody concerned.¹⁰⁸

51. The MLS is also significant to the ability of brokers to compete effectively because it "levels the playing field" between large and small brokers.¹⁰⁹ Without the MLS, smaller brokerages would have to contact individually each of the hundreds or thousands of brokerage firms to obtain information about those firms' listings in order to share the listings with their buyer clients, and to provide information about their own listings to those brokers. This would have to be done repeatedly so as to account for new homes being sold or being put on

¹⁰⁵ Likewise, the MLS provides a broker working with buyers the exposure of all the broker listings for sale that might meet their client's housing needs. *See* Smith Dep. at 19:18 - 20:13 (describing one of the benefits of the MLS as providing an "instant inventory" of properties to show to clients and attempt to earn commissions).

¹⁰⁶ *See* Sweeney Dep. at 36:14 - 36:15 (agreeing that exposure is "key" to selling a home); *see also* Niersbach Dep. at 25:5 - 25:8; Brant Dep. at 37:13 - 38:23.

¹⁰⁷ Kersten Dep. at 24:4 - 24:9; Hardy Dep. at 78:6 - 78:10 (admitting that for a real estate agent to be effective, they need to put listings on an MLS).

¹⁰⁸ Gleason Dep. at 123:8 - 124:4 (discussing impact of less exposure in the context of Internet marketing, but testifying that "the same principle" applies to exposure on the MLS); *see also* Hardy Dep. at 77:15 - 77:18 (admitting that all things equal, "greater exposure leads to a quicker sale"); Brant Dep. at 58:18 - 59:9 (testifying that the likelihood of a successful sale of a property increases with increased exposure of the property to prospective buyers and to agents representing those buyers).

¹⁰⁹ Sweeney Dep. at 81:8 - 82:8 (discussing RX 110, *Thoughts Regarding Our MLS*, at MCAR0000419 ("MLS would advantage the small brokers considerably more than the larger brokers by giving the small brokers access to a considerably larger base of listings than they would have had without the MLS.")).

the market for sale. These transaction costs would be cost prohibitive for all but the largest of brokerage firms, which would have a large stock of their own listings and be able to primarily offer those listings to their buyer clients. The MLS thereby allows buyers and sellers the ability to choose smaller brokerages without being at a disadvantage to those buyers and sellers who work with larger brokerages.¹¹⁰

52. The MLS is so competitively advantageous to brokers that it is used across the country. To my knowledge, there are only two major metropolitan areas in the United States that lack a local MLS: New York City and the Hamptons area of Long Island, New York. These geographic areas have never had an MLS in their histories, and are generally more concentrated than most with the largest 3-4 brokerage firms controlling upwards of 60% of all listings.¹¹¹ Every other metropolitan area ranked in the nation's largest 250 markets that I am aware of has at least one MLS.

53. In fact, every major brokerage firm ranked in the *REAL Trends 500* belongs to at least one MLS, with the exception of firms with offices in New York City or the Hamptons.¹¹² The majority of national brokerage franchises, including RE/MAX, Keller Williams, Prudential Real Estate Affiliates, Realty Executives and Help-U-Sell require their affiliated members to belong to the MLS in the local geographic areas where they operate. Other national brokerages such as Century 21, Coldwell Banker, ERA and Sotheby's International Real Estate used to require MLS membership of all of their franchisees and affiliates, but were compelled to drop

¹¹⁰ Niersbach Dep. at 130:23 - 131:1.

¹¹¹ These brokers had developed means prior to the Internet and online listings for sharing data with each other outside of a formal MLS.

¹¹² The *REAL Trends 500* ranks the nation's top 250 real estate firms, and the top 250 up-and-coming real estate firms.

this condition due to the presence of their affiliates operating in and around New York City and the Hamptons.¹¹³

54. The significance of the MLS to a broker's ability to compete effectively is even stronger in geographic areas where, like southeastern Michigan, there are a large number of small brokerage firms.¹¹⁴ In southeastern Michigan, numerous brokers and the executives of the local Associations of Realtors® have testified that the Realcomp MLS provides significant competitive advantages to its broker members and their clients. For example:

- An Association executive of one of the Realcomp Shareholder Boards testified that it is "very difficult to sell" a home not listed in an MLS.¹¹⁵
- According to Karen Kage, Realcomp's CEO, "the most important features that separate the MLS from mainstream advertising options have to do with: 1) the accuracy and timeliness of the property database that is created and maintained by Realtors for Realtors and 2) the inclusion of a blanket unilateral offer of compensation to Realtors for every listing in the MLS."¹¹⁶
- An executive of a local Association of Realtors® testified that it is important for a seller to have their listing in the Realcomp MLS because the seller receives "immediate availability and access to all the Realtors in the southeastern Michigan area that are subscribers to the system to be able to immediately see that their property is available, and if they have customers or clients to be able to show it to them."¹¹⁷
- A former member of Realcomp's Board of Governors testified that Realcomp members want their listings on the Realcomp MLS because it provides exposure of property listings to the almost 15,000 members.¹¹⁸

¹¹³ Murray Interviews with Richard Smith, Vice Chairman & President of Realogy, David Satori, Senior Vice President of Marketing of Realogy, and Sherri Chris, Chief Operating Officer of Coldwell Banker (February 28 – March 2, 2007).

¹¹⁴ In diverse markets, the MLS enables smaller brokerages to compete effectively with larger brokerages because they are able to access all of the MLS participants' listings when they represent buyers, and disseminate their listings to all participating brokers when they represent sellers. Niersbach Dep. at 130:23-131:20.

¹¹⁵ Smith Dep. at 87:18 - 88:11.

¹¹⁶ Kage Dep. at 34:16 - 38:9 (discussing CX 220, *Straight Talk February 2007: The Purpose of an MLS*).

¹¹⁷ Baczkowski Dep. at 20:10 - 20:23.

¹¹⁸ Nowak Dep. at 26:22 - 27:4.

- As one of Realcomp's Governors admitted, not putting a listing on the MLS "would be like tying my hands behind my back."¹¹⁹

55. The value of an MLS increases with the more listings it has because that increases the likelihood that brokers will be able to match a willing buyer with a willing seller.¹²⁰ An MLS with few listings is of little benefit; [REDACTED]

[REDACTED]

Brokers generally will avoid participating in more than one MLS if possible.¹²²

56. For example, one broker in southeastern Michigan described his belonging to more than one MLS as "burdensome" and that it imposed a "significant cost only to be incurred if necessary."¹²³ This broker's views were shared by other brokers in southeastern Michigan – there were significant efforts to merge the two MLSs operating in southeastern Michigan in order to, in large part, eliminate the costs associated with belonging to more than one MLS.¹²⁴ The costs of participating in more than one MLS include the payment of multiple MLS user and office fees; duplication of efforts in terms of data entry, system access and training sessions; having to perform multiple searches over the same geographic area on behalf of buyers; learning

¹¹⁹ Elya Dep. at 35:25 - 36:10.

¹²⁰ Elya Dep. at 28:23 - 29:4 (the more agents and brokers on an MLS the better it is for a home seller because more potential agents representing buyers will see the listing); Brant Dep. at 37:13 - 38:23; Smith Dep. at 109:19 - 110:7.

¹²¹ [REDACTED]

¹²² Brokers may belong to more than one MLS if there are two MLSs that have overlapping service areas and membership in both MLSs is necessary to reach all of the relevant brokers in the area, or because a broker's service area expands past the geographic area covered by one MLS. Both of these situations appear to exist for some brokers in southeastern Michigan. See Williams Dep. at 14:4 - 14:18.

¹²³ Sweeney Dep. at 17:10 - 17:16, 19:19 - 20:16.

¹²⁴ *Realcomp Admissions*, ¶ 45; Sweeney Dep. at 19:19 - 20:16 ("There were two MLSs in existence at that time, and we were trying to merge those MLSs or force the MLSs together so that our agents wouldn't have to pay two fees every month, do double data entry every month."). As another example, an entire brokerage - SKBK Sotheby's International - decided to drop its membership in a second MLS because "the agents were tired of paying dual fees." Gleason Dep. at 86:7 - 86:15.

different terms and terminology; and following multiple policies, rules and data display requirements.¹²⁵

57. A Listing Broker whose properties were not displayed on an MLS would be at a significant competitive disadvantage to those brokers whose properties were listed on the MLS. A Listing Broker whose properties were not displayed on an MLS would be limited to their own efforts, and those of their agents and employees, in attempting to procure a buyer for the property. In other words, Listing Brokers could no longer count on the thousands of other participating brokers who may be working with buyers to help find a buyer that would be interested in purchasing their seller's home. Not having listings displayed on an MLS would also disadvantage the Listing Broker's ability to obtain listing agreements with potential new seller/clients once this limitation on their ability to expose their property on the MLS was made known.¹²⁶ I understand that Dr. Darrell Williams of LECG has concluded that brokers in certain geographic areas in southeastern Michigan must belong to the Realcomp MLS in order to compete effectively. This conclusion is consistent with my review of the evidence and my understanding of the real estate industry.¹²⁷

¹²⁵ CX 380, *Discussion Paper: Future of the MLS*, at NARFTC 0003726; Mincy Dep. at 56:10 - 57:20 (estimating time spent double listing properties at approximately two weeks per year); D. Moody Dep. at 48:6 - 49:2 (estimating 10.97 work weeks per year spent double listing properties).

¹²⁶ See Mincy Dep. at 60:8 - 62:21; Hepp Dep. at 42:9 - 44:7.

¹²⁷ While there are other MLS's adjacent to Realcomp, I do not know of any effective alternatives that provide the geographic coverage or membership size that is offered by Realcomp. See e.g., Nead Dep. at 13:10 - 13:16 (Coldwell Banker Preferred office is a member of Realcomp MLS but not MiRealSource because "That's Macomb County. I'm not even sure how to get to most of the places in Macomb County. We don't go that far. I mean, that's a ways."); Bowers Dep. at 8:1 - 8:13 (Realcomp Governor who only belongs to the Realcomp MLS, not MiRealSource because "they're pretty much concentrated on the east side of Detroit, if at all, and the eastern suburbs and that is an area that is probably underserved by our firm."); Rademacher Dep. at 9:5 - 9:10 (Keller Williams brokerage in Brighton, Michigan only belongs to the Realcomp MLS); Nowak Dep. at 16:20 - 17:10 (Prudential Great Lake Realty only belongs to the Realcomp MLS); Brant Dep. at 30:19 - 31:9 (Realcomp MLS and MiRealSource operate in different geographic areas; MiRealSource does not service Livingston County).

58. Realcomp has implemented a "Search Function Policy," which operates as a system-wide default on its MLS listing search function so that, unless a broker actively changes the default, their property search will exclude Exclusive Agency, Limited Service and MLS-Entry Only listings. In all of my MLS-related consulting services, including reviewing over 12 MLS technology systems, I have never encountered a search function that defaulted in a systemic way to exclude certain types of listings from view.¹²⁸ Indeed, such a rule appears to be directly contrary to one of the central benefits of an MLS: to include as many listings as possible for its members to search in order to match willing buyers and sellers.¹²⁹

59. Consistent with the Search Function Policy, I understand that there is evidence that Exclusive Agency, Limited Service and MLS-Entry Only listings are not being viewed or e-mailed as often as Exclusive Right to Sell listings.¹³⁰ If so, Listing Brokers using those types of listings would be disadvantaged in their ability to compete effectively and find buyers for their clients' homes.¹³¹ In addition, Listing Brokers would be competitively disadvantaged in their

¹²⁸ In contrast, I have seen MLS systems that allowed individual brokers to set personal defaults, typically based on geographic region. I note that Ryan Tucholski testified that while he was the director of the MLS of the Toledo Board of Realtors, the MLS had a search default that excluded properties being sold by auction, but that they had "horrible" results with brokers not finding properties excluded by the default and after receiving complaints from brokers, changed the search default. Tucholski Dep. at 22:6 - 23:7.

¹²⁹ Elya Dep. at 28:4 - 29:23; Hardy Dep. at 78:1 - 79:24 (the more listings an MLS has, the better).

¹³⁰ I understand that Dr. Darrell Williams of LECG discusses this evidence in his expert report. See also CX 228, *Respondent Objections and Responses to Petitioners Second Set of Interrogatory Responses*, at 6 - 7 (chart showing non-Exclusive Right to Sell listings are viewed by agents only one-fifth as frequently as Exclusive Right to Sell listings, and are e-mailed only once on average, versus an average of 286 times for Exclusive Right to Sell listings); G. Moody Dep. at 34:3 - 35:17; Hepp Dep. at 79:4 - 81:10 (discussing RX 41, *Chargeback Notification*).

¹³¹ I note that the search default appears easy to change, provided that individual brokers are aware of the search default. I understand that Realcomp contends that its Search Function Policy is discussed as part of its 2-hour training session for new members; however, information about the Search Function Policy does not appear in Realcomp's training manual on how to use its system, and there is evidence that Realcomp was aware that not all of its members understood and knew about the policy. Kage Dep. at 131:12 - 133:18 (discussing CX 249, *Realcomp Online Training Manual*); CX 250, *Realcomp II Ltd. Board of Governors Meeting Agenda August 26, 2005*, at MV0098 (listserve posting of Realcomp broker, apparently offering unbundled services, complaining that only Exclusive Right to Sell listings were being viewed by brokers unaware of the Search Function Policy); Kage Dep. at 133:23 - 138:19 (discussing CX 250). Indeed, there is an appreciable risk that brokers would be unaware of an unwritten policy because there is a lot of turnover in the real estate brokerage industry, including in southeastern

ability to compete effectively in obtaining listing agreements with potential clients looking to sell their homes once this policy was disclosed and sellers learned that their property may not have the widest exposure possible through the MLS because of the Search Function Policy.¹³² This could thus hinder Limited Service Brokers from being able to expand their business, particularly if they are new to the market and have not yet built up a strong referral base (of prior clients who refer their services to friends and family).¹³³

V. SIGNIFICANCE OF THE INTERNET AND IDX FEEDS IN BROKERS' ABILITY TO COMPETE EFFECTIVELY

60. The Internet has revolutionized the way consumers can research the housing market and locate properties that fit their housing needs. This has affected the way the real estate industry now markets homes and communicates with buyers and sellers. In short, the Internet has changed the way the real estate industry operates.¹³⁴

61. Historically, MLS listings were made available only in books that were regularly updated and located in the Cooperating Broker's office. With the advent of computers, MLS listings could be searched through computer terminals and kept more easily up to date. Both of

Michigan. See, e.g., Kage IH at 10:8 - 10:14; Kage Dep. at 45:13 - 46:3; Bratt Dep. at 84:14 - 85:17; CX 219, *RealSolutions Newsletter May 2004*, at 3 (monthly newsletter welcoming 41 new members to Realcomp).

¹³² Aronson Dep. at 28:7 - 30:12; Hepp Dep. at 42:9 - 44:7 (testifying that flat-fee brokerage experienced less growth within Realcomp's service area because of "negative word of mouth advertising," attributed to Realcomp's restrictions, including the "default search criteria"); Mincy Dep. at 60:8 - 62:21 (discussing loss of potential clients and other difficulties in obtaining listings when sellers learn about the Search Function Policy).

¹³³ See Mulvihill Dep. at 71:6 - 72:10 (testifying that "90 some percent of my business comes through the referral network I've created," which took "four or five years" to develop, whereas "a new agent is able to generate much, much less" referral business); Elya Dep. at 25:19 - 26:21; Mincy Dep. at 34:13 - 36:4 (noting the importance to Limited Service Brokers of satisfied customers in "growing the referral business"). Nearly three quarters of sellers rely on referrals from friends, neighbors or relatives, or their previous experience with a particular agent, when they select a broker to sell their home. CX 373, *2006 NAR Profile of Buyers & Sellers*, at NARFTC 0002072. Put simply, happy customers lead to more referrals and a growing business.

¹³⁴ According to the Pew Internet & American Life Project, the share of Internet users among adult Americans reached 73% in April 2006 an increase from 66% in January 2005.

these options, however, required buyers to visit the Cooperating Broker's office to search through the MLS listings, or else required the Cooperating Broker to search the listings and courier or fax possible matches to their buyers. The development of the Internet has revolutionized this process. Since the late 1990s, prospective home buyers – in the comfort of their own home and at any time of day or night that is convenient to them – can research homes for sale by using public real estate websites that contain MLS listing information.

62. Although these websites do not provide all of the listing information that is on the MLS, such as information about offers of compensation and agent remarks, real estate websites do provide key information that consumers want.¹³⁵ Industry surveys of home buyers confirm that buyers are using the Internet as an integral part of their home search.

A. Usage of Real Estate Websites & Their Benefits to Consumers

63. The “typical buyer is now the Internet buyer.”¹³⁶ In 2006, 80% of all home buyers -- 83% of first time buyers and 78% of repeat buyers -- used the Internet in their search for a home, primarily to learn about properties for sale.¹³⁷ This number was only surpassed by the number of home buyers using a real estate agent (85%).¹³⁸ At least 57% of buyers reported searching for homes on the Internet “frequently,” with an additional 19% of buyers searching the

¹³⁵ The Internet is not a substitute for the MLS, whose rules (including guarantees of offers of compensation) still govern broker transactions that are advertised on the Internet. The MLS is as relevant today as it was 20 years ago. Niersbach Dep. at 48:1 - 48:11 (MLS is still relevant today because “there are as many or more firms in the marketplace and it’s still the most effective way to find a home.”).

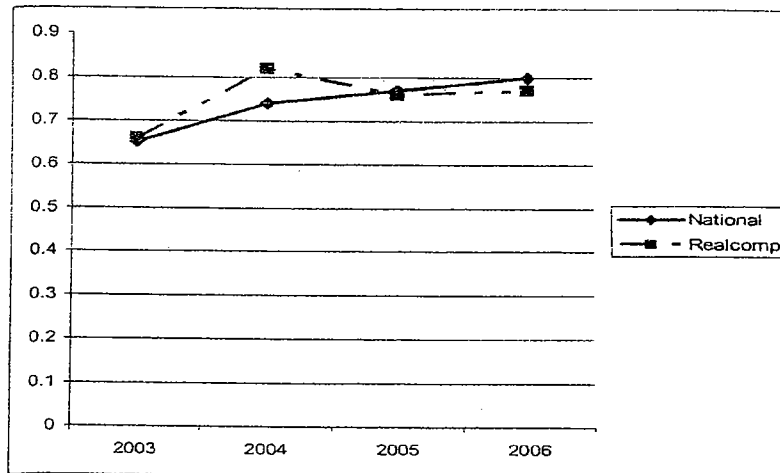
¹³⁶ *Internet Buyer vs. Traditional Buyer*, at NARFTC 0003771. See also *Future of Real Estate Brokerage*, at NARFTC 0003667.

¹³⁷ CX 373, *2006 NAR Profile of Home Buyers & Sellers*, at NARFTC 0002032, 2041 (96% of these buyers used the Internet to search for properties).

¹³⁸ CX 373, *2006 NAR Profile of Home Buyers & Sellers*, at NARFTC 0002032. Other than a real estate agent, the Internet was used by buyers more than any other information source in their home search: Yard sign (63%); Print media (55%); Open house (47%); Home book or magazine (34%); Home builder (26%); Television (11%); Billboard (9%); and Relocation company (5%).

Internet “occasionally.”¹³⁹ Data collected by the National Association of Realtors® suggest that the use of the Internet to search for homes by buyers within Realcomp’s service area is consistent with national statistics. The following graph illustrates the percentage of buyers who used the Internet in their home search nationally and in Realcomp’s geographic area:

Percentage of Buyers Who Used the Internet in Their Home Search¹⁴⁰



64. Data on the usage of real estate websites collected by comScore Media Metrix, the leading reporter of website statistics, also shows the growth of consumers using real estate websites.¹⁴¹ In December 2002, Media Metrix reported that over 21 million people visited real estate websites, spending more than a cumulative total of 294 million minutes on those sites for the month of December.¹⁴² By December 2006, these numbers had skyrocketed to over 31

¹³⁹ CX 373, 2006 NAR Profile of Home Buyers & Sellers, at NARFTC 0002034.

¹⁴⁰ SOURCE: NAR Profile of Buyers & Sellers, 2003-2006; Survey responses to NAR Profiles of Home Buyers & Sellers (2003-2006) received from zip codes beginning with 480-, 481-, 482-, 483-, and 484-.

¹⁴¹ Goldberg Dep. at 105:10 - 105:16 (describing comScore Media Metrix as the “gold standard” of website statistics); see also CX 368 (comScore Media Metrix methodology for reporting website statistics).

¹⁴² CX 609 (December 2002). The “Vertical Network” statistics represent the usage on all public real estate websites except those that receive only a negligible amount of hits. Goldberg Dep. at 110:20 - 111:12.

million people visiting real estate websites and spending more than a cumulative total of 1.2 billion minutes on those sites for the month of December.¹⁴³

65. In particular, buyers “are looking for one web site to search for comprehensive, accurate, up-to-date listings for the entire geographic area.”¹⁴⁴ As described by one industry publication, “More listings increase the amount of time potential buyers spend on a real estate site and increases the likelihood of them finding a home that they would like to purchase.”¹⁴⁵ A website that is user-friendly and contains a comprehensive set of listings in the relevant geographic area benefits both buyers and sellers.¹⁴⁶ It allows buyers to be more efficient in their property search by being able to focus their search on a few websites,¹⁴⁷ which in turn provides more exposure of sellers’ homes and thereby increases the chances that their homes will be sold.¹⁴⁸

66. [REDACTED]

[REDACTED]⁴⁹ The value of the Internet to home buyers has been increasing, mostly at the expense of newspapers. [REDACTED]

[REDACTED]

¹⁴³ CX 609 (December 2006).

¹⁴⁴ CX 403, *Change is Relentless*, at NARFTC 0004224.

¹⁴⁵ *Future of Real Estate Brokerage*, at NARFTC 0003668.

¹⁴⁶ Baczkowski Dep. at 38:7 - 38:9, 115:19 - 116:1 (“The site that a consumer feels they can go to get the most information as easily as possible is typically a site that they will go back to.”); Baczkowski Dep. at 39:4 - 39:7 (the best websites have the most “people viewing and the most staying there and looking at information”).

¹⁴⁷ Goldberg Dep. at 74:1 - 74:15 (websites with more listings “definitely” meet consumer demand better than websites with less complete listings because buyers are able to be more efficient in their search by going to just one website).

¹⁴⁸ Goldberg Dep. at 75:1 - 75:10 (discussing how a website where consumers spend a lot of time is beneficial to sellers because there is more exposure to their listings).

¹⁴⁹ [REDACTED]

[REDACTED]¹⁵⁰ This trend is increasingly apparent with younger buyers – the future of real estate.¹⁵¹

67. The Internet as a real estate marketing tool has grown in popularity because buyers find it useful. Specifically, 73% of buyers in 2006 rated the Internet as a “very useful” information source, with an additional 25% of buyers rating the Internet as “somewhat useful” – which was even higher than the ratings for real estate agents and far more than any other source of information.¹⁵² Buyers have reported that, as a result of their Internet search, they have driven by or viewed a home, walked through a home, found an agent, requested more information about a property, and even pre-qualified for a mortgage online.¹⁵³ In fact, 24% of all buyers in 2006 first learned about the home they ultimately purchased on the Internet, an increase from 2% in 1997.¹⁵⁴ By way of comparison, 36% of buyers in 2006 first learned about the home they purchased from their real estate agent, down from 50% in 1997; and only 15% of buyers in 2006 first found their home based on a yard sign.¹⁵⁵

68. Data collected by the National Association of Realtors® suggest that the usefulness of the Internet to search for homes by buyers within Realcomp’s service area is consistent with national statistics. For example, the following graph shows the percentage of buyers, nationally and in Realcomp’s geographic area, who found their home on the Internet:

¹⁵⁰ [REDACTED]

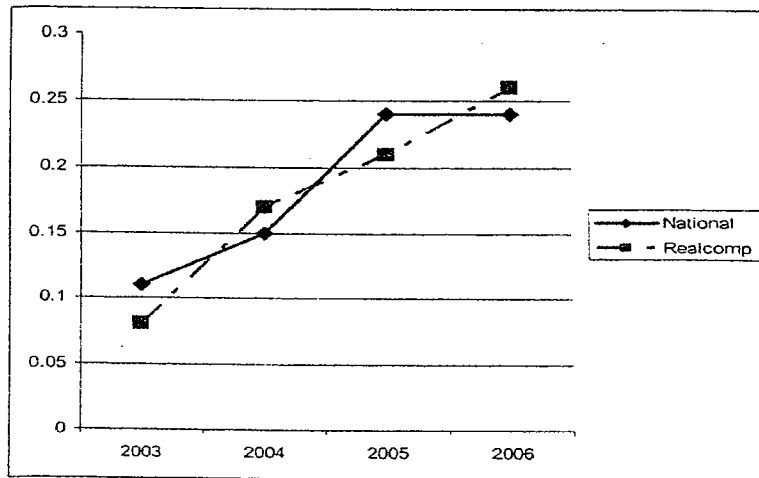
¹⁵¹ [REDACTED]; CX 373, 2006 NAR Profile of Buyers & Sellers, at NARFTC 0002034 (showing that 69% of buyers under 44 use the Internet to search for homes frequently, as compared to 49% of those aged 45 - 64 years, and 21% of buyers who are 65 years of age or older).

¹⁵² CX 373, 2006 NAR Profile of Buyers & Sellers, at NARFTC 0002033. After the Internet, buyers reported the following sources as “very useful”: Real estate agent (69%); Yard sign (31%); Open house (22%); Print newspaper advertisement (20%); Home builder (15%); Home book or magazine (11%); Billboard (3%); Television (3%); and Relocation company (2%). *Id.*

¹⁵³ CX 373, 2006 NAR Profile of Buyers & Sellers, at NARFTC 0002035.

¹⁵⁴ CX 373, 2006 NAR Profile of Buyers & Sellers, at NARFTC 0002036.

Percentage of Buyers Who First Found The Home They Purchased on the Internet¹⁵⁶



69. The Internet is a useful tool for consumers – particularly those websites with a comprehensive set of up-to-date listing information – because it allows far more property information to be displayed and searched than any prior marketing tools available to real estate professionals or consumers. Multiple photos, virtual tours, open house notices, mapping tools, comparable sales data, satellite imagery and other means of displaying information about houses and neighborhoods are all tools that are desired by consumers and are easily available on the Internet.¹⁵⁷ There are also tools that immediately connect an interested buyer with the Listing Broker, and to automatically alert buyers and sellers about new properties on the market, price changes to existing listed homes and other features that were not available before the Internet. The information on the Internet – particularly if the information is supplied by MLSs – is also more likely to be accurate and up-to-date than listings advertised in print media, which in some

¹⁵⁵ CX 373, 2006 NAR Profile of Buyers & Sellers, at NARFTC 0002036.

¹⁵⁶ SOURCE: NAR Profile of Buyers & Sellers, 2003-2006; Survey responses to NAR Profiles of Home Buyers & Sellers (2003-2006) received from zip codes beginning with 480-, 481-, 482-, 483-, and 484-.

circumstances, cannot be changed for days or even weeks. In sum, the Internet has become an “essential tool” in the home buying process.¹⁵⁸

70. Significantly, the data does not support a contention that buyers or sellers are using the Internet as a means to avoid using a real estate agent. In fact, 87% of buyers who used the Internet to search for homes also used a real estate agent as compared to only 74% of buyers who did not use the Internet.¹⁵⁹ Additionally, 81% of those who used the Internet in their home search actually purchased their home through a broker, as compared to only 63% of buyers who did not use the Internet to search for homes.¹⁶⁰ Data collected by NAR from Realcomp’s geographic area is also consistent with these national statistics, although there is less of a discrepancy between Internet and non-Internet users who purchased their home through a broker. The following chart shows the percentage of Internet and non-Internet users who purchased their home through a broker both nationally and in Realcomp’s geographic area:

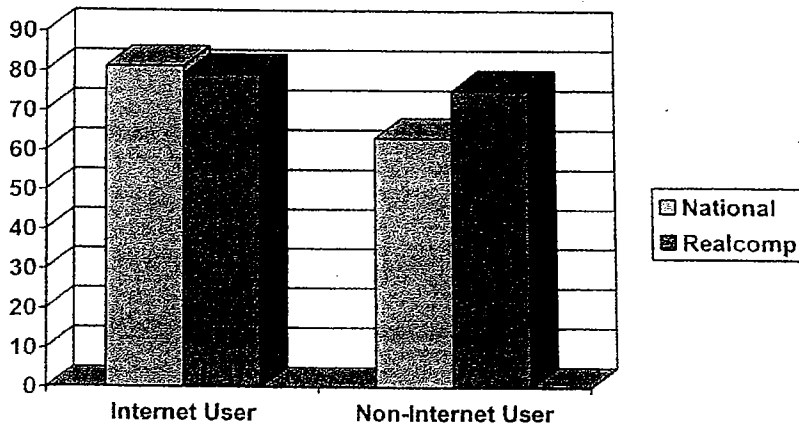
¹⁵⁷ CX 373, *2006 NAR Profile of Buyers & Sellers*, at NARFTC 0002042.

¹⁵⁸ *Internet vs. Traditional Buyer*, at NARFTC 0003771 - 3772.

¹⁵⁹ CX 373, *2006 NAR Profile of Buyers & Sellers*, at NARFTC 0002039.

¹⁶⁰ CX 373, *2006 NAR Profile of Buyers & Sellers*, at NARFTC 0002040.

Percentage of Buyers Who Purchased Home Through Broker¹⁶¹



B. Benefits to Brokers of Internet Marketing

71. Marketing properties on the Internet has become a significant factor in a broker's ability to compete effectively because, first and foremost, it is where buyers are searching for homes for sale, even before they meet with a broker.¹⁶² As discussed above, sellers generally "want to have the widest possible exposure of their listings," and Internet marketing is necessary to reach the potential buyers on the Internet.¹⁶³ Internet marketing has become "more effective" than print media in its ability reach more real estate consumers.¹⁶⁴ [REDACTED]

[REDACTED]

[REDACTED]¹⁶⁵

¹⁶¹ SOURCE: 2006 NAR Profile of Buyers & Sellers; Survey responses to 2006 NAR Profiles of Home Buyers & Sellers received from zip codes beginning with 480-, 481-, 482-, 483-, and 484-.

¹⁶² See discussion at ¶¶ 63 - 70.

¹⁶³ Niersbach Dep. at 87:9 - 88:2.

¹⁶⁴ CX 621, *Real Estate Disconnect: The Confused State of Online Real Estate*, at MOVE-EDOC-0007762; Simos Dep. 69:23 - 70:1.

¹⁶⁵ [REDACTED] See also *Realtor.com/Internet Facts & Figures*, MOVE-HC-00006703, at 6706 (stating that only 4% of a newspaper's circulation reads the real estate classified section).

72. Because it has become more effective at reaching potential buyers, Internet marketing is “emerging as one of the most valuable customer lead generation tools available for realtors today.”¹⁶⁶ As Realcomp’s CEO has stated, “if you miss that consumer connection [on the Internet], you miss a lot of potential commissions and fees.”¹⁶⁷ The National Association of Realtors® has also recognized that those firms who invest in Internet marketing are “rewarded” with leads.¹⁶⁸ “Leads” refers to a potential buyer who expresses interest in a property for sale.¹⁶⁹

73. Specifically, studies have shown that the percentage of leads generated by Internet marketing has been growing.¹⁷⁰ In 2004, of the 52% of firms who had real estate websites, only 12% of residential brokerage firms reported that their website generated more than 25% of their leads.¹⁷¹ In 2006, of the 78% of firms with a website, 24% reported that their website generated 25% or more of their leads, with the typical firm receiving 10% of their leads from their firm website.¹⁷² These two studies on the percentage of leads generated by firm websites are summarized below:¹⁷³

¹⁶⁶ CX 617, *The Need for More Effective Online Marketing by Real Estate Brokers in the Cendant Family of Real Estate Brands: Improving Consumers Online Experience Before Someone Does it For You*, at MOVE-EDOC-0003257, 3260-3262 (describing Internet marketing as a “business imperative”).

¹⁶⁷ CX 221; Kage Dep. at 38:10 - 39:20.

¹⁶⁸ *Future of Real Estate Brokerage*, at NARFTC 00003682 (“Investing in the Internet is not without cost, but firms who make investment have been rewarded with business leads.”). Many brokerages are unable to fully quantify the number of leads, or potential buyers who are interested in a specific property, that they receive from their Internet marketing efforts. See Simos Dep. at 66:19-22. These brokerages may not possess the necessary lead tracking system, or they may never know that a lead was generated by a listing on the Internet because the potential buyer responded by telephoning the Listing Broker. See generally Simos Dep. at 67:2 - 67:24.

¹⁶⁹ Kersten Dep. at 37:8 - 37:18.

¹⁷⁰ *The Consumer: Catalyst of Change*, at NARFTC 0004238 (“Brokers, agents and their vendors all recognize that online leads will be increasingly important in the future.”).

¹⁷¹ CX 369, *2004 NAR Profile of Real Estate Firms*, at NARFTC 0002299.

¹⁷² CX 370, *2006 NAR Profile of Real Estate Firms*, at NARFTC 0002364.

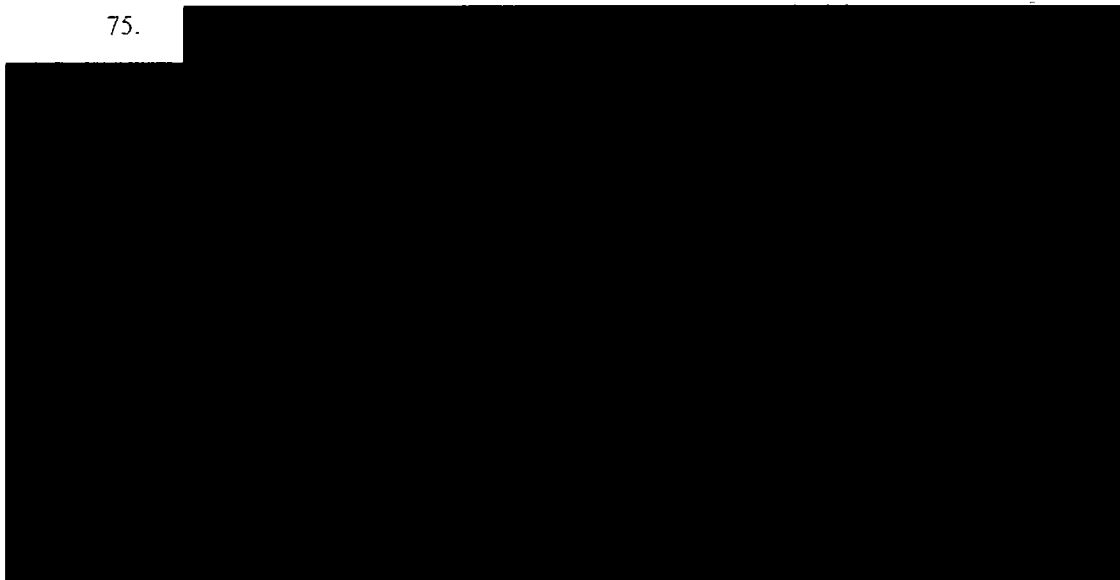
¹⁷³ SOURCE: *2004 NAR Profile of Real Estate Firms*, at NARFTC 0002299; *2006 NAR Profile of Real Estate Firms*, at 2364. The 2006 study also found that the typical brokerage was able to attribute 7% of their sales volume to leads generated by their website. *2006 NAR Profile of Real Estate Firms*, at NARFTC 0002365.

<u>Percentage of Leads</u>	<u>2004</u>	<u>2006</u>
0%.....	15%	7%
1-5%.....	28%	25%
6-10%.....	10%	22%
11-25%.....	14%	23%
More than 25%.....	17%	24%

Notably, these studies measured only the leads generated by a firm's own website and therefore do not include the leads generated by any additional Internet marketing by those brokerages.

74. In southeastern Michigan, at least one broker who was able to track his firm's leads reported that approximately 31% of his leads were generated by Internet marketing.¹⁷⁴ That broker, who has practiced in the industry for 41 years, considered that percentage to be "significant."¹⁷⁵

75.



¹⁷⁴ Kersten Dep. at 36:13 - 37:7.

¹⁷⁵ Kersten Dep. at 38:8 - 38:13 (describing how Internet marketing has grown "extremely" in importance).

¹⁷⁶ [REDACTED] See also CX 373, 2006 NAR Profile of Buyers & Sellers, at NARFTC 0002032 (showing that buyers are searching for homes 2-3 weeks before contacting a broker).

¹⁷⁷ [REDACTED]

[REDACTED]

These statistics

highlight the importance of marketing properties for sale on the Internet in order to reach these potential buyers.

76. Marketing homes on the Internet can also provide significant cost savings.¹⁷⁹ As one study has shown, Internet marketing is more cost effective than any other means used to market the home – it is the least costly marketing tool, even as compared to yard signs, newspapers and direct mail, and it generates more leads than other marketing tools for the amount of money spent.¹⁸⁰ For example, in one Broker Case Study reported in 2005, Internet marketing, which cost \$10,000, generated 25% of the firm’s leads, whereas yard signs, which cost \$163,384, generated 35% of the firm’s leads.¹⁸¹ This case study is also consistent with the experience of [REDACTED]

[REDACTED]

¹⁸²

¹⁷⁸ [REDACTED]

¹⁷⁹ *Realtors & Technology: 2004 NAR Technology Impact Survey Report*, NARFTC 0002093, at 2115 (“Compared to more traditional means of marketing, including direct mail and newspaper advertisements, marketing through websites can often provide significant cost savings and increased visibility for REALTORS.”).

¹⁸⁰ CX 621, *The Real Estate Disconnect*, at MOVE-EDOC-0007762; Simos Dep. at 64:15 - 65:1.

¹⁸¹ CX 621, *The Real Estate Disconnect*, at MOVE-EDOC-0007762. The Internet was the second most effective lead generator behind yard signs, but only represented 1% of total advertising dollars spent. *Id.*

¹⁸² [REDACTED]; see also *List More += Make More!*, MOVE-HC-00004906, at 4971 (comparing ad in newspaper with photos for 90 days as costing \$27,000, with cost of posting ad on Realtor.com with 6 color photos for life of the listing as \$50).

77. The significance of Internet marketing to a broker's ability to compete effectively is reflected in the fact that, outside of the MLS, the Internet is the most frequently used tool by brokers to market their clients' homes. Specifically, 85% of sellers in 2006 reported that their home was marketed by being listed on the Internet -- more than yard signs, open houses, print newspapers, real estate magazines and direct mailers.¹⁸³

78. The competitive advantage of Internet marketing is also reflected in the fact that brokers in southeastern Michigan advertise their skill and expertise in Internet marketing to potential seller/clients. For example, David Elya, who sits on the Realcomp Board of Governors, highlights his "extensive" Internet marketing to potential sellers, which includes his posting listing information on Realtor.com, MoveInMichigan.com, ClickonDetroit.com, broker websites, and other sites.¹⁸⁴ Likewise, Century 21 - Town & Country, a brokerage with approximately 1,000 agents, highlights its Internet marketing to potential seller/clients as one of its top points made to potential seller/clients.¹⁸⁵ Another Century 21 franchise, Century 21 Today, with 300 agents, also highlights its Internet marketing in its materials for potential seller/clients, including the fact that they employ an in-house Internet specialist.¹⁸⁶

79. Finally, the competitive significance of Internet marketing is reflected in the growing expenditure on Internet marketing by brokerages.¹⁸⁷ For example, in a 2006 study, 78% of brokerage firms in 2006 reported that they had invested in a web site, with an additional 5% of

¹⁸³ CX 373, *2006 NAR Profile of Buyers & Sellers*, at NARFTC 0002074.

¹⁸⁴ Elya Dep. at 31:25 - 33:8, 33:24 - 34:4; CX 109 (Elya advertising that he will market properties "extensively" on the Internet); *see also* Taylor Dep. at 66:8 - 67:8 (attracts clients by demonstrating that he has "internet expertise"); [REDACTED]

¹⁸⁵ Kersten Dep. 44:7 - 44:15; CX 357 (Century 21 - Town & Country marketing information).

¹⁸⁶ CX 287; CX 288. *See also* CX 310, at DW00067 and CX 311, at DW00013 (marketing documents highlighting Internet marketing as one of the first bullet points to potential seller/clients).

¹⁸⁷ *E.g.*, [REDACTED]

brokerages intending to start a website – an increase from 52% of firms in 2004 (with 8% of additional firms reporting that they planned to invest in a website in the future).¹⁸⁸ Ninety-one percent of these firms' web sites include property listings and often include consumer-specific web enhancements, such as allowing consumers to save favorite searches or properties.¹⁸⁹

[REDACTED]
[REDACTED]¹⁹⁰ Although these are considered to be significant costs by brokerage firms, they make the investment because they view it as a significant benefit.¹⁹¹ In 2004, the typical firm spent 10% of their total marketing budget on Internet marketing.¹⁹² In addition to investing in a firm website, brokers market their properties on those websites most visited by potential buyers.

C. MoveInMichigan.com, Realtor.com and IDX Websites

80. As discussed above, Internet marketing is a significant competitive advantage to brokers – but only if they are able to advertise their property listings on the websites visited by a significant number of potential buyers in their geographic area.¹⁹³ As recognized by Walter Baczkowski, CEO of the Metropolitan Consolidated Association of Realtors® (the largest Realcomp shareholder board), sellers “want their property exposed to as many people as

[REDACTED]; Greenspan Dep. at 24:21 – 25:10.

¹⁸⁸ CX 370, 2006 NAR Profile of Real Estate Firms, at NARFTC 0002356; CX 369, 2004 NAR Profile of Real Estate Firms, at NARFTC 0002299.

¹⁸⁹ CX 370, 2006 NAR Profile of Real Estate Firms, at NARFTC 0002363.

¹⁹⁰ [REDACTED]

¹⁹¹ Kersten Dep. at 38:8 - 38:19; *Change is Relentless*, at NARFTC 0004225 (a brokerage firm's website “has become a necessity for real estate professionals.”).

¹⁹² 2005 NAR Member Profile, NARFTC 0003887, at 3920.

¹⁹³ Backowski Dep. at 46:10 - 46:15 (sellers want their homes “to be at the best site possible.”); Mulvihill Dep. at 72:22 - 73:20 (discussing a broker's need to spend “a whole lot of money” on “some type of marketing campaign” in order to “find a way for people to be driven to a Web site.”)

possible... [and they] want their information at the site that is going to best market them and best attract the consumer.”¹⁹⁴

81. Buyers who use the Internet as part of their home search have repeatedly ranked four websites (or types of websites) as the ones they use the most: 1) MLS websites; 2) Realtor.com; 3) brokerage firm websites; and 4) the real estate agent websites.¹⁹⁵ As discussed below, these websites are also popular among consumers in southeastern Michigan.¹⁹⁶ Thus, marketing properties on these websites is significant to an ability to compete effectively for brokers within Realcomp’s service area.¹⁹⁷

82. Realcomp provides a free feed of MLS listing information to a number of websites in each of these categories of websites most visited by potential buyers.¹⁹⁸ Realcomp’s feed of listing information to these websites is not only a free benefit to its members, but it is also

¹⁹⁴ Baczkowski Dep. at 38:22 - 39:3; Hardy Dep. at 91:21 - 92:16 (testifying that he participates in IDX because sellers were demanding it).

¹⁹⁵ CX 373, *2006 NAR Profile of Buyers & Sellers*, at NARFTC 0002042 (of buyers who use the Internet, showing the percentage of buyers who use the following websites: MLS web site (53%); Realtor.com (52%); Real estate brokerage web site (41%); Agent Website (40%); Newspaper website (14%); Real estate magazine web site (6%); and all others (10%). [REDACTED]

¹⁹⁶ Data collected by NAR in Realcomp’s geographic area is consistent with the national trend that MLS Websites, Realtor.com, brokerage firm websites and agent websites are the top most visited sites by buyers. Survey responses to *2006 NAR Profile of Buyers & Sellers*, from zip codes beginning with 480-, 481-, 482-, 483-, and 484- reported that they visited the following websites: MLS website (34%); Realtor.com (54%); real estate brokerage website (35%); agent website (34%); newspaper website (8%); and magazine (3%). See also Nowak Dep. at 24:8 - 24:24 (testifying that Realtor.com, MoveInMichigan.com and Realcomp broker websites are beneficial to home sellers because they give those listings exposure to potential buyers). Consumers generally will look at only three public real estate websites. Baczkowski Dep. at 37:8 - 37:9.

¹⁹⁷ CX 78, at 3 (discussing the “market power of web marketing, MoveInMichigan.com, IDX, and REALTOR.com”); Kage Dep. at 51:15 - 51:20. See also Mincy Dep. at 25:8 - 28:12 (ranking Realtor.com “a very close second” to the MLS in terms of marketing properties and “maximizing exposure” in Realcomp’s geographic area; also ranking brokerage and agent websites as “equally important to Realtor.com “as far as effectiveness for maximizing exposure of listings”); Hepp Dep. at 45:19-47:7 (identifying Realtor.com and brokerage and agent websites as “important tool[s]” for selling homes in southeastern Michigan); Kermath Dep. at 66:1-67:7 (within Realcomp’s service area, “the most important Internet-based exposure” to the public for selling residential real estate is through Realtor.com, followed by brokerage and agent websites, and MoveInMichigan.com).

¹⁹⁸ CX 222, at 6 (Statement of Benefits).

an efficient way to update the websites with any changes to the MLS listings because these changes are automatically updated as part of Realcomp's feed to the websites.¹⁹⁹ Pursuant to its Website Policy, however, Realcomp does not include any Exclusive Agency, Limited Service or MLS-Entry Only listings in its feed to these websites.²⁰⁰ It only includes full service, Exclusive Right to Sell listings.

1. MLS Website: MoveInMichigan.com

83. Websites operated by MLSs offer a number of competitive advantages to brokers, particularly smaller brokerages who may not be able to afford to operate their own website with a property search feature. MLS websites benefit consumers because they provide a neutral site for consumers to view a comprehensive set of listings of the MLS members.²⁰¹ In addition to the marketing exposure offered by MLS websites, they also benefit brokers because brokers generally have significant control over the MLS website in determining how much information is displayed (such as whether or not to display street addresses), and its prices and policies.²⁰² As one industry publication concluded:

There is an opportunity for the brokers to utilize the MLS to compete more effectively at a lower cost by directing the leads on a public [MLS] web site to the listing brokers. This positions those who provide the inventory to obtain the maximum benefit and it may provide a way for the brokers to cost effectively compete for leads a third party would receive.²⁰³

¹⁹⁹ Otherwise, brokers need to update each listing on each of these websites, which may lead to a significant expenditure of time and money. Realcomp highlights these services to current and potential members as an important benefit of membership. CX 222, at 6, 9; CX 224, at 2 - 3; Kage Dep. 44:10 - 45:4, 47:1 - 47:7, 52:22 - 55:12.

²⁰⁰ See Paragraph ¶ 43. RX 2, at 3.

²⁰¹ CX 380, *Discussion Paper: Future of MLS*, at NARFTC 0003727 (noting that consumers may demand a website that they view as objective, even if broker websites are user-friendly and have a complete set of listings).

²⁰² CX 380, *Discussion Paper: Future of MLS*, at NARFTC 0003727 - 3728.

²⁰³ CX 380, *Discussion Paper: Future of MLS*, at NARFTC 0003728.

84. MoveInMichigan.com is a MLS website owned and operated by Realcomp that the public may use to search for property listings of Realcomp members.²⁰⁴ The content of MoveInMichigan.com is based on an exclusive feed of listing information from Realcomp. In other words, Realcomp provides the only feed of property listings to MoveInMichigan.com.

85. Realcomp emphasizes the significance of MoveInMichigan.com as a benefit of MLS membership to current and potential members, and even has a separate marketing document devoted to the benefits of MoveInMichigan.com alone.²⁰⁵ Specifically, Realcomp highlights the website's feature-rich content,²⁰⁶ and that MoveInMichigan.com "is accessed by thousands of consumers each week as a primary source of obtaining real estate information for southeastern Michigan."²⁰⁷ The CEO of Realcomp, Karen Kage, considers MoveInMichigan.com to be "a very local version of Realtor.com,"²⁰⁸ and believes that MoveInMichigan.com is a "valuable portal for any Michigan home buyer or seller."²⁰⁹ Put simply, MoveInMichigan.com provides valuable marketing exposure of Realcomp member listings.²¹⁰

86. In addition, MoveInMichigan.com is the exclusive provider of real estate listings for the website for a local television station, ClickonDetroit.com.²¹¹ Thus, users who view

²⁰⁴ Kage IH at 48:3 - 48:14.

²⁰⁵ CX 258; CX 272; RC 15, at RC0210; Kage IH at 68:17 - 69:13.

²⁰⁶ CX 258, at 2 ("Not only is it a great source for finding REALTORS® and their listings, but the website also features multiple photos, virtual tours, and Open Houses that have been scheduled on the Realcomp Online® system."). *See also* Kage Dep. at 154:11 - 154:25; CX 272.

²⁰⁷ CX 267; Kage Dep. at 178:22 - 181:7.

²⁰⁸ CX 258, at 6; Kage Dep. at 156:14 - 157:2.

²⁰⁹ Kage IH at 71:7 - 71:19; CX 15.

²¹⁰ CX 258, at 2; Kage Dep. at 153:14 - 153:20 (testifying that additional marketing exposure is a benefit to Realcomp members).

²¹¹ CX 222, at 9 - 10; Kage Dep. at 48:23 - 49:13.

properties on ClickonDetroit.com actually view only those properties on MoveInMichigan.com.

Realcomp highlights the importance of ClickonDetroit.com to its current and potential members:

MoveInMichigan.com is the exclusive provider of data for WDIV's real estate page on ClickonDetroit.com. This public website operated by WDIV Channel 4 is the #1 local website in Southeast Michigan receiving over 3.3 million clicks a month. The ClickonDetroit.com website actually frames specific functions of Realcomp's MoveInMichigan.com website, sending consumers searching for Realtors, properties and Open Houses to you and your listings.²¹²

87. Realcomp successfully promotes MoveInMichigan.com by "using many different advertising mediums which continue to drive Internet traffic to Realcomp Realtors and their listings."²¹³ [REDACTED]

[REDACTED]²¹⁴ The number of "hits" that MoveInMichigan.com receives has been increasing substantially.²¹⁵ In the last quarter of 2005, MoveInMichigan.com received 1,775,394 hits; in the first quarter of 2006, MoveInMichigan.com received 2,037,682 hits; in the second quarter of 2006, MoveInMichigan.com received 2,184,230 hits; and in the third quarter of 2006, MoveInMichigan.com received 2,524,871 hits. These numbers are considered to be "significant" by local brokers.²¹⁶

²¹² CX 222, at 9 - 10 (emphasis added); CX 224, at 2 - 3; Kage Dep. at 52:18 - 55:12, 157:3 - 167:3; CX 259; CX 260 - 263.

²¹³ CX 258; Kage Dep. at 155:1 - 155:15 (testifying that Realcomp promotes MoveinMichigan.com in order to drive more consumers to Realcomp members).

²¹⁴ [REDACTED]; CX 267; Kage Dep. at [REDACTED] 178:22 - 181:7 (testifying that "these marketing efforts are expected to raise consumer awareness of the benefits of MoveInMichigan.com and ultimately Realcomp Realtors.").

²¹⁵ "Hits" are defined as property views. CX 268 ("In October 2005 a change was made so that every object on a displayed page did not record a hit. Prior to this change, if the page included 20 images, each image would account for another hit, so the single page hit actually recorded as 21 hits (1 for the page & 1 for each image). As of October 2005, the same page should now only account for 1 hit.").

²¹⁶ CX 268; Kage Dep. at 181:8 - 183:17; Nowak Dep. 25:10 - 25:16 (testifying that MoveInMichigan.com receives a "significant" amount of hits from potential buyers and sellers); Baczkowski Dep. at 109:1 - 110:20 (testifying that the 730,586 hits on MoveInMichigan.com in May 2006 was a large number of views).

88. Realcomp operates the MoveInMichigan.com website, and its feed of MLS listings to the website, as a free benefit of MLS membership.²¹⁷ Realcomp members therefore do not have to pay any additional fees for their listings to be posted on MoveInMichigan.com (or ClickonDetroit.com). Pursuant to its Website Policy, however, Realcomp does not submit Exclusive Agency, Limited Service and MLS-Entry Only listings to MoveInMichigan.com (and ClickonDetroit.com).

89. There is no alternative way for Limited Service Brokers to post their properties (with non-Exclusive Right to Sell listing agreements) onto MoveInMichigan.com or ClickonDetroit.com. Limited Service Brokers are therefore at a competitive disadvantage to other brokers who use “full service” Exclusive Right to Sell listings because they are not able to obtain the valuable exposure of listing their properties on two top local websites in southeastern Michigan.²¹⁸ This in turn may negatively impact the seller, whose home may take longer to sell and lead to a lower satisfaction with the Limited Service Broker’s services (which may in turn limit the broker’s ability to expand their business through referrals).²¹⁹ Moreover, to the extent this limitation on their Internet marketing abilities is disclosed to sellers, Limited Service Brokers would be at a competitive disadvantage in obtaining listing agreements with potential seller/clients.

²¹⁷ CX 222 at 9; CX 224 at 2 - 3; CX 272; Kage Dep. at 52:18 - 55:12.

²¹⁸ See discussion at ¶¶ 80 - 82, 87.

²¹⁹ Mincy Dep. 63:20 - 64:17 (describing how the Realcomp Search Function and Website Policies restrict the exposure of his listings and hurts his business); Hepp Dep. at 42:9 - 44:7 (describing “negative word of mouth advertising” as limiting growth of flat fee broker’s referral business within Realcomp’s service area specifically because of Realcomp’s Website Policy and Search Function Policy).

2. Realtor.com

90. Realtor.com is the official website of the National Association of Realtors®.²²⁰ The website is operated by Move, Inc. pursuant to an operating agreement with NAR, and it allows buyers to search for homes across the country, including southeastern Michigan.²²¹ Realtor.com is the leading real estate website in the country – it has the most unique visitors, and more than double the total number of visits and more than triple the total number of minutes spent on the website than any other real estate website in the country.²²²

91. Specifically, Media Metrix reported that in December 2006, Realtor.com had 3.91 million unique visitors, who on average made 2.2 visits to Realtor.com, with each visit lasting approximately 14 minutes and including approximately 25 page views. There were a total of 8.59 million visits, with a cumulative total of 119 million minutes spent on Realtor.com for the month of December 2006.²²³

92. Realtor.com has a number of exclusive “co-branding” relationships with websites that drive web traffic – and in particular, those interested in buying or selling homes -- to Realtor.com.²²⁴ For example, pursuant to Move, Inc.’s “co-branding” agreement with AOL, any visitor to Aol.com who is interested in searching for real estate properties, will click on a Real

²²⁰ Goldberg Dep. at 25:8 - 25:17.

²²¹ Goldberg Dep. 25:24 - 26:8 (Move, Inc. is required to operate Realtor.com in compliance with the operating agreement with NAR); Simos Dep. at 69:6 - 69:12 (describing Realtor.com’s comprehensive listing information); Dawley Dep. at 18:5 - 19:8 (testifying that Realtor.com receives a feed of listing information from Realcomp).

²²² CX 609 (December 2006).

²²³ CX 609 (December 2006). Notably, the December statistics on real estate websites quoted in this report underestimate the total usage of the real estate websites because usage of real estate websites is, like the real estate industry itself, seasonal. Dawley Dep. at 53:6 - 53:11. Thus, more consumers use real estate websites in the spring than they do near the December holidays. Realtor.com has listings from approximately 900 MLSs (and local associations of realtors that operate MLSs), including Realcomp. CX 601. This represents almost every MLS in the country. Dawley Dep. at 14:21-24. Under the terms of the operating agreement between Move, Inc. and NAR, FSBO sellers may not post listings on Realtor.com. CX 360, *Operating Agreement*, at NARFTC 0003265.

²²⁴ MOVE-HC-00008347-8684 (“co-branding” contracts).

Estate button on the Aol.com website and be re-directed to Realtor.com.²²⁵ These agreements are exclusive, which means that Realtor.com will be the “primary and major provider” of property listings on the website, outside of the “occasional” or few listings that brokers or consumers may be able to post on the website for a fee.²²⁶

93. The websites that are covered by the “co-branding” agreements with Realtor.com include Aol.com, Msn.com (Microsoft’s website), Compuserve.com, Netscape.com, Netzero.com, Wsj.com (Wall Street Journal’s website), Juno.com, iWon.com, Excite.com, Pennysaver.com, and a suite of over 50 websites owned by IBS and operated by local television stations across the country, including ClickonDetroit.com.²²⁷ Thus, any listings posted on Realtor.com are also exposed to all of the consumers visiting these additional sites.²²⁸

94. Buyers benefit from Realtor.com because it is a “single destination with comprehensive content, has the most listings available, and an easy to use functionality to search for viable properties in – across the whole country using a variety of search techniques.”²²⁹

²²⁵ Simos Dep. 13:20 - 15:2. These agreements are considered to be “co-branding” because the consumer will not necessarily know that he or she left the Aol.com website because AOL will keep its brand as a frame around the Realtor.com content. *Id.*

²²⁶ Simos Dep. at 15:21 - 16:2. *See also* United Online contract (Juno.com, Netzero.com), MOVE-HC-00008390, at 8395 (“Homestore shall be the sole and exclusive provider of Real Estate Content...”); IBS contract (TV network websites), MOVE-HC-00008422, at 8426 (same exclusivity provision, except for any pre-existing agreements or incidental real estate content); Dow Jones contract (Wsj.com), MOVE-HC-00008262, at 8265 (exclusive, although can allow properties to be listed in its “Classified Section,” which per the website, entails a fee for posting a property); AOL contract (Aol.com, Netscape.com, CompuServe.com), MOVE-HC-00008506, at 8509, 8514 (will only promote Realtor.com); Microsoft contract (Msn.com) MOVE-HC-00008627, at 8671 (exclusive); Pennysaver contract, MOVE-HC-00008387, at 8388 (exclusive).

²²⁷ Simos Dep. at 15:11-23:6; MOVE-EDOC-00003997 - 4004 (charts showing traffic acquisition structure); MOVE-HC-00008347 - 8684 (“co-branding” contracts). The website, ClickonDetroit.com, had a pre-existing agreement to receive its real estate content from Realcomp and is therefore not included in the agreement between its parent company, United Online, and Move, Inc., but if the Realcomp agreement is terminated, Realtor.com has the right of first negotiation and first refusal. MOVE-HC-00008449, 8450, 8463.

²²⁸ Because these other websites direct the consumer to Realtor.com, the “hits” to these websites that are related to real estate are counted in the website statistics for Realtor.com.

²²⁹ Simos Dep. at 69:6 - 69:12. Except for MLS websites that also receive their content directly from MLSs, Realtor.com is one of the most accurate real estate websites because it updates its listings based on any changes to

Sellers benefit from Realtor.com because it is attractive to buyers, who spend more time on Realtor.com than on any other website, thereby providing considerable exposure for their properties and increasing the likelihood that their homes will be sold and sold quickly.²³⁰

95. These benefits to consumers are reflected in the high national usage statistics collected by Media Metrix, discussed above. Move, Inc., however, is able to collect data from its internal servers related to the usage of Realtor.com based on specific geographic areas and MLSs. This Move, Inc. data shows that Realtor.com is used frequently by consumers in southeastern Michigan. Specifically, according to Move, Inc.'s internal records for the last quarter of 2003, consumers performed over 1.6 million property searches and had over 35 million property views on Realtor.com in Realcomp's geographic area.²³¹ In 2003, properties submitted by Realcomp to Realtor.com received the 13th most property views of the approximately 900 MLSs and local Associations of Realtors® (which operate an MLSs) that submit listing feeds to Realtor.com. In the last quarter of 2006, consumers again performed over 1.6 million property searches and had over 54 million property views on Realtor.com in Realcomp's geographic area.²³²

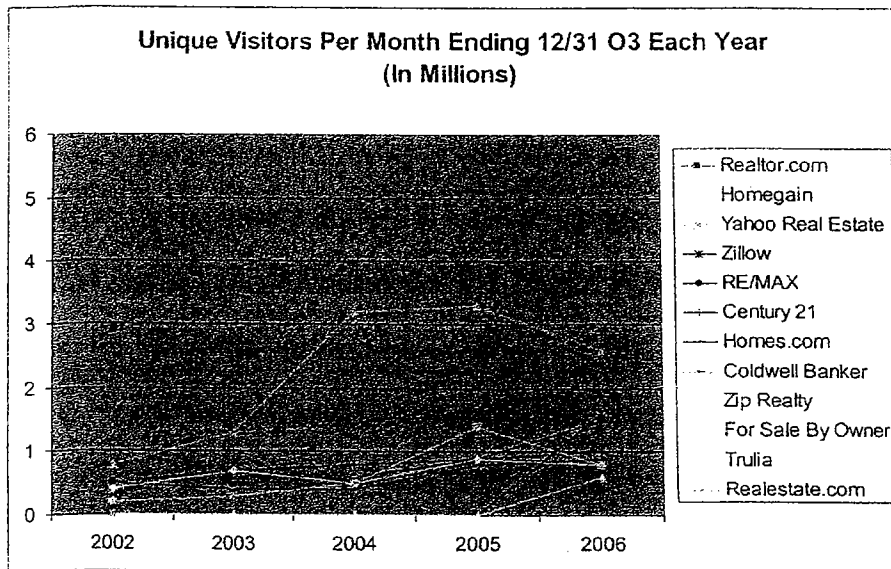
the MLS within approximately 24 hours of being posted. Dawley Dep. at 66:18-67:15.

²³⁰ Greenspan Dep. 48:20 - 49: 19 (describing benefits of exposure on Realtor.com, especially for brokers who may not be able to afford a website of their own); CX 362, *Newco, Inc. Business Plan*, at NARFTC 0004872; Sweeney Dep. 36:14 - 36:15 (discussing how exposure is "key" to selling a home); Gleason Dep. at 123:8 - 124:4 (discussing impact of less exposure on ability to sell home).

²³¹ MOVE-EDOC-00021036 (CD). These numbers are cumulative for the September 1, 2003 - December 31, 2003 time period. The data on searches represent all searches conducted on Realtor.com that would have yielded a property in Realcomp's geographic area. The data on property views includes all views of properties that appeared on search result pages as well as clicks to view more detailed information on specific properties. Dawley Dep. at 44:4 - 48:10.

²³² MOVE-EDOC-00021037 (CD). These numbers are cumulative for the September 1, 2006 - December 31, 2006 time period. This data on searches and property views is interpreted in the same way as the 2003 data (described in FN 231). Dawley Dep. 47:25 - 48:6.

96. Realtor.com provides competitive advantages to brokers who post property listings on Realtor.com. A primary competitive advantage is that the brokers' properties are given tremendous exposure to potential buyers – as reflected by the Media Metrix website statistics.²³³ The graph below shows the relative value of Realtor.com's website usage as compared to the other national real estate websites:²³⁴



97. Realtor.com also provides a significant competitive advantage to brokers by virtue of the fact that it is free for brokers to post a basic property listing. Under the terms of the operating agreement between Move, Inc. and NAR, Realtor.com may not charge brokers any fees for posting a basic property listing, which includes information about the property, a text description of the property, a color photograph and the brokerage's name and phone number.²³⁵

²³³ Simos Dep. at 58:25 - 59:11 (describing Realtor.com's promotion of the Realtor and his listings as a "key advantage"); [REDACTED]

²³⁴ SOURCE: comScore Media Metrix Website Statistics for December 2002, December 2003, December 2004, December 2005 and December 2006 (CX 609).

²³⁵ CX 360, *Operating Agreement*, at NARFTC 0003270 - 3272; Goldberg Dep. at 32:9 - 32:16.

Although Move, Inc. may charge brokers for enhancements to their listings on Realtor.com, such as multiple photos or virtual tours, it cannot charge any referral fees or other types of fees based on any leads generated by Realtor.com.²³⁶ This is a significant advantage over many other third party real estate websites that operate a business model whereby they charge brokers to post listings on their website and/or charge brokers for leads generated by the website (which can be a flat fee or a percentage of any commission received from a closed transaction).²³⁷

98. Realcomp provides a feed to Realtor.com as a free member benefit, and advertises this benefit to current and potential members. In January 2007, Realcomp had 1,723 offices, representing 13,184 Realcomp agents, authorizing Realcomp to submit their listing information to Realtor.com.²³⁸ However, pursuant to its Website Policy, Realcomp does not submit Exclusive Agency, Limited Service or MLS-Entry Only listings to Realtor.com.²³⁹

99. This Website Policy imposes a significant competitive disadvantage to Limited Service Brokers who use those types of listing agreements. The Website Policy prevents Limited Service Brokers from being able to take advantage of the benefits of posting properties on Realtor.com through Realcomp – particularly the significant exposure of property listings to potential buyers. This may therefore make it more difficult to sell a home, which in turn could affect the satisfaction of the seller and whether they would be willing to provide referrals to the Limited Service Broker. There is also evidence that sellers in southeastern Michigan demand

²³⁶ E.g., Simos Dep. at 67:25 – 68:5; Greenspan Dep. at 39:3 – 39:5.

²³⁷ Simos Dep. at 75:17 – 75:22 (defining “tariff fee” as a “business model where agents have to pay third parties for leads and also a larger amount in the event of a sale transaction closing.”). See also *Referral Fees: CPA Model*, MOVE-EDOC-000004970, at 4971; *Realtor Group*, MOVE-HC-00000543, at 550 (identifying websites that act as a tariff model).

²³⁸ Kage Dep. at 80:9 - 80:16.

²³⁹ CX 100, *Realcomp Rules*, at RC1341. Realtor.com does not have any rules regarding what types of listing agreements can be included on Realtor.com. Rather, listings that are submitted to Realtor.com “are fully determined by the data content providers.” Greenspan Dep. at 9:7 - 9:17.

that their properties be posted on Realtor.com.²⁴⁰ This policy then would make it much more difficult for Limited Service Brokers to obtain listing agreements with potential seller/clients once the policy is disclosed.²⁴¹

100. To the best of my knowledge, there are only two potential ways for Limited Service Brokers to circumvent Realcomp's Website Policy and post properties on Realtor.com, both of which entail a significant cost to the brokers and one of which may not even be a practical alternative.

101. The first option for Limited Service Brokers to bypass Realcomp's Website Policy and be able to post listing information on Realtor.com involves Limited Service Brokers "double listing" their properties on a second MLS that does not have the same Website Policy and will submit Exclusive Agency, Limited Service and MLS-Entry Only listings to Realtor.com. This option has two obvious drawbacks. First, it is premised on a reliance that another nearby MLS submits listings to Realtor.com, allows out-of-area brokers to be members of the MLS, and that the MLS will not adopt the same Website Policy as Realcomp in the future. Second, it requires Limited Service Brokers to belong to two MLSs and double list their properties. As discussed above in Paragraph 56, this represents a "significant" cost to brokers because that represents double the cost and double the work.²⁴²

²⁴⁰ Groggins Dep. at 49:8 - 49:22; Aronson Dep. at 65:1 - 65:22 (discussion of RX 68); Mincy Dep. at 59:17 - 60:7.

²⁴¹ Aronson Dep. at 28:7 - 30:12 (Limited Service Broker testifying that he stopped doing business in southeastern Michigan because "Realcomp prevented us from performing our business model" by implementing the Search Function and Website Policies).

²⁴² Sweeney Dep. at 17:10 - 17:16 (describing costs of membership in two MLSs (Realcomp and MiRealSource) as being, "on a per agent basis that is viewed as a significant cost only to be incurred if necessary"); D. Moody Dep. at 42:23 - 63:24 (extensive discussion of the disadvantages of "double listing" and RX 26); Mincy Dep. at 56:7 - 57:24 (noting that "double listing" consumes "two weeks" of work" annually).

102. Second, under the terms of the operating agreement between Move, Inc. and NAR, individual brokers may technically submit a feed of their listings directly to Realtor.com. In cases where a local MLS has no feed to Realtor.com, Move, Inc. has contacted brokers in that area to obtain feeds of their listing information.²⁴³ There are brokers in only six geographic areas around the country who send an individual feed of listings to Realtor.com.²⁴⁴ None of these brokers are in Michigan. Currently, in at least five of these six areas, the local MLS facilitates the transfer of the listing data for the individual brokers (by being the entity to transfer the data), which minimizes the costs to the broker and the costs to Move, Inc of having to handle additional individual feeds.²⁴⁵ According to Move, Inc., it does not currently charge these brokers for submitting an individual feed, but may in the future (in order to recoup Move, Inc.'s additional costs) if individual brokers submitting a feed to Move, Inc becomes a more prevalent, and therefore more costly to Move, Inc., practice.²⁴⁶

103. If the MLS does not facilitate the individual broker's feed of listing data to Realtor.com, this second option may be more theoretical than practical. As recognized by Move, Inc., the individual feed of property listings to Realtor.com would require a broker to either hire personnel or a third party vendor in order to be able to aggregate and submit their listings to

²⁴³ Dawley Dep. at 25:23 - 26:12.

²⁴⁴ CX 602-607; Dawley Dep. at 23:11 - 23:14. This number may increase to seven as one MLS in the Seattle, WA area has announced recently that they intend to stop providing a feed of listing information to Realtor.com: CX 608 (Realty Times article).

²⁴⁵ Dawley Dep. at 28:11 - 30:12; CX 608 (Realty Times article quoting Move, Inc executive, "Even if we contract directly with the brokers, as we do in about a half dozen markets, the MLS, in all cases except one, administers the project so that we can manage it without incremental personnel."); Greenspan Dep. at 54:18 - 55:23 (explaining process of individual brokers submitting direct feeds of listing information).

²⁴⁶ CX 608 (Realty Times article); Dawley Dep. at 30:25 - 32:10 (the more listings Move, Inc. has to handle, the more work it has to do and the more costs it has to incur). Under the Operating Agreement, Move, Inc. has the right to charge brokers for individual feeds in order to recoup their costs. Goldberg Dep. 32:17 - 33:1 (noting that Move, Inc. has not yet charged any individual brokers for direct feeds to Realtor.com).

Realtor.com.²⁴⁷ While I have not seen this cost quantified, I note that no Limited Service Brokers in southeastern Michigan – or in any of the other jurisdictions that the Federal Trade Commission obtained consent orders barring the MLSs’ prior practice of excluding non-Exclusive Right to Sell listings from the MLSs’ feed to Realtor.com – has availed themselves of this option even though Limited Service Brokers have testified to the importance of marketing properties on Realtor.com to their business.²⁴⁸ Nevertheless, it is clear that in comparison to Realcomp submitting property listings to Realtor.com for free for its members, this option would entail some measure of cost to Limited Service Brokers. This is particularly troublesome because “[b]oosting productivity and efficiency are the primary operational goals of most brokers today.”²⁴⁹

3. IDX Websites

104. The third and fourth categories of websites that are most visited by home buyers are brokerage firm and agent websites, or “IDX Websites.” IDX (Internet Data Exchange) is a set of rules and policies that set forth how a local brokerage firm may receive and display on the broker’s own website most of the listings that are available from a local MLS. In essence, MLSs provide a feed of MLS property listings (referred to as an “IDX feed”) to its members that enables MLS members, with the consent of Listing Brokers, to display the MLS listing

²⁴⁷ CX 608 (Realty Times article describing the cost to brokers for individual feeds as, “The cost will be higher to brokers who will have to hire staff or pay third-party vendors to aggregate their listings to provide a direct-feed to Realtor.com and other sites where the broker would like to market his or her company’s listings.”); Greenspan Dep. 55:16 – 55:22 (noting that some brokers submit their listing information directly to Realtor.com via vendors).

²⁴⁸ E.g., G. Moody Dep. at 31:8 - 32:24 (testifying that Realtor.com is “neck and neck” in importance with being in the MLS as “the most effective means” of selling homes through the Internet, followed by the IDX); Kernath Dep. at 66:1 - 67:7 (within Realcomp’s service area, “the most important Internet-based exposure” to the public for selling residential real estate is through Realtor.com, followed by brokerage and agent websites and MoveinMichigan.com).

²⁴⁹ *Consumer is Catalyst of Change*, at NARFTC 0004234 (finding that the key to success will be operating more efficiently and quoting one broker as stating that, “Survival and growth are possible only through attention to cutting costs.”).

information on their own broker websites.²⁵⁰ For the 91% of firm websites that contain searchable property listings, the IDX feed is how those firms obtain listings other of their own. For example, a customer in southeastern Michigan can visit Remax.com, one of the large franchise brokerage websites, and view properties in southeastern Michigan that are listed by all the different brokers (from different brokerages) in Realcomp's MLS that participate in the IDX feed.

105. IDX rules and policies cover the type of information about the listing that can be displayed, who can display it, what other information can be displayed along side the MLS listings, and what advertising can be displayed near an IDX listings. Under Realcomp's IDX rules, members consent to share their property listings on other brokers' IDX websites.²⁵¹ Although a member could "opt-out" and not allow the display of their listings on other members' Internet sites, they in return could not display any other member's listings on their own websites.²⁵² Similarly, brokers must post all IDX listings on their website and can only exclude specific listings based on objective criteria, such as geographic area or price range.²⁵³

106. The second aspect of Realcomp's Website Policy relates to its IDX rule that excludes any type of listing agreement in its IDX feed other than full-service, Exclusive Right to Sell listings.²⁵⁴ Until recently, the National Association of Realtors® had a similar rule as part of its Model MLS Rules and Policies.²⁵⁵ This rule was designated as "Optional," which meant that

²⁵⁰ Local broker websites that are franchisees may ultimately provide their IDX feed to a national franchise website.

²⁵¹ CX 210.

²⁵² CX 100, *Realcomp Rules*, at RC1360.

²⁵³ CX 100, *Realcomp Rules*, at RC1360.

²⁵⁴ CX 100, *Realcomp Rules*, at RC1361.

²⁵⁵ CX 399, *Handbook on Multiple Listing Policy 2006*, at NARFTC 0003962.

it was not “necessary for the proper operation of the MLS.”²⁵⁶ This conclusion was also reached by one of Realcomp’s Board of Governors, Mr. Elya, who admitted that if Realcomp did not have this IDX rule, Realcomp would not fold “today, tomorrow, or next year,” nor would it be any less efficient.²⁵⁷ In fact, Realcomp’s Policy appears to be contrary to the main benefits of having an IDX feed. As described by the Vice President of Board Policy and Programs at the National Association of Realtors®, IDX benefits from “having the highest percentage of listings, the more listings, the more effective it’s going to be, makes broker sites the best place to go for listing information on the web.”²⁵⁸

107. Participating in IDX represents a significant competitive advantage to brokers. As described by NAR, IDX is “the next age in the evolution of the MLS as the primary means of enhancing cooperation between realtors to facilitate the purchase and sale of real property.”²⁵⁹

While IDX is a “powerful tool to enable brokers with a business presence on the internet to attract consumers,” it is also an effective means of marketing properties on the top websites used by consumers.²⁶⁰

108. Broker IDX Websites are a powerful marketing tool because they allow brokers to market their properties on two of the top four websites – brokerage firm and agent websites – that

²⁵⁶ Niersbach Dep. at 39:13 - 39:17 (comparing optional rules to mandatory rules which are necessary to the effective operation of the MLS).

²⁵⁷ Elya Dep. 75:20 - 76:10. *See also* Baczkowski Dep. 11:10 - 15:13 (describing his experience at the Toledo Board of Realtors whose MLS rules did not discriminate between Exclusive Right to Sell listings and Exclusive Agency, Limited Service and MLS Entry Only listings, and that it did not impair the efficient functioning of the MLS).

²⁵⁸ Niersbach Dep. at 89:25 - 90:24; CX 392.

²⁵⁹ CX 390, *IDX Virtual Kit*, at NARFTC 0000985; Niersbach 85:25 - 86:17.

²⁶⁰ CX 391 (quoting NAR General Counsel, Laurie Janick); Niersbach Dep. at 61:17 - 62:8 (IDX policy created because of vision that broker firm websites would become an integral part of the brokerage job of prospecting and marketing properties – a vision that is turning out to be correct as brokerage firm websites have gained in importance).

are visited by buyers (nationally and in southeastern Michigan).²⁶¹ IDX websites make “it easier for the consumer to get information in a single point rather than visiting more Internet sites or other more traditional ways to find out about available listings.”²⁶² Thus, the IDX feed “is an important tool that helps market their home to the maximum number of potential buyers.”²⁶³

109. As already discussed above, websites with more complete listings benefit buyers and sellers.²⁶⁴ Viewership can be significantly and negatively affected when the only listings available are those of the sponsoring realty firm. This is one of the contributing factors to the recent growth of Remax.com, which has seen significant traffic growth since it added listing content from IDX feeds to its website in early 2006. Real estate brokerage firms are keenly aware that although they may have large shares of the listings in a given geographic area, without sharing listings with other firms in their area, they will be at a significant disadvantage. Thus to my knowledge, a great majority of leading realty firms at the local level participate in IDX.

110. In addition to consumer reports that IDX Websites represent two of the top four websites visited by buyers, Media Metrix data shows that the competitive significance of IDX Websites is large and growing. For example, according to Media Metrix data for December 2006, Realtor.com was the single most used real estate website with 3.91 million unique visitors spending a total of 119 million minutes on Realtor.com. However, adding up all of the top IDX Websites – including Keller Williams, Century 21, Re/Max, Coldwell Banker, ERA, Prudential, Weichert and Long & Foster – shows that they had a total of 5 million unique visitors, spending a

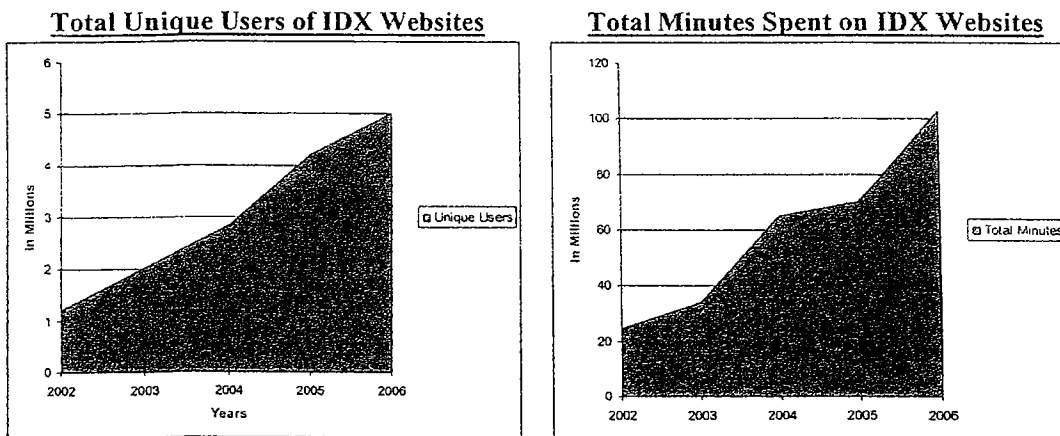
²⁶¹ See discussion at ¶¶ 80 - 81.

²⁶² Greenspan Dep. at 12:10 - 13:6.

²⁶³ Elya Dep. 36:23 - 37:8; Nowak Dep. at 20:20 - 20:25 (Prudential Great Lakes Realty gets an IDX feed from Realcomp for their website because “they feel that it can attract people who are looking to purchase or sell.”).

²⁶⁴ See discussion at ¶ 65.

total of 103 million minutes for the month of December 2006. This represents a significant growth in market share of the IDX Websites, which in December 2002 represented only 1.22 million unique visitors, spending 24.4 million minutes on the IDX Websites. The graph below illustrates the growth of these IDX Websites on a national level since 2002.²⁶⁵



111. Evidence from this case demonstrates that the significance of Realcomp's IDX is in line with the national data. Data from consumers within the Realcomp service area show that consumer usage of real estate brokerage websites and real estate agent websites is similar to the national survey results. Specifically, data collected by the National Association of Realtors® showed that 35% of consumers within the Realcomp service area reported using real estate company websites and 34% reported using real estate agent websites.²⁶⁶ In addition, 82% of Realcomp members authorize their listings to be included in the Realcomp IDX feed, which

²⁶⁵ SOURCE: comScore Media Metrix Website Statistics from December 2002 (includes Century21.com, ReMax.com, and ColdwellBanker.com), December 2003 (Century21.com, ReMax.com, ColdwellBanker.com, ERA.com, and Weichert.com), December 2004 (Century21.com, ReMax.com, ColdwellBanker.com, Weichert.com, ERA.com, and KW.com), December 2005 (ReMax.com, Century21.com, Weichert.com, ColdwellBanker.com, Windermere.com, PrudentialProperties.com, and KW.com) and December 2006 (ReMax.com, Century21.com, ColdwellBanker.com, PrudentialProperties.com, Weichert.com, KW.com, LongandFoster.com, and ERA.com).

²⁶⁶ Survey responses to 2006 NAR Profile of Buyers & Sellers, received from zip codes beginning with 480-, 481-, 482-, 483-, and 484-.

listing information is then sent to approximately [REDACTED] of brokerage firm and agent websites of Realcomp members.²⁶⁷ Many of these member websites include the websites of franchises of such brand names as Century 21,²⁶⁸ Re/Max,²⁶⁹ Keller Williams,²⁷⁰ Prudential,²⁷¹ Real Estate One,²⁷² Realty Executives,²⁷³ Coldwell Banker,²⁷⁴ and Sotheby's International.²⁷⁵ Many of these local franchise sites are linked to their national franchise sites such as Remax.com, Century 21.com, kw.com, etc.

112. Brokers in southeastern Michigan consistently testified that having listings included on the Realcomp broker IDX websites is an important marketing tool:

- Realcomp Governor David Elya of Realty Executives Group admitted that including the listings in the IDX feed "is an important tool that helps market [the seller's] home to the maximum number of potential buyers."²⁷⁶
- Realcomp President and Governor Doug Hardy testified that his brokerage, Century 21 Today (which has 300 agents) participates in the IDX because his agents and home sellers wanted their listing to show up on IDX Websites.²⁷⁷

²⁶⁷ [REDACTED] *Respondent's Objections and Responses to Petitioner's First Set of Interrogatories*, No. 1.

²⁶⁸ Nead Dep. at 73:20 - 74:13 (Coldwell Banker IDX listing on Century 21 sites as shown in CX 122, CX 123).

²⁶⁹ Gleason Dep. at 90:15 - 92:4 (Sotheby's IDX listing on Remax site as shown in CX 338, CX 339); Nead Dep. at 75:4 - 75:17 (Coldwell Banker IDX listing on Re/Max site as shown in CX 124); Hardy Dep. at 93:13 - 94:16 (Century 21 Today IDX listing on Re/Max site as shown in CX 295).

²⁷⁰ Gleason Dep. at 93:15 - 93:22 (Sotheby's IDX listing on Keller Williams site as shown in CX 341); Hardy Dep. at 91:3 - 91:17 (Century 21 Today IDX listing on Keller Williams site as shown in CX 293).

²⁷¹ Hardy Dep. at 94:24 - 96:3 (Century 21 Today IDX listing on Prudential site as shown in CX 296).

²⁷² Whitehouse Dep. at 91:8 - 92:1 (Hannett Wilson & Whitehouse IDX listing on Real Estate One site as shown in CX 318).

²⁷³ Taylor Dep. at 74:16 - 75:11 (Weir Manuel IDX listing on Realty Executives site as shown in CX 383).

²⁷⁴ Nead Dep. at 67:22 - 68:18 (IDX listings on Coldwell Banker site as shown in CX 80).

²⁷⁵ Gleason Dep. at 96:16 - 97:1 (IDX listings on Sotheby site as shown in CX 345).

²⁷⁶ Elya Dep. at 36:23 - 37:8.

²⁷⁷ Hardy Dep. at 91:18 - 92:16.

- Douglas Whitehouse of Hannett Wilson & Whitehouse testified that he wants his listings on the IDX to expose those listings through other broker sites.²⁷⁸
- Several Limited Service Brokers also testified of the competitive importance of the Realcomp IDX.²⁷⁹
- Realcomp itself highlights to consumers the “market power of web marketing, MoveInMichigan.com, *IDX*, and Realtor.com.”²⁸⁰

113. Realcomp’s Website Policy therefore puts Limited Service Brokers at a competitive disadvantage. Specifically, the policy denies Limited Service Brokers access to Realcomp’s IDX feed, which gives brokers greater exposure for their listings on two of the top four buyer website categories and therefore more opportunities to sell the listed property.²⁸¹ The Website Policy also puts Limited Service Brokers at a competitive disadvantage in obtaining listing agreements once this limitation on the broker’s ability to market the sellers’ properties is made known to potential seller/clients.²⁸²

114. There is no viable alternative for Limited Service Brokers to circumvent Realcomp’s Website Policy and gain access to the IDX Websites of Realcomp members. Realcomp has sole control over its IDX feed. Rather, the only way to duplicate the competitive advantage of the IDX feed would be to negotiate with all of Realcomp’s members. The transaction costs of a Listing Broker individually negotiating with each of Realcomp’s over 14,500 members, or each of the over 2,300 brokerage firm members, for access to or for an

²⁷⁸ Whitehouse Dep. at 58:14 - 58:25.

²⁷⁹ See, e.g., Mincy Dep. at 27:16 - 27:22 (importance of IDX for exposure of listings equal to that of Realtor.com); Aronson Dep. at 21:7-22:14 (ranking importance of IDX for promotional benefits right after the MLS and Realtor.com); Hepp Dep. at 45:19 - 47:1 (same); G. Moody Dep. at 32:18 - 32:24 (importance of IDX not far behind Realtor.com).

²⁸⁰ CX 78, at 3; Kage Dep. at 51:15 - 51:20.

²⁸¹ Jacobs Dep. at 68:2 - 68:24.

²⁸² E.g., Groggins Dep. at 49:23 - 51:13 (discussing customers’ concerns and resulting business problems when their exclusive agency listings did not appear on the websites of national brokerage firm websites).

exchange of listing information, including for that listing information to be published on the member websites, would be cost prohibitive.²⁸³

4. Alternative Websites

115. I have also considered whether there are alternative websites that would be effective substitutes for Limited Service Brokers to the websites affected by Realcomp's Website Policy. Media Metrix has tracked the usage of the most popular real estate websites since at least 2002. For December 2006, the Media Metrix data for the top real estate websites with at least 250,000 hits were as follows:

REAL ESTATE VERTICAL METRIX*

Website	Visitors	Pages	Time on Site	Ad Impressions	Ad Clicks	Ad Revenue
Real Estate Vertical	31.23 M	3.7	10.8	20.8	115.54 M	1,259 M
Move Network**	5.92 M	2.1	12.9	21.4	12.42 M	160 M
REALTOR.com	3.91 M	2.2	14.1	25.1	8.59 M	119M
HomeGain.com	2.59 M	1.3	2.1	4.3	3.37 M	7 M
Yahoo! Real Estate	2.47 M	1.4	3.8	5.0	3.46 M	14 M
Move.com	1.69 M	1.3	4.2	7.1	2.20 M	9 M
Zillow.com	1.55 M	1.8	8.5	10.1	2.79 M	24 M
ReMax.com	1.51 M	1.7	10.9	22.1	2.57 M	28 M
Century21.com	.98 M	2.1	16.4	25.8	2.06 M	34 M
Homes.com	.88 M	1.3	6.5	17.6	1.15 M	8 M
ColdwellBanker.com	.80 M	1.7	10.8	16.1	1.36 M	15 M
ZipRealty.com	.79 M	2.5	15.0	32.1	1.98 M	30 M
ForSaleByOwner.com	.78 M	1.5	7.9	28.0	1.17 M	9 M
Trulia.com	.58 M	1.2	3.5	5.7	.69 M	2 M
Obeo.com	.52 M	1.9	4.8	20.6	1.00 M	5 M
RealEstate.com	.49 M	1.5	2.6	4.7	.74 M	2 M
LivingChoices.com	.47 M	1.2	3.5	5.2	.56 M	2 M
PrudentialProperties.com	.44 M	1.6	1.9	4.6	.71 M	1 M
Weichert.com	.36 M	1.4	7.4	14.9	.51 M	4 M
Owners.com	.36 M	1.2	4.3	9.9	.43 M	2 M
KW.com	.33 M	2.8	11.1	23.5	.93 M	10 M
HAR.com	.30 M	3.7	11.7	43.6	1.12 M	13 M
LongandFoster.com	.30 M	2.3	11.2	21.2	.66 M	8 M
UnitedCountry.com	.29 M	1.9	13.9	31.0	.56 M	8 M
ERA.com	.28 M	1.6	7.5	13.5	.46 M	3 M

* SOURCE: COMSCORE MEDIA METRIX (MM) - REAL ESTATE LISTING SITES WITH TRAFFIC GREATER THAN 250,000 UNIQUE VISITORS

** MOVE NETWORK INCLUDES: REALTOR.COM, MOVE.COM, MOVING.COM, WELCOMEWAGON.COM, ETC.

NOTE: MSN's House & Home channel and AOL's Home & Real Estate channel are excluded from the list of sites highlighted in our Real Estate Vertical Metrix because their home search traffic is exclusively redirected to REALTOR.com.

²⁸³ See also *Complaint Counsel's Responses and Objections to Third Set of Interrogatories*, at 5 - 6. It is not clear whether brokerages within Realcomp's service area would have the technical capability to have multiple feeds of listings from each of the Limited Service Brokers. Further, creating an alternative IDX is not a viable alternative because an IDX feed of only a limited number of listings would not be competitive. See *Niersbach Dep.* at 90:25 - 91:17 ("Well, if there's no listings, there is no point to having an IDX site...").

116. The Media Metrix chart thus reflects the most significant real estate websites on a national level in terms of consumer usage, although it may not take into account the significance of local websites that have a fewer number of hits but are nevertheless considered to be significant websites by local brokers and consumers, such as MoveInMichigan.com or ClickonDetroit.com.²⁸⁴ As discussed above, Internet marketing is only a competitive advantage to brokers to the extent that a significant number of buyers in the relevant geographic area are actually visiting the relevant websites. Thus, although there are at least thousands or tens of thousands of real estate websites, it is only necessary to consider the competitive alternatives of those listed in the Media Metrix chart and any other websites that have been identified to be significant on a local level in southeastern Michigan.

117. Several of the websites listed by Media Metrix in the above chart represent the websites of national brokerage franchises, including Remax.com, kw.com (Keller Williams), Century21.com, ColdwellBanker.com, LongandFoster.com, Era.com, Weichert.com, and Prudentialproperties.com. The properties available to be searched on these websites include the brokerage's own listings, and in some cases, the IDX feed of their local franchisee brokerages.²⁸⁵ For example, Century21.com only lists their own properties, but if a consumer clicks on a property and then clicks that they would like to see more listings, they are brought to the local franchise's website where they can search for additional property listings that the local franchise receives through their local MLS IDX feed.²⁸⁶ For Remax.com, a consumer will indicate the

²⁸⁴ See Goldberg Dep. 146:24 - 147:8.

²⁸⁵ Simos Dep. at 36:21 - 36:24; Murray Interviews with Richard Smith, Vice Chairman & President of Realogy, David Satori, Senior Vice President of Marketing of Realogy, and Sherri Chris, Chief Operating Officer of Coldwell Banker (February 28 - March 2, 2007); Murray Interview with Bruce Benham, Chief Operating Officer of Re/Max (February 28, 2007).

²⁸⁶ Murray Interviews with Richard Smith, Vice Chairman & President of Realogy, David Satori, Senior Vice President of Marketing of Realogy, and Sherri Chris, Chief Operating Officer of Coldwell Banker (February 28 -

geographic area where they would like to search for properties, and the website will provide them with access to this data from the Re/MAX website which has aggregated listings through IDX sites from its affiliates throughout the United States. Listings on the Remax.com website are all the result of an IDX feed from their local affiliates.²⁸⁷ Because these national brokerage IDX websites are limited to their own listings, or those of an IDX feed, they do not represent alternative websites for Limited Service Brokers (who are unaffiliated with the franchise).

118. Other websites listed by Media Metrix, including Livingchoices.com, Homes.com, Homegain.com, Realestate.com, Obeo.com and Yahoo! Real Estate charge brokers a fee for posting properties on the website, and/or charge brokers a referral fee for any leads generated by the website.²⁸⁸ Yahoo! Real Estate has an exclusive relationship with Prudential Properties, and it is unclear the extent to which they list properties outside of that relationship.²⁸⁹ However, under the Yahoo! Real Estate Classified section, brokers and consumers have the option of posting properties on Yahoo! for a fee. Websites like Homegain.com and Realestate.com charge brokers a referral fee and/or, for any closed transaction, a percentage of their commission.²⁹⁰

119. Some in the real estate industry have condemned business models that use property listings to attract home buyers to their website only to then sell the lead back to the

March 2, 2007).

²⁸⁷ Murray Interview with Bruce Benham, Chief Operating Officer of Re/Max (February 28, 2007).

²⁸⁸ Simos Dep. at 32:14 - 32:24 (discussing fee structure at Homegain.com); Simos Dep. at 35:3 - 35:15 (discussing fee structure at Realestate.com).

²⁸⁹ Simos Dep. 31:6 - 31:18 (discussing Yahoo! Real Estate relationship with Prudential).

²⁹⁰ Simos Dep. at 32:14 - 32:25, 35:3 - 35:15; *Referral Fees: CPA Model*, MOVE-EDOC-00004970 (Lending Tree/Realestate.com charges brokers 35% of buy side leads that convert to purchase); *Realtor Group*, MOVE-HC-00000543, at 550 (identifying Homegain.com as a "Pay Per Lead & Tariff" model).

broker who had used their intellectual capital to obtain the listing in the first place.²⁹¹ These third parties, often unrelated to the real estate industry, do not provide a value-added service but merely profit from the transaction by inserting themselves between brokers and consumers.²⁹² These business models, such as Homegain.com and Realestate.com, can charge up to 1/3 of a broker's commission as a referral fee or, as some in the real estate industry refer to them, as a tariff.²⁹³ Indeed, one of the main benefits emphasized by Move, Inc. of the benefits of Realtor.com is that Move, Inc. will not charge brokers a referral fee based on leads generated by Realtor.com.²⁹⁴ Because of these fees and charges, these websites therefore do not represent an alternative to the free listings on MoveInMichigan.com (and ClickonDetroit.com), Realtor.com and the IDX websites.²⁹⁵

120. The websites Owners.com and Forsalebyowner.com are targeted towards FSBO sellers. It is therefore unclear whether these would represent a competitive alternative for broker listings. Nevertheless, both websites charge fees to post listings on the websites. In addition, sellers have to update their own listing whenever there are changes to be made, such as changes

²⁹¹ CX 616, *Background on Realtor.com*, at MOVE-HC-0005877 (describing benefits of Realtor.com as protecting members from "unfriendly tariff models"); Greenspan Dep. 46:24 - 48:16 (describing how tariff models are a "disservice" to consumers because their "sole purpose" would be "no more than," in essence, to "capture and sell back a consumer that may have likely found a realtor another way...;" rather than providing real estate information or services, they are a third party that's not really involved at all with the transaction, but just "making a profit off of it").

²⁹² Greenspan Dep. 46:24 - 48:16; *Referral Fees: CPA Model*, MOVE-EDOC-00004970, at 4971 (explaining how lead referral programs operate).

²⁹³ E.g., *Referral Fees: CPA Model*, MOVE-EDOC-000004970, at 4971; *Realtor Group*, MOVE-HC-00000543, at 550 (identifying websites that act as a tariff model).

²⁹⁴ *A Realtor.com Presentation to Keller Williams*, MOVE-EDOC-00003074, at 3079 (sales presentation to Keller Williams brokerage that emphasizes the benefit to brokers that Realtor.com does not charge referral fees).

²⁹⁵ I am aware that Realcomp charges a monthly fee for brokers to receive an IDX feed in order to post property listings on a broker's own website. However, it is free to authorize a broker's own listings to be included on the IDX feed to gain the exposure of on other brokers' websites.

to the list price – which is also true for any websites that do not receive broker listings from the local MLS.

121. HAR.com represents the MLS website for the Houston Association of Realtors and is limited to property listings of HAR members in the Houston area. Similarly, Zillow.com is primarily a valuation website that allows sellers to obtain information on the estimated value of their home (or “zestimates”), although Zillow now does allow homeowners and brokers to post properties on their site. ZipRealty does not operate in southeastern Michigan and contains no listings from that area. These sites therefore do not offer an effective alternative for Limited Service Brokers in southeastern Michigan in which to post properties.

122. Trulia, however, appears to allow brokers and others to post listings for free on their website. Trulia is a new website, with approximately 580,000 visitors nationally in December 2006. It began in 2005, and it therefore was not an alternative available to Limited Service Brokers in southeastern Michigan before that time. In addition, because it is a relatively new website, it is uncertain at this time whether the website will be successful and continue to grow or whether it will encounter financial difficulties due to its financial model of relying on web advertising alone – and either fold or change its business model to charge brokers a fee for posting on their website or a referral fee. Trulia recently entered into contracts to obtain listing information from Keller Williams and Realogy, but most websites that have used Trulia’s business model have either folded or changed their business model to earn additional revenue more directly, such as by charging brokers a flat fee or a referral fee based on any leads generated from the website. This is in sharp comparison to Realtor.com, MoveInMichigan.com and the IDX sites, which do not charge brokers for posting a basic listing or a referral fee.

123. Notably, there is little or no information in the record that any of the flat fee/referral fee model websites are used in any significant way by buyers in southeastern Michigan. There is also no indication that sellers are demanding that brokers place their listings on these websites – as there is with Realtor.com and IDX websites.

124. I am aware that Realcomp has identified MiHomeHunt.com (which is the same website as MarketplaceDetroit.com) as an alternative website, potentially having significance in the southeastern Michigan area. MiHomeHunt.com is run as a joint venture of the Detroit Free Press and the Detroit News and requires brokers to pay a fee to post their listings. In comparison to Realtor.com, MoveonMichigan.com (and ClickonDetroit.com), and the IDX Websites, MiHomeHunt.com has not been cited as being important to the business of local brokers.²⁹⁶ Indeed, only 14% of consumers nationally reported in 2006 that they visited newspaper websites as part of their home search; and only 8% of consumers in Realcomp's geographic area reported visiting newspaper websites.²⁹⁷ Thus, MiHomeHunt.com (and MarketplaceDetroit.com) does not appear to be a substitute for Limited Service Brokers who have been excluded by Realcomp's Website Policy from posting their properties on Realtor.com, MoveonMichigan.com (and ClickonDetroit.com) and the IDX Websites.

125. In addition, I am aware that Realcomp in its answers to Interrogatories identified a number of additional websites as potential substitutes for Limited Service Brokers.²⁹⁸ However, brokers in southeastern Michigan, including members of Realcomp's Board of Governors,

²⁹⁶ In fact, the only broker in southeastern Michigan who testified about MiHomeHunt.com testified that he had "never heard of it." Kermath Dep. at 66:12 - 67:7.

²⁹⁷ CX 373, 2006 NAR Profile of Buyers & Sellers, at NARFTC 0002042; Survey responses from 2006 NAR Profile of Buyers & Sellers received from zip codes beginning with 480-, 481-, 482-, 483-, and 484-.

²⁹⁸ CX 77.

uniformly testified that they were not familiar with these sites.²⁹⁹ In addition, one broker used an Internet tool to estimate the usage of the websites identified by Realcomp, which were primarily driven by FSBO sites. That broker was able to conclude that the average of the total rankings for all of the sites identified by Realcomp reflected far less usage than the sites affected by Realcomp's Website Policy. Specifically, the websites identified by Realcomp had an average ranking of 143,069, as compared to those affected by the Realcomp Website Policy that had a ranking of 44,309 – with the lower number reflecting a much higher usage.³⁰⁰ It is apparent, therefore, that the alternative websites identified by Realcomp in its Interrogatory responses are not adequate substitutes for the Limited Service Brokers to the websites affected by Realcomp's Website Policy.

126. In short, Realcomp's Website Policy forces Limited Service Brokers to search for alternatives that cost more in time and money than the Realcomp feeds to Realtor.com, MoveInMichigan.com (and ClickonDetroit.com), and the IDX Websites – the websites in the top four categories most visited by potential home buyers. The policies may also cause sellers to have their homes spend longer times on the market due to their lower exposure to potential buyers. Realcomp's Website Policies also cause buyers to be less efficient in their home search because it forces them to search multiple websites, each with partial listings, in order to be able to find homes that meet their housing needs. Finally, Realcomp's Website Policies cause sellers to either sell their home with less key exposure – thereby risking that the home will not be sold or will take longer to sell – or else purchase services that they do not want or need.

²⁹⁹ Hardy Dep. at 99:6 - 99:16 ("there's not one I recognize that I've actually spent more than this time on this page with except zillow at the bottom"); Nead Dep. at 82:20 - 83:1 ("Most of them I never heard of."); Elya Dep. at 44:23 - 44:24 ("Q. Do you recognize any of these websites? A. Not really.").

³⁰⁰ D. Moody Dep. at 60:17 - 63:5; RX26, at GM000032.

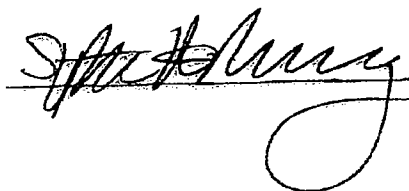
03/30/2007 08:06 3037411070

REAL TRENDS INC

PAGE 02

Respectfully Submitted,

Date: March 30, 2007

A handwritten signature in black ink, appearing to read "J. H. [unclear]", written over a horizontal line.

7 11 0077 / AM

561-588-4555 - SALES

MAR. 30. 2007 9:16AM

RX154-A-73

ATTACHMENT A

Stephen H. Murray
Castle Rock, CO

Curriculum Vitae

5/1/87 - Present

Consultant, Publisher and Speaker

President
Murray Consulting, Inc.

Editor and President
REAL Trends, Inc. and LORE LLC

CEO and Editor of nation's leading trends newsletter that reaches over 19,000 readers each month and covers trends, events and strategies affecting brokerage industry primarily in North America. Also hosts annual REAL Trends Leadership Conference" and Real Trends Re-invention Conference meetings of North American industry CEO's.

Mergers, Acquisition and Valuation advisory services provided to over 1,800 realty firms. Merger related transactions totaling \$2.5 billion in value completed since 1989.

Publisher of three periodicals on mergers and valuations: "A Guide to Mergers, Acquisitions and Roll-Ins", 1994; "Valuing a Residential Real Estate Brokerage", 1995 and "Valuing a Residential Realty Firm", 2006.

Expert Witness and Testimony (Partial, 2003 - Present)

Testified in arbitration proceedings in New Jersey, January 2006, *Coldwell Banker Real Estate Corporation v. RSI 3 and RSI 4*, Case # 05-4459, re: valuation and practices of a brokerage firm.

Testified in arbitration proceedings in the State of New York, January 2005, **Richey v. Allan Snyder Inc.*, re: valuation of a residential brokerage firm.

Testified in Massachusetts State Court, August 2005,
**Fisichelli v Buck et al.*, re: valuation of a residential
brokerage firm, RE/MAX Properties of Methuen, MA.

Testified in California State Court, December 2004,
Carrillo v. Carrillo, re: valuation of a residential brokerage
firm, RE/MAX Properties of Santa Cruz.

* Testified on behalf of the party denoted with an asterisk.

Valuation expertise and experience

Producer of training programs on Valuations, Mergers and
Acquisitions for Coldwell Banker Corporation, The
Prudential Real Estate Affiliates, RE/MAX International,
GMAC Real Estate, Century 21 Real Estate Service and
Keller Williams Real Estate.

Valuation services provided in all fifty states that
include assignments in bankruptcy, divorce, ESOP
planning, sale of stock, minority stock disputes and
liquidation.

Other consulting services

Technology and strategic advisor to real estate
brokerages in 37 markets on MLS and related
activities.

Served as governance and technology advisor to eleven
Realtor associations and addressed memberships of
numerous associations concerning technology and the
future.

Provided strategic planning services to four national and 26
regional real estate organizations in business planning and
strategy development.

Research and published

Co-author of several national consumer and industry
studies on realty and housing issues, Room for

Improvement (2002), One-Stop Shopping (2002), The Impact of Financial Institutions in Residential Real Estate (2003), From Homogeneity to Segmentation study of real industry for National Association of Realtors (2004), How

Homes will be Bought and Sold (2004), Alternative Selling Models (2005) and The Consumer Tsunami (2005)

Serve as Executive Vice President of The Vision Group, The Leadership Council, Trendsetters, New Home Marketing Group of America and The RE/MAX CEO Group since 1989 all CEO idea exchange forums.

Co-developer of television documentary, "The Impact of Technology on Real Estate Brokerage", 1995.

Editor of LORE magazine with circulation of 40,000 published six times per annum. Founder of REAL Trends Institute that provides advanced educational programs to senior industry executives. Founder and Managing Partner of the REAL Housing Report that tracks national housing sales trends.

5/1/92 - 2/28/93

Founder and Director, InterAsset Group Inc.
Denver, CO

Co-founded leading residential asset management firm; raised initial funding of \$1,000,000, designed marketing and business plan. Also responsible for introducing firm's services to investment community. Sold to Coldwell Banker Corporation in 1993.

10/31/89 - 11/30/91

Executive Vice President
The Commercial Network, Inc.
Denver, CO

Founded international network of commercial real estate firms which grew to 76 members in five countries, representing 1400 brokers and \$3.5 billion in annual transactions. Sold to new owners in 1992.

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Curriculum, Stephen H. Murray

10/31/86 - 9/30/89

President and CEO
American Relocation Network, Inc.
Orlando, FL

Founder, Director and CEO of national residential brokerage network which grew into nations top four ranking with over 120 members in 45 states. Purchased by Travelers Realty in 1989.

12/1/83 - 10/30/86

President and CEO
Equitable Realty Network
Orlando, FL

Initial President and CEO of wholly owned residential real estate subsidiary The Equitable Life Assurance Society. During tenure as CEO grew business by 90 percent and led all Equitable Life subsidiaries in earnings growth and return on capital.

12/1/79 - 11/31/93

Executive Vice President and COO
InterCommunity Relocation, Inc.
Kansas City, MO

Managed privately held residential network of 340 residential brokerage firms through its purchase by The Equitable Life Assurance in 1983.

5/31/75

B. B. A., Marshall University

Murray Consulting, Inc. and REAL Trends, Inc.
E-mail: smurray@realtrends.com
(303)741-1000 (Office)
(303)741-1070 (Fax)
6898 South University Blvd., Suite 200
Littleton, CO 80122

RX154-A-77

ATTACHMENT A (continued)

List of published articles or research written or co-authored by Stephen H. Murray, president of REAL Trends, Murray Consulting, Inc. and LORE LLC from January 1997 to December 2006.

REAL Trends

Composed the Commentary, Analysis and Trends sections of REAL Trends from January 1997 to October 2002. Composed the Commentary Section of REAL Trends from November 2002 through present. REAL Trends is a monthly trends newsletter published each month since May 1987.

Oversaw the research and publication of REAL Trends 500, a report ranking nation's largest realty firms, from 1998 to 2007.

Special publications

Published and co-authored four books; "A Guide to Mergers, Acquisitions and Roll-Ins", 1994; "Valuing a Residential Real Estate Brokerage", 1995 and "Valuing a Residential Realty Firm", 2006 and "People Still Matter", 2007.

Co-authored six industry studies: "Room for Improvement", 2002; "One Stop Shopping", 2002; "The Impact of Financial Institutions in Residential Brokerage", 2003; "From Homogeneity to Segmentation", 2004; Alternative Selling Models Study", 2005; "The Consumer Tsunami", 2006.

Wrote and published the 2002 – 2006 Brokerage Performance Report an analysis of brokerage incomes, expenses and profits.

Wrote and published the 2002 and 2005 Brokerage Compensation Report that analyzes the compensation for senior leaders within the residential brokerage industry.

Co-authored and wrote a study on real estate standards, "Touchstone for Excellence" published in January 2005.

LORE LLC

Wrote the letter from editor section for all issues published from January 2004 to December 2006. Wrote book review section of LORE from January 2006 to December 2006. LORE is published six times per year.

ATTACHMENT B

I have reviewed and relied on the following materials in drafting my report:

Pleadings and Discovery Responses:

Complaint

Realcomp II Ltd. Answer to Complaint

Realcomp Initial Disclosures

Respondent's Objections and Responses to Petitioner's First Set of Interrogatories

Respondent's Objections and Responses to Petitioner's Second Set of Interrogatories

Respondent's Objections and Responses to Petitioner's First Request for Admissions

Complaint Counsel's Objections and Responses to Respondent's First Set of Interrogatories

Complaint Counsel's Objections and Responses to Respondent's Second Set of Interrogatories

Complaint Counsel's Objections and Responses to Respondent's Third Set of Interrogatories

Deposition Transcripts, and associated deposition exhibits, for the following individuals:

Dreu Adams (February 7, 2007)

Wayne Aronson (February 16, 2007)

Walt Baczkowski (January 29, 2007)

Paul Bishop (March 8, 2007)

Darralyn Bowers (February 20, 2007)

Michelle Brant (January 17, 2007)

Gerald Burke (January 30, 2007)

John Cooper (January 23, 2007)

Phil Dawley (March 20, 2007)

David Elya (January 22, 2007)

Robert Gleason (February 23, 2007)

Robert Goldberg (March 8, 2007)

Robert Greenspan (March 20, 2007)

Anita Groggins (February 7, 2007)

Douglas Hardy (February 21, 2007)
Albert Hepp (February 14, 2007)
Patricia Jacobs (January 16, 2007)
Karen Kage (Investigational Hearing, August 23, 2006)
Karen Kage (Deposition, February 20, 2007)
Jeffrey Kermath (February 6, 2007)
John Kersten (March 1, 2007)
Mark Lesswing (March 8, 2007)
Craig Mincy (February 28, 2007)
Denise Moody (February 9, 2007)
Gary Moody (February 9, 2007)
Daniel Mulvihill (January 31, 2007)
Alissa Nead (January 22, 2007)
Cliff Niersbach (March 9, 2007)
Martin Nowak (January 30, 2007)
Thomas Rademacher (January 31, 2007)
Paul Simos (March 20, 2007)
Kelly Sweeney (March 1, 2007)
Dale Smith (January 16, 2007)
Robert Taylor (March 14, 2007)
Ryan Tucholski (January 23, 2007)
Douglas Whitehouse (February 22, 2007)
Carl Williams (January 17, 2007)

Documents: (in addition to those used as deposition exhibits)

RC 868 - 1562

FSBO 000001 – 89

NARFTC 0000001 - 4922

NAR Data collected from survey responses to the 2003 – 2006 NAR Profile of Home Buyers & Sellers, received from zip codes beginning with 480-, 481-, 482-, 483-, and 484-.

Selected documents produced by Move, Inc. Those specifically relied on, in addition to those used as deposition exhibits, are as follows:

MOVE-HC-00000543 - 558

MOVE-HC-00004906 - 4973

MOVE-HC-00006703 - 6708

MOVE-HC-00008347 - 8684

MOVE-EDOC-00003074 - 3108

MOVE-EDOC-00003997 - 4004

MOVE-EDOC-00004970 - 4976

Excel Spreadsheets contained on the CDs identified as: MOVE-EDOC-00021036
and MOVE-EDOC-00021037

Interviews:

Murray Interview with Steve Ozonian, Chairman and CEO, Help-U-Sell (Feb. 12, 2007)

Murray Interviews with Richard Smith, Vice Chairman & President of Realogy, David Satori, Senior Vice President of Marketing of Reology, and Sherri Chris, Chief Operating Officer of Coldwell Banker (February 28 – March 2, 2007)

Murray Interview with Bruce Benham, Chief Operating Officer of Re/Max (February 28, 2007)

Murray Interview with Tim Fagan, CEO of HomeGain (March 1, 2007)

Murray Interview with Russell Cappers, E-Ruealty/Prudential Real Estate Affiliates (February 27, 2007)

Murray Interview with Eric Cunliffe, E.V.P. of Realestate.com (February 23, 2007)

Murray Interview with Lloyd Frink, CEO of Zillow (January 2007)

Murray Interview with Pete Flint, CEO of Trulia (March 1, 2007)

Other Materials:

Publications by Murray Consulting, which are publicly available on my website, www.realtrends.com, and include the following:

REAL Trends 500 (Murray Consulting 2006)

Murray Consulting & Harris Interactive, *Real Estate Consumer Service Model Assessment for Sellers*, at 54 (2005)

Murray Consulting, Inc., *The Consumer Tsunami: Waves of Change for the Real Estate Industry* (2006)

Murray Consulting, *Room for Improvement: Perspectives of Real Estate Consumers and the Professionals Who Serve Them* (2002)

Government Accountability Office, *Real Estate Brokerage: Various Factors May Affect Price Competition* (2006), FTC 0000335 - 355

Data collected by the Economics Department, NAHB (December 2006)

comScore Media Metrix Monthly Website Statistics (January 2002 – December 2006)

2006 Pew Center: The Future of the Internet

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

EXPERT REPORT OF DARRELL L. WILLIAMS, Ph.D.

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I. Introduction

A. Qualifications

1. I am a Director at LECG, where I have conducted economic analyses on commercial and antitrust matters in various industries. I possess a B.S. degree in Economics from the University of Kentucky, and M.A. and Ph.D. degrees in Economics from Washington University. Prior to my current position, I was an economics professor of Economics at the University of California at Los Angeles. I also previously worked (1) at the President's Council of Economic Advisors, where I analyzed economic policy issues, including antitrust and regulatory issues, and (2) at the U.S. Securities and Exchange Commission, where I conducted analyses on the performance and regulation of securities markets. My professional activities in the antitrust and economics fields include faculty lecturer for the Basic Economics Institute for Federal Judges (sponsored by George Mason Law School); faculty lecturer for the Practicing Law Institute; Vice-Chair of the Economics Committee of the Antitrust Section of the American Bar Association; and membership in the American Economics Association. A copy of my curriculum vitae is attached as Appendix A.

B. Claims

2. This case involves a concerted refusal to deal on equal terms within a collaboration among competitors. The collaborative venture in question, Realcomp, is a joint venture between independent real estate brokers whereby member brokers representing home sellers advertise (or "list") homes for sale and member brokers representing home buyers search home sale advertisements (or "listings").¹ The Federal Trade Commission ("FTC") challenges certain rules of the Realcomp Multiple Listing Service ("MLS") that restrict the search and public dissemination of certain types of listings. In particular, the FTC claims that Realcomp has

¹ Realcomp is owned by several Boards and Associations of Realtors in the Southeastern Michigan area. These Boards of Realtors include Dearborn Board of Realtors, Detroit Association of Realtors, Eastern Thumb Association of Realtors, Livingston Association of Realtors, Metropolitan Consolidated Association of Realtors, North Oakland County Board of Realtors, and Western-Wayne Oakland County Board of Realtors. "Statement of Real Property Information Services," CX99, p. 2.

adopted rules restricting the dissemination of listings other than Exclusive Right to Sell listings (“ERTS”), including Exclusive Agency (“EA”), Limited Service (“LS”), and MLS Entry Only (“MEO”) listings, to certain key real estate websites, including Realtor.com, Realcomp’s “Moveinmichigan.com”, and Realcomp-member websites (“Website Policy”).² Realcomp thus hinders the viewing of non-ERTS listings by potential home buyers on key real estate Internet sites to which Realcomp transmits its members’ ERTS listings. Realcomp has also adopted a policy which sets the default search on the Realcomp MLS system to ERTS listings only (“Search Function Policy”).³ EA, LS, and MEO listings are not seen by brokers that do not change the default settings when they search the Realcomp MLS.

3. Realcomp also defined an ERTS listing to require that the broker using this listing type provide an array of services, including showing the property to potential home buyers, accepting and presenting offers to the home seller, advising sellers as to the merits of purchase offers, assisting the seller in developing and communicating counteroffers, and helping the seller negotiate with home buyers.⁴ The definition of ERTS listings implemented by Realcomp amounts to a “minimum service requirement” for ERTS listings.⁵ As Realcomp puts it, an ERTS listing “is a listing where the listing agent offers full service to the seller(s).”⁶ The combination of the Website Policy, Search Function Policy, and the definition of ERTS listings inhibits competition from real estate brokers offering discounted, unbundled, real estate services to home sellers.

² In the Matter of Realcomp II, LTD., United States of America, Before Federal Trade Commission, Complaint (“Complaint”), p. 4. *See also*, Realcomp II Ltd. Rules and Regulations, October 2006 (RC1337-1363 at 1341): “Exclusive Agency, Limited Service and MLS Entry Only listings will not be distributed to any Real Estate Internet advertising sites”; The Investigational Hearing of Karen Kage, August 23, 2006, (“Kage Investigational Hearing”), p. 52.

³ Complaint, p. 4; CX 82 at 2.

⁴ Realcomp II Ltd. Rules and Regulations, October 2006 (RC1337-1363 at 1341).

⁵ *See, e.g.*, Adams Deposition, pp. 79-80: “according to my agreement with Realcomp, I have to provide a set minimum amount of services ... to be able to input the listing as an exclusive right to sell.”

⁶ *See, e.g.*, Plans for Implementing “Listing Type” Data in the Realcomp MLS, November/December 2003 (RC0178-0187 at 0719).

C. Summary of opinions

4. I have been retained by the FTC to analyze the competitive effects, if any, of Realcomp's Website Policy and Search Function Policy. This report summarizes my current opinions based on the evidence I have reviewed to date. My review has included the Complaint, interrogatory responses, other legal filings in the case, deposition transcripts, produced documents, various sources of publicly available information, and listing data from the Realcomp MLS and other MLSs. A list of the materials I have relied upon is attached as Appendix B.

5. Based on my experience, education, and general knowledge of economics as well as my review of documents produced in this case, I conclude the following:

- 1) The relevant output market is real estate brokerage services.
- 2) The relevant input market is MLS listing services.
- 3) Competition occurs within relevant geographic markets at the county level and may even occur in more local areas.
- 4) Realcomp has market power in MLS listing services in the relevant markets.
- 5) The structure of full service brokerage contracts implies a de facto price floor on the brokerage fees.
- 6) Nontraditional brokers using non-ERTS listings compete differently than traditional full service brokers by offering alternative contractual forms and the option of unbundled services. As a result, competition among traditional brokers is not a substitute for competition by nontraditional brokers.
- 7) Realcomp's Website Policy, Search Function Policy, and minimum service requirement are associated with significant decreases in the percentage of non-ERTS listings in the relevant market.
- 8) Realcomp's Website Policy and Search Function Policy inhibit the ability of nontraditional brokers to compete effectively. As a result, Realcomp has reduced the choices available to consumers of brokerage services, inhibited the unbundling of brokerage services, and protected the de facto price floor that supports the level of real estate brokerage commissions.
- 9) Realcomp's procompetitive justifications for its Website Policy and Search Function Policy are economically incorrect and inconsistent with the facts.

II. The Residential Real Estate Brokerage Services Industry

A. Structure of the residential real estate brokerage services industry

1. Types of real estate brokers

6. There are two types of residential real estate brokerage service professionals – real estate “brokers” and real estate “agents.”⁷ Brokers typically manage their own offices, and may employ many real estate agents (or salespeople).⁸ States typically require that brokers meet more educational requirements and have more experience than agents.⁹ Agents typically split their commissions with their brokers.¹⁰ (For simplicity, I refer to both agents and brokers as “brokers” through the remainder of this report.)

7. Brokers often operate as part of a brokerage firm or franchise (*e.g.*, Century 21 or Coldwell Banker), and benefit from the brand name, marketing efforts, and other assets of a large firm. Brokers who operate as part of a franchise sometimes may share a portion of their commissions with the franchise.

8. Real estate brokers supply services both to home sellers and home buyers. Real estate brokers working for home sellers are referred to as “listing brokers.” Real estate agents working on behalf of home buyers are referred to as “cooperating brokers.” The vast majority of real estate brokers do not specialize on selling or purchasing homes. Rather, they work both as listing brokers and cooperating brokers.

⁷ This report focuses on residential real estate rather than commercial real estate.

⁸ *See, e.g.*, United States Government Accountability Office, Report to the Committee on Financial Services, House of Representatives, “Real Estate Brokerage, Factors That May Affect Price Competition,” August 2005 (“GAO Report”), p. 6.

⁹ For instance, in Michigan, a broker must have a state issued license, take 90 hours of education, have three years of work experience in the real estate profession, and pass a broker’s exam. *See e.g.*, Michigan Department of Labor and Economic Growth (http://www.michigan.gov/cis/0,1607,7-154-35299_35414_35475-115121--,00.html; <http://www.cis.state.mi.us/bcsc/forms/real/lre035.pdf>); *see also*, Elya Deposition, p. 9.

¹⁰ The sharing of commissions between brokers and agents vary widely. New agents typically keep 50 percent of the commissions, but successful agents may keep as much as 90 to 100 percent. *See, e.g.*, Nadel, p. 2.

2. Demand for real estate brokerage services

9. Home sellers can sell their homes on their own or through a professional real estate broker. Homes sold without a real estate broker are referred to as “for sale by owner” (“FSBO”). The vast majority of home sellers choose to sell their home through a professional real estate broker. In 2006, 84 percent of home sales in the U.S. were sold through the use of a real estate broker.¹¹ For most home sellers, there are significant advantages in using a real estate broker to sell a home. One primary benefit to home sellers of using a real estate broker is the ability to list the home in an MLS. FSBO properties cannot be listed in an MLS because only members of the MLS, which must be brokers or their agents, can list a home in the MLS.¹² For other home sellers, the benefits of using a real estate broker include having the assistance of a professional in pricing, staging, and showing the home, in negotiating with buyers, and in closing the transaction.

10. Many home buyers also choose to use a real estate broker. As in the home selling side of the market, one of the primary benefits to home buyers of using a cooperating broker is the ability to search MLS listings.¹³ Nevertheless, many home buyers choose to search for homes on their own.¹⁴ There are various ways for home buyers to search for homes other than through the use of a real estate broker. For instance, home buyers can search for homes on several real estate websites, newspapers, other real estate publications, and by driving around a

¹¹ The 2006 National Association of Realtors, Profile of Home Buyers and Sellers (“2006 NAR Survey”), p. 69. The percent of FSBO sales have been decreasing in the past ten years. In 1995, FSBO sales comprised 15 percent of all home sales. *Id.*

¹² See Realcomp II Ltd. Rules and Regulations, October 6, 2006, RC1337-63 at 39: “Cooperating Participants/Listing Participants are the Participants who are serviced by the MLS under an operative Subscription/Service or Data Sharing Agreement from which they derive benefits and under which they have various obligations and duties to others and to the MLS... Participant – A Realtor eligible to receive MLS.”

¹³ Home buyers report that the principal reason they work with a broker is to “help find the right home to purchase.” According to the NAR Survey, 50 percent of buyers worked with a broker for this reason. Other reasons for using a broker include helping with negotiating the terms of sale, determining comparable home prices, price negotiations, paperwork, determining how much the buyer can afford, and finding and arranging financing. However, less than between 3 and 13 percent reported these as the reason why they chose to work with a broker. 2006 NAR Survey, p. 49.

¹⁴ The percentage of buyers that work with a broker in purchasing a home has decreased over the past ten years, from 81 percent in 1995 to 77 percent in 2006. 2006 NAR Survey, p. 46. This estimate seems to include buyers who work with the listing broker and thus overstates the percentage of buyers that employ their own brokers.

neighborhood.¹⁵ It is also important to note that, for many home buyers, these other methods of searching for homes are not substitutes for the services of a cooperating broker. Many home buyers use the services of a cooperating broker in addition to their own home search.¹⁶

3. *Traditional brokerage services*

11. Listing brokers traditionally have offered “full services” to home sellers. These service typically include listing the house in the local MLS, marketing the home in other ways (e.g., through the Internet), helping to price the home, “staging” the home, holding open houses, scheduling showings, assisting in negotiations, and coordinating various steps necessary to close the transaction (e.g., coordinating appraisal, inspection, and escrow).

12. Real estate agents working on behalf of home buyers (referred to as selling or cooperating brokers) have also typically offered a bundle of services. Cooperating brokers typically assist buyers in searching listings, showing homes, preparing offers, assisting in negotiations, and coordinating steps necessary to close the transaction (e.g., appraisal, inspection, escrow, and financing).

4. *Traditional brokerage commissions*

13. The commission of the listing agent typically is paid by the home seller. The industry practice traditionally has been to express the brokerage fees as a percentage of the sale price for the house (e.g. 6 percent).¹⁷ The cooperating broker used by the home buyer typically also is paid by the home seller through the listing broker. The listing broker makes an offer to compensate any cooperating broker representing the home buyer if the cooperating broker is a procuring cause of the sale.¹⁸ The offer of compensation is usually 3 percent of the sale price of

¹⁵ The NAR Survey reports that 80 percent of home buyers used the Internet to search for homes, 63 percent searched for yard signs, 55 percent searched print newspaper ads, and 47 percent attended open houses. The only information source used by more home buyers was a real estate agent (used by 85 percent of home buyers). 2006 NAR Survey, p. 34.

¹⁶ For instance, buyers that used the Internet to search for homes were more likely to also use a real estate agent than buyers that did not use the Internet. *See infra* note 27.

¹⁷ According to the NAR Survey, listing brokers compensated by sellers were paid a commission based on a percentage of the home sales price 93 percent of the time. 2006 NAR Survey, p. 78.

¹⁸ *See, e.g.*, Realcomp II Ltd. Rules and Regulations: “The Listing Participant shall specify, on each listing filed with the MLS, the compensation offered to MLS participants, for their services with respect to the sale/lease of the

the house.¹⁹ The listing broker, and not the home seller, is responsible for paying the offer of compensation to a cooperating broker that is the procuring cause of the sale.²⁰ Even though the home seller typically is responsible for the payment of the brokerage commission, the home buyer clearly bears part of the brokerage fee to the extent that part of the commission is passed on in the sale price of the house.

14. There is little evidence that competition between traditional service brokers has led to significant reductions in the amount of brokerage commissions paid. Most studies show a fair amount of rigidity in percentage brokerage rates.²¹ The actual amount of brokerage commissions paid in dollar terms also has fluctuated nearly proportionally with changes in housing prices. For instance, it is reported that between 1991 and 2004, percentage commission rates declined from 6.1 percent to 5.1 percent, a decrease of 16 percent on average.²² However, during the same period, the average dollar brokerage commissions paid increased by 30 percent in response to housing price increases of 55 percent.²³ In metropolitan housing markets on the east and west coasts, for example, where housing prices have increased at higher rates than national averages, the increase in the amount of brokerage commissions actually paid have been even greater.²⁴

real estate covered by such listing. Such offers are unconditional except that entitlement to compensation is determined by the Cooperating Broker's performance as the procuring cause of sale (or lease) or as otherwise provided for in this rule." Realcomp II Ltd. Rules and Regulations, October 6, 2006, RC1337-63 at 46.

¹⁹ For instance, in the Realcomp MLS, the offer of compensation was 3 percent in over [REDACTED] of new listings. Source: Realcomp listing data.

²⁰ See, e.g., Bowers Deposition, pp. 46-47.

²¹ For instance, studies and anecdotal evidence suggests that real estate brokerage commissions have typically been in the 5-7 percent range for decades, despite large increases in house prices (and therefore in commissions in dollar terms). See, e.g., GAO Report, p. 3. Various studies using data from the 1970s and 1980s found that the majority of listings in many communities are clustered around the same rate, exactly 6 percent or 7 percent. GAO Report, p. 5. Anecdotal evidence indicates that commissions still cluster around a common rate within most markets, generally of 5 percent or 6 percent. GAO Report, p. 5. Commission rates within a market at a given time also do not appear to vary significantly on the basis of the price of the home. One study found that the percentage commission is the same regardless of house prices in a metropolitan area. See, e.g., Chang-Tai Hsieh, *The Tragedy of the Commission*, p. 3. Thus, more expensive homes typically pay commissions that are higher by an amount proportional to the price of the house.

²² Robert W. Hahn, Robert E. Litan, and Jesse Gurman, *Bringing More Competition to Real Estate Brokerage*, Working Paper 05-11, p. 89, 94.

²³ Hahn et al., p. 94.

²⁴ Hahn et al., p. 94.

B. The Internet and the emergence of non-traditional brokerage service models

1. *The Internet has reduced information costs for home buyers and home sellers*

15. Before the Internet, information regarding real estate markets, and in particular information on properties for sale, was primarily available from real estate brokers. MLS listings could be searched only through computer terminals located at the office of a real estate broker. Accordingly, home buyers could only view MLS listings by visiting a broker's office or by receiving the listings from the broker through fax or mail.

16. An important change in the environment affecting the real estate brokerage industry is the amount of information available to the consumers of brokerage services, especially home buyers. The Internet is an important catalyst for this change. Through public websites home buyers have direct access to information regarding thousands of listings²⁵ and the ability to search among them based on a variety of criteria, such as price, location, type of dwelling (single-unit, multi-unit, etc.), and characteristics of the property.²⁶ Using this new and important tool, home buyers can actively participate in searching for a home to purchase, even when they are represented by a cooperating broker or in cases where the home buyer desires to search independently.²⁷ According to the NAR Survey, in 2006, 80 percent of home buyers used the Internet "frequently" or "occasionally" to search for homes.²⁸ In fact, 24 percent of home buyers found the home they purchased on the Internet.²⁹

²⁵ The information provided through public websites is a subset of that provided in the MLS. As discussed later, public websites do not show the offer of compensation, nor do these sites have other information such as agent remarks. The sites do, however, convey information that consumers want, such as price, number of bedrooms, location, etc.

²⁶ Real estate websites often include information on homes for sale that typically is unavailable through other information sources, including photos, virtual tours, interactive maps, and neighborhood information.

²⁷ Some home buyers may chose to search for a house without ever hiring the services of a selling broker to assist them. However, for most home buyers, the Internet is not a substitute to using a real estate broker. According to the NAR Survey, 87 percent of buyers who used the Internet to search for homes also used a real estate broker, compared to 74 percent of buyers who did not use the Internet. 2006 NAR Survey, p. 41. The Internet also helps home buyers find a broker. In fact, 23 percent of home buyers found an broker used to buy a home by using the Internet. 2006 NAR Survey, p. 37.

²⁸ 2006 NAR Survey, p. 37. This percentage has increased from 71 percent in 2003. *Id.* Younger home buyers are more likely to use the Internet to search for homes. According to the survey, 87 percent of home buyers of age 18-44 used the Internet, compared to 76 percent for home buyers between 45 and 64 years of age and 44 percent of buyers 65 years and older. *Id.*, p. 36.

²⁹ 2006 NAR Survey, p. 38. This percentage increased from only 2 percent in 1997 to 11 percent in 2003. *Id.*

17. Home buyers can also gather information about the distribution of housing prices in a particular area, which can assist in the determination where they want to focus their search and/or assist in formulating offers when a desirable home is found. Home buyers relocating from outside a state or city can learn about neighborhoods at their new destination and market conditions within the neighborhoods which enable them to screen out certain neighborhoods and focus more intensely on others making the most productive use of their search time when visiting.

18. The Internet also provides to home sellers and their brokers direct access to home buyers themselves. Before the Internet, the primary methods of reaching potential home buyers directly (i.e. other than through brokers) were newspapers, mailings, and yard signs. The Internet provides direct access to a much larger percentage of potential buyers than these other information channels.³⁰ Additionally, the Internet allows listing brokers to display much more information regarding the property for sale than these other information channels, including photos, virtual tours, and interactive maps.

2. The Internet has contributed to the emergence of various competitive alternatives to the traditional full-service brokerage model.

19. The changing economic environment created by the Internet has contributed to the entry of several new models of real estate brokerage services. These new models include discount brokerage firms that offer low-cost unbundled services to home buyers and sellers ("limited service brokers"). Discount unbundled service brokers offer limited service packages and often charge on a fee-for-service basis. For example, at one extreme, the broker only lists the house in the MLS. Other unbundled service brokers may list the house in the MLS and provide certain other services such as assisting with negotiations, but generally provide less than a "full" set of services. The types of unbundled services offered by limited service brokers varies and there is often a menu of service levels available to a home seller. For instance, AmeriSellRealty, a low-cost unbundled service brokerage firm in Southeast Michigan, offer a

³⁰ For instance, according to NAR, 80 percent of home buyers used the Internet to search for homes, compared to 63 percent for yard signs and 55 percent for print newspapers. 2006 NAR Survey, p. 34.

service plan consisting of listing the property in an MLS for \$349.³¹ They also offer a “Better Way” service plan consisting of more photos and a headline for \$499.³² Similarly, Michiganlisting.com offers a \$495 flat fee package which lists the property in an MLS.³³

20. In effect, unbundled brokerage service model allow home sellers to purchase a subset of brokerage services (such as listing in an MLS), while “self-supplying” other services. For instance a home seller may wish to list their home on the MLS, but self-supply other services such as showing the property, holding open houses, negotiating with buyers, and closing the transaction. As a result of this unbundling of brokerage service, these brokerage service models allow home sellers (and indirectly home buyers) to significantly reduce the costs of selling a home. For instance, at the typical 6 percent commission paid by the home seller, the commission on the sale of a \$150,000 house would be \$9,000. This is many times the typical fee for unbundled services (*e.g.*, between \$349 and \$499 for unbundled services from AmeriSellRealty).³⁴ Even if there is a payment of 3 percent to a cooperating broker used by the home buyer, the cost savings would still be at least \$4000 (\$4500 minus \$499), or over 44 percent of the total real estate commission paid.

21. Low-cost unbundled service brokerage models now comprise a significant share of the brokerage service industry. According to NAR, in 2006, limited service brokerage models comprised 17 percent of all residential real estate transactions.³⁵ This fraction is significant, especially in light of the fact that several MLSs associations have passed rules impeding the ability of such alternative brokerage models to compete, and several states have imposed minimum service laws.³⁶

³¹ AmeriSellRealty.com, accessed on March 28, 2007. *See also*, Exhibit RX 5. The home seller must also pay the offer of compensation to a cooperating broker, which is typically 3 percent of the home sales price, if the buyer employs one.

³² *Id.*

³³ Michiganlisting.com accessed on March 28, 2007 (<http://michiganlisting.com/ForSellers.html>); *see also* GreaterMichiganRealty.com (<http://www.greatermichiganrealty.com/packages/>).

³⁴ In 2006, the average asking price of a property listed in the Realcomp MLS was [REDACTED]. Source: Realcomp listing data.

³⁵ 2006 NAR Survey, p. 77.

³⁶ States that have passed Minimum Service laws include Alabama, Texas, Florida, Illinois, Indiana, Missouri, New Mexico, Oklahoma, Utah and Kentucky (<http://www.newswiretoday.com/news/5497>). These laws typically require listing brokers to 1) Accept and present to the principal offers and counter-offers to buy, sell, or lease the principal's

C. Brokerage service contracts

1. *Traditional listing contract: Exclusive Right to Sell*

22. The real estate listing contract traditionally used by full-service brokers is an Exclusive Right to Sell Listing (ERTS).³⁷ An ERTS listing is an exclusive contract between the home seller and the listing broker that guarantees to the listing broker the full amount of the negotiated commission if the house sells during the contract period, regardless of whether or not the listing broker was responsible for identifying the home buyer.³⁸ For example, if the home seller sells the home to a relative or friend who learned that the house was for sale from the home seller instead of through marketing by the listing broker, the listing broker is still entitled to and receives the negotiated commission.

23. MLSs, including Realcomp, do not require that the home buyer use a cooperating broker. However, under an ERTS listing contract, if a home buyer is not represented by a broker, the listing broker will keep the entire commission. Take for example a home seller that enters into an ERTS contract with a listing broker at a 6 percent commission and a 3 percent offer of compensation to a cooperating broker. The listing broker will earn 3 percent of the home sale price if a home buyer employs a cooperating broker (that is the procuring cause of the sale), but will earn 6 percent of the sale price if the buyer does not use the services of a cooperating broker. Thus, the home seller (and indirectly the home buyer) will pay the same commission whether or not the buyer uses a cooperating broker. The buyer and seller cannot avoid paying commissions to a cooperating broker if a buyer does not want to use one after the seller has entered into an ERTS contract with the listing broker. In other words, because of the structure of commissions under an ERTS contract, there is little scope for negotiating the brokerage commission *after* the home seller has entered into an ERTS contract with the listing broker.

property or property the principal seeks to buy or lease; 2) assist the principal in developing, communicating, and presenting offers, counter-offers, and notices that relate to the offers and counter-offers; and 3) answer the principal's questions relating to offers, counter-offers and notices." ("Competition Issues in Real Estate Brokerage," Maureen K. Ohlhausen, *The Antitrust Source*, November 2005, p. 6.)

³⁷ Realcomp II Ltd.'s Answer to Complaint, Answer 8 (admitting that "Exclusive Right to Sell listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services").

24. There is typically no inherent requirement that a real estate broker using an ERTS contract to sell a home provide a full range of services.³⁹ For instance, a home seller can contract with a listing broker to list the home in an MLS and provide certain other services, but get paid a commission (which could be a flat fee or percentage based commission) regardless of who finds the buyer for the house. In some MLSs, such a listing contract would be considered an ERTS contract, even though it is used to offer unbundled services, because the listing broker is assured of compensation even if the home seller finds a buyer for the property.⁴⁰

25. However, in the Realcomp MLS, brokers offering unbundled or limited services cannot use ERTS listing contracts. This is because Realcomp requires ERTS listings to be “full service.” Realcomp requires that brokers listing properties as ERTS provide an array of services, including showing the property to potential home buyers, accepting and presenting offers to the home seller, advising sellers as to the merits of purchase offers, assisting the seller in developing and communicating counteroffers, and helping the seller negotiate with home buyers.⁴¹ Accordingly, all brokers listings a property as an ERTS listing in the Realcomp MLS must provide a “full” set of services as defined by Realcomp.

2. *Alternative listing contracts*

26. Real estate brokers offering alternative service models, including providing low-cost unbundled services, often use listing contracts other than ERTS listing contracts to sell homes. In the Realcomp MLS, because Realcomp has implemented a “minimum service

³⁸ See, e.g., Kage Investigational Hearing, p. 23.

³⁹ See, e.g., Hardy Deposition, pp. 57-58 (Realcomp President and Governor admitting that ERTS contracts do not inherently require minimum services); CX 175 (form ERTS contract from Michigan Association of Realtors).

⁴⁰ See, e.g., Hepp Deposition, pp. 56-57 (Columbus, Ohio MLS allows limited service brokers to use ERTS contracts).

⁴¹ Realcomp II Ltd. Rules and Regulations, October 2006 (RC1337-1363 at 1341). Realcomp describes an LS listing as one in which “the listing broker will NOT provide one, or more, of the following services: (a) Arrange appointments for cooperating brokers to show listed property to potential purchases but instead gives cooperating brokers authority to make such appointments directly with the seller(s); (b) Accept and present to the seller(s) offers to purchase procured by cooperating brokers but instead gives cooperating brokers authority to present offers to purchase directly to the seller(s); (c) Advise the seller(s) as to the merits of offers to purchase; (d) Assist the seller(s) in developing, communicating, or presenting counteroffers; or (e) Participate on the seller(s) behalf in negotiations leading to the sale of listed property.”

requirement” for ERTS listings, brokers offering unbundled services *must* use listing contracts other than ERTS listing contracts.

27. In the Realcomp MLS, there are three types of listing contracts other than ERTS listings. An Exclusive Agency (EA) Listing is a listing in which the listing broker receives a commission if the broker (or one of its agents) sells the home within the listing period, but receives no commission if the seller finds a buyer.⁴² A Limited Service (LS) listing is a listing in which the listing broker or agent does not provide a “full” set of services, as defined by the MLS association.⁴³ An MLS Entry Only (MEO) listing is a listing in which the broker or agent only lists the house in the MLS.⁴⁴ All of these listing types are used by listing brokers to offer low-cost unbundled real estate brokerage service.

28. It is important to note that for all listings in an MLS, regardless of the listing type, the home seller must offer a compensation to a cooperating broker who brings a buyer and is the procuring cause of the sale.⁴⁵ The listing broker is responsible for ensuring that the cooperating broker is compensated if she is the procuring cause of sale, regardless of the level of services offered by the listing broker or the listing type used.

3. *Cooperating broker contracts*

29. Common law typically has considered both the listing broker and the cooperating broker (working with the buyer) to have a fiduciary duty to the seller, unless the buyer has entered into an alternative contract with the cooperating broker.⁴⁶ A cooperating broker with a fiduciary duty to the home seller, referred to as a “selling broker,” is considered a sub-agent of the listing broker. Because there is no contract between a home buyer and the selling broker,

⁴² See, e.g., Realcomp II Ltd. Rules and Regulations, October 2006 (RC1337-1363 at 1341): “Exclusive Agency Listings: authorizes the listing broker, as exclusive agent, to offer cooperation and compensation on a blanket unilateral basis, but also reserves the general right of the seller to sell the property on an unlimited or restrictive basis. (In other words, the seller will pay the agent’s commission if the agent brings in the buyer, but if the seller brings in their own buyer, the seller is not obligated to pay a commission) and will be identified by the marking the “Exclusive Agency” box on the Profile Form.” See also, Kage Investigational Hearing, p. 22.

⁴³ *Supra* note 41.

⁴⁴ See, e.g., Realcomp II Ltd. Rules and Regulations, October 2006 (RC1337-1363 at 1341); Kage Investigational Hearing, p. 24.

⁴⁵ See, e.g., Realcomp II Ltd. Rules and Regulations, October 2006 (RC1337-1363 at 1346).

⁴⁶ GAO Report, p. 5.

selling brokers have non-exclusive arrangements with home buyers. For instance, according to the Realcomp MLS rules, a selling broker that is not the procuring cause of a sale is not entitled to a commission, regardless of the time spent assisting the buyer.⁴⁷

30. Alternatively, buyers can enter into contractual arrangements with cooperating brokers. Cooperating brokers that have a contract with buyers are referred to as “buyer’s brokers.” The agreement between a buyer’s broker and a home buyer is called a buyer agency agreement.⁴⁸ Buyer’s brokers represent the interests of the buyer. Buyer agency agreements also protect the interest of the broker because the buyer is typically responsible for ensuring the broker’s compensation.⁴⁹ For instance, buyer agency agreements may take the form of an exclusive, in which the buyer ensures that the buyer’s broker is compensated regardless if he or she is the procuring cause of a particular home purchase.⁵⁰

D. MLS listing services

1. The role of the MLS in the search process

31. The MLS is a cooperative arrangement among real estate brokers serving a particular geographic area whereby listing agents share listing information with cooperating brokers. Listing brokers use the MLS to list the house being offered for sale, and provide brokers representing home buyers with detailed information about the properties (*e.g.*, the asking price, the location, and a description of the house). Listing brokers also publish their unilateral offers of compensation to cooperating brokers through the MLS. The offer of compensation is a

⁴⁷ Realcomp II Ltd. Rules and Regulations, October 6, 2006, RC1337-63 at 46: “The Listing Participant shall specify, on each listing filed with the MLS, the compensation offered to MLS participants, for their services with respect to the sale/lease of the real estate covered by such listing. Such offers are unconditional except that entitlement to compensation is determined by the Cooperating Broker’s performance as the procuring cause of sale (or lease) or as otherwise provided for in this rule.”

⁴⁸ According to the NAR Survey, in 2006, 44 percent of buyers had a written agreement with the cooperating broker and 20 percent had an oral arrangement. 2006 NAR Survey, p. 48.

⁴⁹ *See, e.g.*, Elya Deposition, p. 11. In Michigan, a broker may also establish an agency relationship with a buyer through a disclosure, which does not obligate the buyer to pay the broker’s commission – the broker is compensated through the offer of compensation. Gleason Deposition, p. 15.

⁵⁰ *See, e.g.*, Elya Deposition, p. 11. There are other roles that cooperating brokers can take. For instance, a “transaction coordinator” merely assists a buyer and seller with executing the real estate transaction (*i.e.* does not assist the home seller in finding a buyer or the buyer in finding a property). A “dual agent” acts as an agent for the buyer and the seller. *See e.g.*, Nead Deposition, pp. 10, 118-121.

dollar sum or a percentage of the sale price that will be paid to a cooperating broker that is a “procuring cause” of the sale.⁵¹ MLSs require that all listings specify an offer of compensation to a cooperating broker that is the procuring cause of the sale.⁵² Other than contacting the listing agent directly, the MLS is the only source that provides the commission being offered by the listing agent to cooperating brokers.⁵³

32. The typical MLS pools information about nearly all residential real estate properties available for sale through brokers in a particular geographic area. The MLS provides maximum exposure for sellers and facilitates the home search for buyers. For listing brokers (and home sellers), the MLS exposes their listings to thousands of cooperating brokers working with buyers. For cooperating brokers (and home buyers), the MLS allows the convenient search of the vast majority of properties available for sale in a particular area.

33. The value of an MLS to cooperating brokers working with buyers increases with the number of homes for sale that are listed in the MLS. This is because the greater the number of listings, the greater the likelihood that a cooperating broker will be able to match a particular buyer with a property for sale and/or the shorter will be the search period necessary to achieve this match. Similarly, the value of an MLS to listing brokers increases with the number of cooperating brokers that search the MLS. The greater the number of cooperating brokers using the MLS to search for homes, the shorter will be the expected time to sell a home and/or the higher will be the expected sales price. As I discuss in Section III.A. below, this discussion is a description of what economists call “network effects.”⁵⁴

34. Despite the increased use of the Internet by home buyers, sellers, and real estate professionals, the Internet has not been a substitute for an MLS, or decreased the value of an MLS. In fact, the Internet is largely a complement to an MLS. In particular, the advent of the

⁵¹ According to Realcomp rules, a cooperating broker is entitled to the offer of compensation only if it is a procuring cause of the sale. *Supra* note 18.

⁵² See e.g., Realcomp II Ltd. Rules and Regulations, October 2006, RC1337-1363 at 1369: “In filing a property with the MLS, the Listing Participant is making blanket unilateral offers of compensation to the other potential MLS Cooperating Participants, and shall therefore specify on each listing filed with the MLS, the compensation being offered to the other potential MLS Cooperating Participants.” See also, Elya Deposition, p. 82.

⁵³ See, e.g., Nead Deposition, p. 134; Cooper Deposition, p. 39; Response to First Interrogatories, No. 5; CX220.

⁵⁴ “Network effects” are a type of demand-side economies of scale that occur when the value of a product or service to a customer depends on the number of other customers who also use the product or service.

Internet has enhanced the efficiencies of the MLS. The Internet effectively increases the number of users in an MLS network by allowing home buyers to search MLS listings independently of a cooperating broker. Some of the most popular websites such as Realtor.com, Aol.com and Msn.com are primarily sourced by listings from local MLSs.⁵⁵

35. Consistent with these benefits of an MLS, the vast majority of homes for sale in the U.S. are listed in an MLS. According to NAR, 88 percent of home sellers in the U.S. listed their homes in an MLS in 2005-2006.⁵⁶ In short, despite the impending changes in the brokerage industry, the MLS remains the primary means of advertising a house to brokers representing potential home buyers.

2. Governance of the MLS

36. MLSs are generally owned and operated by one or more realtor associations.⁵⁷ Membership in the association itself is open to all licensed real estate brokers and agents. The price of membership, including the right to search the MLS and list homes for sale in the MLS, can usually be obtained for a relatively small membership fee. For example, membership in the Realcomp MLS costs \$99 per quarter.⁵⁸

37. An MLS typically is governed by its members. The rules and regulations that govern the use of the MLS, including the rules at issue in this case, are promulgated by a representative governing body.⁵⁹ In the case of Realcomp, the governing committee consisted of 11 to 13 voting members from 2001 to the present, the period during which the rules at issue

⁵⁵ For instance, a majority of the listings on Realtor.com come from MLSs. Individuals for the most part cannot put their listings on Realtor.com. *See, e.g.*, Goldberg Deposition, pp. 34-5; 122-3. Realtor.com has co-branding agreements with msn.com and aol.com, such that when individuals search for listings on any of these websites, they are automatically directed to search Realtor.com. Simos Deposition, pp. 14-21.

⁵⁶ 2006 NAR Survey, p. 77.

⁵⁷ Though there are some MLSs that are broker owned, the vast majority of MLSs are owned by Realtor Boards or Associations. For instance, the Realcomp MLS is owned by several Boards of Realtors in the Southeastern Michigan area. These Boards of Realtors include Dearborn Board of Realtors, Detroit Association of Realtors, Eastern Thumb Association of Realtors, Livingston Association of Realtors, Metropolitan Consolidated Association of Realtors, North Oakland County Board of Realtors, and Western-Wayne Oakland County Board of Realtors. *Supra* note 1.

⁵⁸ Realcomp, Revision: April 21, 2006 (CX 88), p. 1.

⁵⁹ *See e.g.*, Fifth Amended Bylaws of Realcomp II Ltd., Adopted November 2004 (RC0300 – RC0331) at RC0309-0310.

were adopted and implemented, out of a total membership of more than 15,000 real estate professionals.⁶⁰

III. Relevant Antitrust Markets

A. Relevant product markets

1. *Economic framework for defining the relevant antitrust markets*

38. The purpose of market definition is to identify a set of products that are reasonably substitutable with and thereby compete with the product at issue. Market definition provides an economic framework to evaluate the possibility that a particular entity has market power and therefore the power to act anticompetitively. A relevant product market is the set of products, if any, that constrain the ability of the supplier of the product in question to behave anticompetitively. The standard economic framework for defining relevant antitrust markets is to identify the smallest group of products for which a “hypothetical monopolist” of such product could profitably impose a “small but significant and nontransitory increase in price” (SSNIP).⁶¹ The assessment of whether a hypothetical monopolist would be able to profitably increase in prices above competitive levels involves an examination of the extent to which consumers could substitute to other products or services in response to such a price increase.

39. In this case, there are two relevant product markets that are important in assessing Realcomp’s discriminatory access restrictions. The first is the relevant *output* product market, in which real estate brokers are the suppliers and home sellers and buyers are the customers of real estate brokerage services. The second is the relevant *input* product market, in which the MLSs are the suppliers and real estate brokers are the purchasers of MLS listing services.

⁶⁰ See e.g., RC Exhibit 2, p. 1, RC Exhibit 9, p. 1, CX 211; <http://www.realcomp.com/company>.

⁶¹ Horizontal Merger Guidelines, U.S. Department of Justice and The Federal Trade Commission, Revised April 8, 1997. This framework was developed to define relevant markets for the analysis of mergers, but has often been used to define markets in regard to other antitrust issues.

2. *The relevant output product market is the supply of real estate brokerage services to sellers and buyers of residential real estate.*

40. The relevant *output product market* is the supply of real estate *brokerage services* to sellers and buyers of residential real estate. For the majority of home buyers and sellers, there are no reasonable substitutes to real estate brokerage services. For a home seller, the only alternative to selling a home using a real estate broker is to sell the home on his or her own, which is typically referred to as for-sale-by-owner (“FSBO”). FSBO sales typically entail the home owner placing a yard sign, listing the home in a newspaper or in certain FSBO Internet sites, holding open houses, or selling the home to friends or relatives.⁶²

41. For the majority of home sellers, FSBO is not a reasonable substitute to using a real estate broker because for most home sellers there are significant advantages to using a real estate broker in selling a home. One primary benefit of using a real estate broker is the ability to list the home in an MLS.⁶³ However, FSBO properties cannot be listed in an MLS because only members of the MLS, which must be brokers or agents, are permitted access to the MLS.⁶⁴ As mentioned, the MLS is the primary channel for reaching cooperating brokers working with buyers and most home buyers are assisted by a cooperating broker. According to the NAR Survey, 85 percent of home buyers used the services of a real estate broker to search for homes.⁶⁵

42. Given the importance of reaching buyers represented by brokers, it is not surprising that the vast majority of home sellers hire the services of a listing broker to assist in the sell of their home. For example, in 2006, FSBO transactions comprised only about 12 percent of real estate transactions in the U.S.⁶⁶ The vast majority of houses sold in the U.S. (88 percent in 2006) are sold by real estate brokers and are listed on a MLS.⁶⁷ Moreover, FSBO properties are not typically sold through the same channels as properties that are sold on the open

⁶² See, e.g., 2006 NAR Survey, p. 85, which reports that these methods are the most often-used marketing methods used by FSBO sellers.

⁶³ For other home sellers, the benefits of using a real estate broker are having the assistance of a professional in pricing, staging, and showing the home, in negotiating with buyers, and in closing the transaction.

⁶⁴ *Supra* note 12.

⁶⁵ 2006 NAR Survey, p. 34.

⁶⁶ 2006 NAR Survey, p. 69.

⁶⁷ 2006 NAR Survey, p. 77.

marketplace. A significant portion of FSBO properties are sold to persons known by the home seller, transactions where the cost of searching and matching a buyer and seller is significantly reduced. For example, in 2006, of the 12 percent of U.S. houses sold by home owners without the assistance of a broker (i.e. FSBO sales), approximately 40 percent were sold to persons known to the home seller such as family members or friends.⁶⁸ When the home seller did not know the home buyer (which is the case in 91 percent of residential real estate transactions), only 4 percent of home sellers sold the property without a real estate broker.⁶⁹ Given that most home sales occur between anonymous buyers and sellers, listing a home in an MLS is particularly important. Because FSBO transactions do not afford this option, most home sellers will not perceive FSBO as a viable substitute for brokerage services.

43. Consequently, a hypothetical monopolist of real estate brokerage services would be able to profitably increase commissions significantly above competitive levels. Such a price increase would be profitable because the vast majority of home sellers would not be willing to switch to selling their homes on their own (FSBO) in response to a price increase by a hypothetical monopolist of brokerage services. Applying the standard market definition framework, this implies that the relevant product market is real estate brokerage services and does not include FSBO.⁷⁰

3. *The relevant input product market is the supply of real estate MLS listing services to real estate brokers.*

44. Among the various services that may be offered by brokers, listing services are important both for marketing a seller's home and for assisting a buyer in their search for a home. There are various outlets where a real estate broker can list a property for sale, including print classified ads, electronic classified ads, and public websites such as Yahoo.com. However, these are not good economic substitutes for listing a property in an MLS.

⁶⁸ 2006 NAR Survey, p. 80.

⁶⁹ 2006 NAR Survey, p. 69.

⁷⁰ The lack of a substitutability between real estate brokerage services and FSBO for most home sellers is also suggested by the fact that, while commissions have increased significantly (in dollar terms) in recent years (*see supra* note 23), the share of FSBO real estate transactions has fallen. Between 1997 and 2006, the percentage of FSBO transactions in the U.S. decreased from 18 percent to 12 percent. 2006 NAR Survey, p. 69.

45. Only an MLS provides an offer of compensation to a cooperating broker. As a result, cooperating brokers need access to the MLS to determine the amount of any brokerage commission being offered by either a listing agent on behalf of the home seller. Without access to the MLS, cooperating brokers would be required to directly contact (*e.g.*, by phone, fax, or e-mail) the broker or home seller, significantly increasing the time involved in searching on behalf of home buyers and thus the cost of search.

46. The fact that the MLS is an important input for cooperating brokers searching on behalf of home buyers makes it an attractive venue for listing brokers to advertise houses being sold. In fact, the greater the number of cooperating brokers using the MLS to search for homes, the shorter the expected time required to sell a home and/or the higher the expected offer price and thus the greater the value of the MLS to listing brokers. A similar argument applies to cooperating brokers. The greater the number of listing brokers that list homes on the MLS, the greater number and variety of homes available to cooperating brokers to choose from, which makes it more likely that cooperating brokers will find a closer match between home characteristics and home buyer preferences and/or the shorter the time period required to achieve a given match and hence the greater the value of the MLS to cooperating brokers.

47. The foregoing discussion is a description of "network effects." Network effects, a type of demand-side scale economies, exist where the value of a product/service to a given user increases with the number of other users. In this case, the value of the MLS to listing brokers increases as the number of cooperating brokers increases because (a) the expected selling price increases with the number of home sellers that demand the house and/or (b) the time required to sell the house at a given asking price decreases. Conversely, the value of the MLS to cooperating brokers searching for homes increases as the number of listings increases because (a) the closeness of the match between home characteristics will be greater for a given amount of time devoted to search and/or (b) the expected amount of time required to achieve a given match. These forces reinforce one another such that both listing brokers and cooperating brokers will achieve greater efficiencies in the provision of brokerage services if they use an MLS.

48. The presence of network effects results in the MLS being a necessary input in the provision of real estate brokerage services. Because efficiencies grow with the number of users,

other sources of listing services with fewer users are not economically viable substitutes for an MLS. Listing brokers that do not have access to the MLS, and thus are required to advertise their listing by means other than a MLS, can expect that fewer cooperating brokers will see the property such that, at a given asking price, the likelihood of a sale will be lower and, if a sale occurs, the expected time to sell will be longer, all else equal. Cooperating brokers who are unable or unwilling to use the MLS will need to contact listing brokers or home sellers directly to learn the compensation offer and at the same time may need to search over multiple sources in order to identify the same number and type of houses being offered for sale that are available on the MLS. As a result, search costs, including time costs, would increase significantly compared to the search costs using the MLS. Brokers without full access to an MLS would be at a significant competitive disadvantage. Consistent with these benefits of using an MLS, the overwhelming majority of real estate brokers are members of an MLS and list all homes for sale in an MLS.⁷¹

49. Applying the standard economic framework for defining relevant markets, the net result is that a hypothetical monopolist of MLS listing services would be able to implement a “small but significant and non-transitory increase in price” for access to the MLS because few brokers could withdraw from participating in an MLS even if the fees or other costs associated with participation substantially increased.

B. Relevant geographic markets

50. The relevant geographic market defines the geographic scope of competition within a relevant product market. The economic framework for defining the relevant geographic market is similar to the framework for defining the relevant product market. In particular, the objective is to identify the smallest geographic area in which a “hypothetical monopolist” could profitably impose a SSNIP above competitive levels. This assessment involves an examination of whether consumers could substitute to suppliers in other geographic areas in response to such a price increase.

⁷¹ See, e.g., REALTOR Consumed Services Outlook White Paper, Oct 8, 2003, p. 15: “Most real estate brokers in an MLS’s region subscribe to the MLS and maintain membership in the local association, receiving varied services from each entity.” See also, Smith Deposition, p. 21: Approximately 5% of the 4,000 members of the Western Wayne Oakland County Association of Realtors (WWOCAR) were not members of the MLS.

51. In the case of MLS listing services, the scope of the geographic market will largely be determined by degree of substitutability between neighborhoods for home buyers. To see this, suppose that a hypothetical monopolist of MLS services in a particular geographic area, say Dearborn, Michigan, implements a supracompetitive price increase for all houses listed in that MLS that are located in Dearborn. For brokers representing home buyers and sellers in Dearborn, MLSs prevalent in adjoining geographic areas are not effective substitutes to the hypothetical monopolist of MLSs services in Dearborn because a listing in an adjacent MLS will not be seen by the majority of cooperating brokers and home buyers searching for a home in Dearborn. Listing in an adjacent MLS would therefore have significantly lower value to listing in the Dearborn MLS. Thus, listing brokers representing the sellers of homes located in Dearborn cannot substitute away from MLS listing services in Dearborn. Then, any broker representing the seller of a home located in Dearborn would face the supracompetitive price for MLS listing services for houses located in Dearborn. The higher cost of MLS listing services in Dearborn will be passed on in the form of higher brokerage fees for brokerage services supplied in Dearborn. Similarly, for cooperating brokers working with home buyers in Dearborn, MLSs in adjacent geographic areas are not effective substitutes because the vast majority of homes for sale in Dearborn will be listed in the MLS of the hypothetical monopolist in Dearborn. In essence, network effects make the geographic markets for MLS listing services local in nature.

52. Home buyers can defeat the increase in the price of brokerage services in Dearborn only by buying a house in a neighborhood other than Dearborn where the supracompetitive listing fees apply. If, for example, many home buyers consider an adjacent neighborhood a substitute for Dearborn in terms of house location then Dearborn is not the relevant geographic market. If, however, most home buyers are unwilling to purchase a house in a neighborhood other than Dearborn where, in this example, supracompetitive MLS listing fees lead to elevated brokerage fees, then Dearborn is a relevant geographic market for MLS listing services.

53. Applying the hypothetical monopolist framework more generally to various subsets of a MLS service area, starting with any local geographic area (*e.g.*, neighborhoods or groups of neighborhoods), the relevant geographic markets will be determined by the degree of

substitutability between neighborhoods for home buyers. Competition occurs within geographic markets at the county level, and may even occur in more local areas.⁷²

IV. Realcomp Has Market Power in the Provision of MLS Listing Services in the Relevant Geographic Areas

A. The Realcomp MLS has a significant share of MLS listings in Livingston, Oakland, and Wayne counties

54. Market shares are an important indicator of market power for MLS listing services. This is because the value of an MLS to cooperating brokers (and their customers) is directly related to the number of listings in the MLS. The value of the MLS to listing brokers also is related to the number of listings in the MLS because the larger the number of listings, the greater the number of cooperating brokers that are likely to search the MLS for listings. And, listing brokers will place a greater value on the MLS the greater the number of cooperating brokers (and home buyers) that they can reach by listing in the MLS. Because of these “network effects” in MLS listing services, the value of an MLS with a high market share in a given geographic market will be much greater to brokers (and home buyers and sellers) than the value of an MLS with a small market share.

55. Additionally, because of “network effects,” competitors cannot easily expand their share of listings. This is because such a shift in shares would require that both cooperating brokers and listing brokers simultaneously switch to the competing MLS.⁷³ A listing broker has little incentive to list a property in an MLS with a small market share in a given area because there will be few cooperating brokers searching such an MLS for homes in that area. Similarly,

⁷² Existing data sharing arrangements also do not alter the analysis of relevant geographic markets because the relevant market should not turn on a contractual arrangement. In particular, because Realcomp has the power to unilaterally end data sharing arrangements at will, the data sharing partners do not constrain Realcomp’s market power. Moreover, four of the seven sharing arrangements are only “guest access” or password sharing arrangements, in which a Realcomp broker would have to log in to search the listings of the other MLS. Down River, Jackson Association, Lenawee Association and Monroe have password sharing arrangements with Realcomp, while Flint Association and Lapeer Association have data sharing arrangements. (“Realcomp Revision,” April 21, 2006, CX 88, p. 2.) Ann Arbor has a data sharing agreement for Washtenaw, Livingston, Western Wayne, Western Oakland and Lenawee counties and has a password sharing agreement for the rest of the Realcomp MLS (RC Exhibit 26, RC 0211 – 21).

⁷³ Economists refer to the ability to expand output as “supply elasticity.”

a cooperating broker has little incentive to search an MLS with a small share of listings. Because of these economic factors in the market for MLS listing services, high market shares are indicative of market power. An MLS with significant market share in a relevant geographic market would be able to engage in anticompetitive conduct without losing a significant share of brokers.

56. The vast majority of Realcomp listings are in four counties. As Exhibits 1 and 2 show, over █ percent of new listings in the Realcomp MLS between 2002 and 2006 were in Wayne county and Oakland county (█ percent and █ percent, respectively). Another █ percent of Realcomp listings were in Macomb and Livingston counties (█ percent and █ percent, respectively). These four counties therefore account for █ percent of all Realcomp listings. Each of the other counties account for less than █ percent of Realcomp listings. Accordingly, I focus the analysis of market shares on Wayne, Oakland, Livingston, and Macomb counties.

1. Shares of new MLS listings

57. As described above, the relevant geographic markets will largely be determined by degree of substitutability between neighborhoods for home buyers. Such markets are likely to be local in nature and smaller than entire counties. Nevertheless, for simplicity, I report Realcomp's share of listings for each of the four counties listed above. Exhibits 3 to 6 show that Realcomp's share of new listings between 2002 and 2006 was █ percent in Wayne county, █ percent in Oakland county, █ percent in Livingston county, and █ percent in Macomb county. In all four counties combined, Realcomp's share of new listings was █ percent during that same period (Exhibit 7). These shares are summarized in Exhibit 8. Exhibit 9 shows Realcomp's share of listings by zip code throughout southeastern Michigan for the period 2002-2006.

2. Shares of "unique" new MLS listings

58. These estimates of listing shares understate the percentage of homes for sale in these counties that are listed in the Realcomp MLS. This is because many homes for sale are listed in two or more MLSs, particularly in geographic areas where two MLSs overlap. To

illustrate, assume that all homes for sale in a particular area were listed both in Realcomp and MiRealSource. In this hypothetical, Realcomp would have only 50 percent share of listings, but in fact, 100 percent of all homes for sale would be listed in the Realcomp MLS. This latter share (which I refer to as the share of "unique" listings) is a better indicator of Realcomp's market power because it illustrates the extent to which the Realcomp MLS is a necessary input into the sale of a home. Stated differently, in such a hypothetical geographic area, the Realcomp MLS, the MiRealSource MLS, and the data sharing MLSs are not really substitutes. Exhibits 10 to 13 show Realcomp's share of new unique listings. Realcomp's share of new unique listings between 2002 and 2006 was [REDACTED] percent in Wayne county, [REDACTED] percent in Oakland county, [REDACTED] percent in Livingston county, and [REDACTED] percent in Macomb. In all four counties combined, Realcomp's share of new unique listings was [REDACTED] percent during that same period (Exhibit 14). These shares are summarized in Exhibit 15. Exhibit 16 shows Realcomp's share of "unique" listings by zip code throughout southeastern Michigan for the period 2002-2006.

59. The data strongly support the inference of market power in Wayne, Oakland, and Livingston counties, and suggests that Realcomp has market power in Macomb county, although to a lesser extent. The value to brokers of MLSs with much smaller shares of listings in Wayne, Oakland, and Livingston counties is significantly lower than the value of the Realcomp MLS. As I discuss above, in an industry with significant network effects such as MLS listing services, the value of the network to customers is closely related to the number of network users. Market shares will therefore be an important indicator of the relative value of different MLSs. Thus the value of Realcomp to brokers in the geographic areas where Realcomp has a significant market share is significantly greater than the value of competing MLSs with small market share. As a result, Realcomp can engage in engage in anticompetitive conduct in these areas without losing a significant share of brokers.

B. Brokers cannot create an alternate MLS or otherwise obtain the benefits of participation in the Realcomp MLS.

60. Successful entry by a rival MLS is improbable because of high collective switching costs. Because of network effects, an individual broker has little or no incentive to list in an alternative MLS unless other brokers do also. Consider the incentives of an individual

listing broker choosing between Realcomp in an area where it has a large market share, say Dearborn, and a new MLS entrant. An individual listing broker has little or no unilateral incentive to switch to an alternative MLS (if one were available) in response to, e.g., an increase in listing fees by the MLS, because there would be few, if any, cooperating brokers working with home buyers using the alternative MLS. Likewise, an individual cooperating broker has little or no incentive to switch in response to an increase in the price of MLS listing services because there would be few, if any, listings to search. Consequently, brokers on both the selling and buying sides will not perceive an alternative MLS as an economically viable substitute to the hypothetical MLS monopoly. In fact, comparable efficiencies can be achieved only if the vast majority of brokers switched collectively. But there are substantial costs of coordinating collective switching by brokers and, as long as these coordination costs exceed the increase in listing costs, there is no incentive for any broker to incur them.

C. By virtue of control over a critical input, Realcomp has the ability to anticompetitively hinder or exclude competitors in the market for real estate brokerage services.

61. Realcomp's market power in the relevant geographic areas can be exercised by hindering or excluding competitors in the market for real estate brokerage services. For most brokers there are no reasonable substitutes to the Realcomp MLS in these areas. Realcomp therefore has the ability to anticompetitively exclude certain competitors, such as low-cost unbundled service brokers, from the real estate brokerage services market by implementing rules that exclude such competitors or inhibit their ability to compete. Excluded or disadvantaged competitors cannot costlessly switch to listing in an alternative MLS, such as MiRealSource or the data sharing partners. This is because the value of listing a home located in the relevant geographic areas in an alternative MLS would be significantly lower than the value of listing that home in Realcomp. The number of cooperating brokers searching alternative MLSs for homes in the relevant areas is likely to be much smaller than the number of cooperating brokers searching for homes in the Realcomp MLS. Thus, such brokers would be significantly disadvantaged competitively relative to brokers that are not restricted from access to the full services of Realcomp.

D. By virtue of its market power over brokers, Realcomp can exercise market power over home buyers and sellers in the relevant geographic areas.

62. The ability to restriction competition in the brokerage services market also implies that the Realcomp MLS can exercise market power over home buyers and sellers. That is, the Realcomp MLS can implement rules that anticompetitively harm home buyers and sellers in the relevant geographic markets.⁷⁴ Most home sellers in the relevant geographic areas do not have effective alternatives to selling homes through Realcomp-affiliated brokers. Brokers affiliated with alternative MLSs (and not affiliated with Realcomp) are not effective substitutes from the perspective of home buyers and home sellers in the relevant geographic areas because such brokers cannot offer the value of access to a critical mass of home listings and home buyers in the relevant areas. Home sellers in the relevant geographic areas must use a Realcomp listing broker in order to list their property on the Realcomp MLS and have their listing reach brokers working with home buyers in the relevant geographic areas.⁷⁵ Neither can most home sellers costlessly switch to FSBO. As I discuss above, for the majority of home sellers FSBO sales are not an adequate substitute for the services of a professional real estate broker that is a member of an MLS with a critical mass of brokers.

V. Realcomp Has Inhibited the Ability of Brokers Offering Low-Cost Unbundled Discount Services to Compete Effectively

A. Realcomp's discriminatory access restrictions reduce the exposure of non-ERTS listings to potential home buyers.

63. There are two primary channels through which MLS real estate listings reach potential home buyers. First, MLS listings are disseminated to cooperating brokers that are members of the MLS who, in turn, inform home buyers that they represent. Second, MLS listings are disseminated to certain websites that are directly accessible by home buyers. As will be explained in the remainder of this section, Realcomp's discriminatory access restrictions,

⁷⁴ The proper focus is the collective market power of the Realcomp MLS, and not the market power of individual Realcomp members. The unconcentrated structure of the membership is irrelevant to the possibility of anticompetitive harm by members of the association acting collectively.

⁷⁵ Listing a home in the Realcomp MLS displays the home to nearly 15,000 Realcomp members. (<http://www.realcomp.com/company>)

which include the Website Policy and the Search Function Policy, have had the effect of limiting the ability of listing brokers to reach potential home buyers through both channels if they list a property under a non-ERTS contract on the Realcomp MLS. The discriminatory access restrictions, in combination with Realcomp's minimum service requirement, which prevents brokers offering unbundled services from using ERTS listing contracts, has inhibited competition from brokers offering unbundled services to home sellers.

1. *Realcomp's Website Policy inhibits non-ERTS listings from being displayed on websites that are key sources of information for home buyers.*

64. Before it adopted its Website Policy, Realcomp sent all of its listings to certain key real estate websites. Over time, these came to include Realtor.com, Realcomp's Moveinmichigan.com, and Realcomp-member websites.⁷⁶ These websites enable home buyers to view information from MLS listings without the assistance of a cooperating broker. Brokers representing home sellers listing properties in the Realcomp MLS therefore were not only assured that their listings would reach cooperating brokers searching the Realcomp MLS, but they were also afforded the opportunity to reach home buyers directly through one of these public websites. Because public websites are publicly accessible, this meant that all listing brokers had an opportunity to reach home buyers who had not yet hired a cooperating broker or who had no intention of ever doing so.

65. After Realcomp enacted its Website Policy in June 2001, certain listings in the Realcomp MLS were no longer granted direct access to potential home buyers via certain key public websites.⁷⁷ Brokers unaffected by the Realcomp Website Policy continued to have direct access to potential home buyers, including home buyers who had not yet hired a broker or who had no intention of ever doing so. In particular, Realcomp continued to send all ERTS listings to the key websites. But Realcomp stopped sending non-ERTS listings, including EA, LS, and MEO listings, to these websites. By doing so, Realcomp hindered the viewing of non-ERTS

⁷⁶ *Supra* note 2. Listings are sent to Realcomp-member websites via IDX. The IDX is a protocol that enables Realcomp-members to receive Realcomp listings so that they may be displayed on their websites.

⁷⁷ Although the board voted for the Website policy in June 2001, it was not until the end of 2003 that the Website Policy became fully effective as Realcomp began requiring that all Realcomp listings indicate the listing type. Thus, before the end of 2003, Realcomp appears to have had little ability to implement the Website Policy.

listings by potential home buyers on Moveinmichigan.com,⁷⁸ Realtor.com,⁷⁹ and hundreds of Realcomp-member IDX websites.⁸⁰

66. The reason that public websites are important to the selling process is that home buyers participate in the search process and the Internet is a primary resource used by home buyers to search. Through public websites home buyers have direct access to thousands of listings and the ability to search among them based on a variety of criteria, such as price, location, type of dwelling, and characteristics of the property. Public websites generally have a more comprehensive, accurate, and up-to-date set of listings of homes for sale in a particular area than do other publications such as newspapers.⁸¹ Real estate websites often also include information on homes for sale that typically is unavailable through other information sources (e.g., such as newspaper classified ads), including photos, virtual tours, interactive maps, and neighborhood information.⁸² Because of these benefits, some 80 percent of all potential home buyers use the Internet “frequently” or “occasionally” to search for homes.⁸³ In fact, the percentage of buyers using the Internet to search for homes exceeded all other methods of searching, except for one – the assistance of a professional real estate broker (Exhibit 17).⁸⁴ A

⁷⁸ Moveinmichigan.com is the official website of the Realcomp MLS. Moveinmichigan.com receives its listings from the Realcomp MLS and no other source. Moveinmichigan.com was first introduced to the Realcomp members in August 2002. CX 15 (RC0210). Consequently, the Website Policy completely forecloses all brokers using non-ERTS listings from advertising directly to home buyers on the Moveinmichigan.com website.

⁷⁹ Although brokers using non-ERTS listings can reach Realtor.com by listing in an MLS without restrictions on such listings, brokers would bear the cost of having to dual-list. *See, e.g.,* Denise Moody Deposition, p. 20; Hepp Deposition, p. 41.

⁸⁰ According to a document provided by MiRealSource, [REDACTED] offices receive their “Broker Data Sharing” or BDS feed. As of November 30, 2006 there were [REDACTED] offices that received an IDX feed or had an IDX framing arrangement with Realcomp. So, at the maximum [REDACTED] percent of the Realcomp offices also receive a feed from MiRealSource. I did not have the required information to perform an accurate analysis, but will do so as the information becomes available to me.

⁸¹ When a listing is entered or updated on the Realcomp MLS, it is automatically added or updated on all of the websites to which Realcomp sends listing information. Kage Deposition, p. 30.

⁸² Additionally, for home buyers who live out of state but are re-locating to Michigan or simply interested in purchasing in Michigan for investment purposes, local sources of information, such as newspapers, open houses, or yard signs, may be less accessible.

⁸³ 2006 NAR Survey, p. 34. Younger home buyers are more likely to use the Internet to search for homes. According to the survey, 87 percent of home buyers of age 18-44 used the Internet, compared to 76 percent for home buyers between 45 and 64 years of age and 44 percent of buyers 65 years and over. *Id.*, p. 34.

⁸⁴ According to the NAR Survey, 85 percent of buyers reported that they used a real estate broker as an information source, 80 percent used the Internet, 63 percent of buyers looked for yard signs, 55 percent used print newspaper ads, 47 percent went to open houses, 34 percent used home books or magazines, 26 percent used home builders, 11

significant portion of home buyers (24 percent) found the home they eventually purchased using the Internet.⁸⁵ And, the frequency at which the Internet is being used by home buyers is increasing.⁸⁶

67. It is important to emphasize that Internet usage by home buyers is not limited to buyers who are not assisted by a broker in their search. In fact, buyers who use the Internet are more likely to be assisted by brokers in their home search than buyers who do not use the Internet. Some 87 percent of home buyers who used the Internet to search for homes were assisted by a broker, compared to 74 percent of buyers who did not use the Internet.⁸⁷ The Internet has also been an important way in which buyers find a broker to assist them in buying a home, with 23 percent of home buyers reporting that they found a broker to buy a home by using the Internet.⁸⁸ In sum, the record shows that the function of public websites has not been merely to permit home buyers to search independent of their brokers, but more broadly, the Internet has increasingly become a complement to brokerage services on the buying side of the transaction. The importance of public websites as a complement to the search process regardless of whether or not the home buyer is represented by a selling broker implies that listing brokers' productivity, namely facilitating a match between buyer and seller, will depend on access to public websites.

68. The Realcomp affiliated Websites to which Realcomp sends ERTS listings but restricts non-ERTS listings are important public websites for home buyers. In fact, according to a NAR Survey, Realcomp restricts non-ERTS listings from the top four sources identified by home buyers as being most widely used by home buyers to search for homes. According to the NAR Survey, the percentage of home buyers using public websites by type and in order of popularity is 53 percent of home buyers used MLS websites (such as Moveinmichigan.com), 52 percent used Realtor.com, 41 percent used real estate company websites and 40 percent used real

percent used the television, 9 percent used billboards, and 5 percent used a relocation company. 2006 NAR Survey, p. 34.

⁸⁵ 2006 NAR Survey, p. 38.

⁸⁶ For instance, the percent of home buyers who used the Internet "frequently" or "occasionally" to search for homes has increased from 71 percent in 2003 to 80 percent in 2006. 2006 NAR Survey, p. 37. The percentage of buyers who found the home they eventually purchase online has increased from only 2 percent in 1997 to 11 percent in 2003 and to 24 percent in 2006. 2006 NAR Survey, p. 38.

⁸⁷ 2006 NAR Survey, p. 41.

⁸⁸ 2006 NAR Survey, p. 37.

estate agent websites, all of which Realcomp denies non-ERTS listings access to the IDX feed that sources these websites (Exhibit 18).⁸⁹ Trailing these websites in popularity by home buyers are newspaper websites, which only 14 percent of home buyers used in their home search demonstrating the importance of the public websites that are subject to Realcomp's Website Policy.⁹⁰ Consistent with the importance of the public websites affected by Realcomp's Website Policy, the vast majority of Realcomp agents have authorized the display of their active ERTS listings on these public websites, even though they have the discretion to prevent their display on public websites of their choosing.⁹¹

2. *Realcomp's Search Function Policy inhibits the searching of non-ERTS listings by cooperating brokers working for buyers.*

69. In December 2003, Realcomp implemented changes to the default settings for all MLS searches by member brokers so that no non-ERTS listing would be displayed by default.⁹² Only if a selling broker changes the default search settings will non-ERTS listings be displayed among the search results, even if a house being sold using a non-ERTS listing meets all other search criteria entered by the broker conducting the search. Brokers searching the Realcomp MLS would need to change the default search terms to include EA, LS, and MEO listings every time they conduct a new search in order to obtain matching properties that include these non-ERTS listing types.⁹³ However, unlike the Website policy which restricts non-ERTS listings to public websites where home buyers can view them directly, the Search Function Policy affects the viewing of non-ERTS listings by *cooperating brokers* representing home buyers. The Search Function Policy therefore reduces the likelihood that non-ERTS listings will reach home buyers via cooperating brokers searching the Realcomp MLS.

⁸⁹ 2006 NAR Survey, p. 44.

⁹⁰ *Id.*

⁹¹ For example, 82 percent of Realcomp agents (11,989 out of 14,568) authorize their listings to be included in the IDX feed to public websites. Responses to First Set of Interrogatories, No. 1. Over 90 percent of Realcomp agents (13,184) are in offices which authorize their listings to be sent to Realtor.com. Responses to First Set of Interrogatories, No. 3. And, 87.7 percent of Realcomp agents (12,773) are in offices which authorize their listings to be sent to Moveinmichigan.com. Responses to First Set of Interrogatories, No. 4.

⁹² RC Exhibit 16. Realcomp voted to change the default setting in August 2003. RC Exhibit 9.

⁹³ Kage IH, pp. 72-73. A Realcomp member can save a search with specific parameters, but every time a member wants to conduct a new search (*i.e.* new city, price range, etc.), then they have to change the default to include all listing types. Kage IH, pp. 92-93.

70. Even though a broker has the ability to change the default setting, many brokers actually do not.⁹⁴ This behavior itself may be related to the Realcomp restrictions. Because of network effects, there is little value to cooperating brokers in changing default settings because there are few non-ERTS listings. The probability that a non-ERTS listing will match the search criteria of a selling broker is very small. If there were more non-ERTS listings, the value of changing the default setting would be much greater. However, Realcomp's access restrictions hinder the expansion of non-ERTS listings because non-ERTS listings are not seen by a significant share of home buyers.

71. While data sufficient to analyze the impact of the Search Function Policy separate from Realcomp's other restrictions is not available, there is evidence that non-ERTS listings are viewed less often than ERTS listings. Realcomp's own data shows that non-ERTS listings are viewed less often by brokers than are ERTS listings. For example, between January 2004 and October 2006, the time period during which Realcomp appears to have systematically tracked the viewing of listings by Realcomp member brokers, ERTS listings were viewed, on average, 5.1 times per day, compared to only 3.2 times per day for non-ERTS listings (Exhibits 19-20).⁹⁵

72. It is also noteworthy that brokers e-mail non-ERTS listings to their customers (home buyers) less frequently than they e-mail ERTS listings, which can be accomplished by Realcomp members via direct emails to home buyers after Realcomp MLS searches.⁹⁶ Realcomp tracks these e-mails. The data show that the average number of e-mails per listing is much lower for non-ERTS than ERTS listings. For instance, in 2006, an average of 6.9 daily e-

⁹⁴ See, e.g., Hepp Deposition, pp. 49-52, 92-93 (reports that brokers unaware of search default); Mincy Deposition, pp. 64-67 (listing names of specific selling brokers unable to find listings through Realcomp search function); RX 45 at AH000264 (customer complaint stating, "Realtors simply do not check all the boxes when they do property search's [sic], the[y] do quick searches for active listings. Therefore the listing I currently have does not work."); "Realcomp Rules," AmeriSellRealty.com, p. 2 (estimating that 25-35 percent of brokers do not change the default settings to include non-ERTS listings when searching the Realcomp MLS).

⁹⁵ See also Respondent's Responses and Objections to Complaint Counsel's Second Set of Interrogatories, Response to Interrogatory 12 (calculating the overall average number of views for ERTS listings at 201 versus 94 for non-ERTS listings).

⁹⁶ After brokers perform a search, they are able to save that particular search to a particular buyer ("a prospect"). Brokers then are able to then send e-mail messages to that buyer based on that search. In addition, the system allows for automatic e-mail messages to be sent to the buyer and the broker, with daily updates of the listings that matched the original search criteria. "Realcomp Online Basics, Training Workbook," June 30, 2005, CX 249, pp. 22-24.

mails per listing were sent to clients by brokers for ERTS listings compared to only 1.9 daily e-mails per listing for non-ERTS listings (Exhibits 21 to 22).⁹⁷

3. *Realcomp's minimum service requirement for ERTS listings ensures that unbundled brokerage services can only be supplied using non-ERTS listings*

73. Realcomp also began to require that brokers listing properties as ERTS provide a full array of services, which it defines as showing the property to potential home buyers, accepting and presenting offers to the home seller, advising sellers as to the merits of purchase offers, assisting the seller in developing and communicating counteroffers, and helping the seller negotiate with home buyers.⁹⁸ The definition of ERTS listings implemented by Realcomp amounts to a minimum service requirement for ERTS listings⁹⁹ such that, in the Realcomp MLS, brokers offering unbundled or limited services are prohibited from using ERTS listing contracts. Realcomp's minimum service requirement for ERTS listings ensures that unbundled brokerage services can only be supplied using non-ERTS listings. The effect of Realcomp's minimum service requirement is that ERTS listings correspond to full service brokerage contracts.

4. *Realcomp's Website Policy, Search Function Policy, and minimum service requirement for ERTS listings collectively define its Access Restrictions*

74. Throughout the remainder of this report, Realcomp's Website Policy, Search Function Policy, and minimum service requirement for ERTS listings will be referred to collectively as Realcomp's "access restrictions."

⁹⁷ See also Respondent's Responses and Objections to Complaint Counsel's Second Set of Interrogatories, Response to Interrogatory 12 (calculating the overall average number of emails for ERTS listings at 281 versus 1 for non-ERTS listings).

⁹⁸ Realcomp II Ltd. Rules and Regulations, October 2006 (RC1337-1363 at 1341). Realcomp describes an LS listing as one in which "the listing broker will NOT provide one, or more, of the following services: (a) Arrange appointments for cooperating brokers to show listed property to potential purchases but instead gives cooperating brokers authority to make such appointments directly with the seller(s); (b) Accept and present to the seller(s) offers to purchase procured by cooperating brokers but instead gives cooperating brokers authority to present offers to purchase directly to the seller(s); (c) Advise the seller(s) as to the merits of offers to purchase; (d) Assist the seller(s) in developing, communicating, or presenting counteroffers; or (e) Participate on the seller(s) behalf in negotiations leading to the sale of listed property."

⁹⁹ See, e.g., Adams Deposition, pp. 79-80: "according to my agreement with Realcomp, I have to provide a set minimum amount of services ... to be able to input the listing as an exclusive right to sell."

B. Realcomp's discriminatory access restrictions have reduced the use of non-ERTS listing contracts in the Realcomp MLS

1. Introduction

75. Evaluating the effects, if any, of Realcomp's access restrictions on the providers of nontraditional brokerage services requires a comparison of limited brokerage activities under the access restrictions implemented by Realcomp with the extent of limited brokerage activity in circumstances where access restrictions are not a factor. The economic outcomes in the absence of the access restrictions provide a benchmark by which to assess the effect of the restrictions. Economists use two standard approaches for determining a benchmark. The before/after (or time series) approach compares observed economic outcomes when the practices at issue are in effect with economic outcomes either before the practices took effect or after the practices at issue ceased. The cross-sectional approach compares economic outcomes subject to the practices to the economic outcomes in different environments where the practices at issue are not in effect.

76. Because I do not have available to me data that precedes the date that Realcomp's access restrictions were implemented and there is no post-restriction period since the access restrictions continue to this day,¹⁰⁰ the before/after approach is biased against finding an economic effect from Realcomp's access restrictions using Realcomp data. This bias favors Realcomp in the sense that it makes it less likely that an effect from the restrictions will be detected in an analysis based on Realcomp data, even if an effect occurred. Nevertheless, I show below the results of a before/after comparison using the Realcomp data where the event that is evaluated is the initiation of new efforts by Realcomp to enforce its Website Policy.

77. In addition, I show below the results of cross-sectional comparisons between MLSs which have implemented access restrictions against non-ERTS listings, including Realcomp, and MLSs where no access restrictions of the type at issue in this case were in place. The results of this analysis are not tainted by the presence of access restrictions in the benchmark MLSs.

¹⁰⁰ Realcomp adopted its Website Policy on or about June 2001. The Realcomp data available to me span the period January 2002 to December 2006.

78. The results of these analyses are all consistent with the conclusion that the access restrictions implemented by Realcomp have the effect of significantly reducing the percentage of non-ERTS listings such that the providers of low-cost unbundled brokerage services are inhibited and otherwise disadvantaged by Realcomp's access restrictions.

2. *Realcomp's enforcement of the reporting of listing type*

79. Exhibit 23 shows the fraction of all new listings (including listings that did not indicate the listing type) on the Realcomp MLS that were non-ERTS listings for the five year period beginning in 2002 through the end of 2006, the period for which data were available. For the entire period shown in Exhibit 23, Realcomp's Website Policy was in effect. Therefore, any disadvantages caused by the Website Policy to using non-ERTS listings were already at work throughout the period shown. However, it was not until late 2003 that Realcomp began to require and enforce that members indicate the listing type (*i.e.*, ERTS, EA, LS, or MEO) for all homes listed in the Realcomp MLS.¹⁰¹ This event provides an opportunity to assess the effect of Realcomp's policy on non-ERTS listings.

80. Exhibit 24 shows the effect of Realcomp's enforcement policy on the reporting of listing types for all new listings by Realcomp members. Prior to late 2003, the general practice was that none of the new listings added to the Realcomp MLS reported the type of listing – that is, indicated whether the listing was an ERTS, EA, LS, or MEO listing. As the data points labeled “blank” or “unknown” in Exhibit 24 show, the percentage of new listings which did *not* report the type of listing was virtually 100 percent. It is clear from the data that the common practice by brokers was to not report the listing type such that virtually none did.

81. However, beginning in May 2003, the percentage of new listings reporting the type of listing began to increase rapidly. For example, there was a slight increase in the percentage of new listings reporting the listing type from 0.47 percent in March 2003 to 2.5 percent in July 2003. The percentage of new listings that reported listing type increased rapidly during the fall of 2003, jumping to 27.78 percent of all new listings reporting a listing type by December 2003. By the end of the first quarter of 2004, Realcomp's enforcement actions

¹⁰¹ Investigational Hearing of Karen Kage, Exhibit 17 (RealFax Nov. 17, 2003).

requiring reporting of listing type was nearly complete with 87.49 percent of new listings reporting a listing type in March 2004. According to Realcomp's own listing data, the requirement that brokers report the listing type was fully in effect with virtually 100 percent of new listings reporting a listing type by May 2004 and thereafter.

82. With the requirement that all new listings report the type of listing, Realcomp had the ability to distinguish between ERTS and non-ERTS listing and Realcomp's Website Policy could now be effective.

3. *The access restrictions have reduced the frequency of non-ERTS listings in the Realcomp MLS*

83. Exhibit 25 shows the percentage of all new listings on the Realcomp MLS that are reported as non-ERTS listings for the five year period 2002 through 2006. The relationship between Realcomp's requirements and enforcement actions and the percentage of non-reporting of listing type is shown over the same period. From January 2002 through March 2003, when non-reporting of listing type was the common practice, the percentage of non-ERTS listings hovered around zero percent. Of course, this reflects the reporting patterns and not the actual percentage of non-ERTS listings which simply was not available in these data before reporting of listing type became the common practice. Likewise, the increase in the percentage of non-ERTS listings reflects an increase in reporting.

84. In May 2004, reporting compliance reached virtually 100 percent. In that same month, non-ERTS listings represented 1.5 percent of all new monthly Realcomp listings. Between May 2004 and the end of 2006, the percentage on non-ERTS listings fell from 1.5 percent of all new monthly Realcomp listings to less than 0.8 percent of all new monthly Realcomp listings, a drop of more than 50 percent.

85. The data likely *understate* the actual effect of the Realcomp's discriminatory access policies because Realcomp enacted its discriminatory access policies before (in June 2001) the period used in the data analysis above. As a result, strong conclusions about the magnitude of the effect are not possible. However, these results do clearly show a relationship between Realcomp's access restrictions and the decrease in non-ERTS listings. The next section employs a cross-sectional approach.

4. *The effect of discriminatory access restrictions on the frequency of non-ERTS listings is evident from other MLSs*

86. The following analysis makes use of data from 10 different MLSs (including Realcomp) in the U.S. The criteria used to select the MLSs included in the sample controlled for environmental factors likely to affect the level of non-ERTS listings (see Appendix C for details). Data were collected for 9 other MLSs over 5 years each (2002 to 2006). The data set includes over 1.08 million total listings and an average of over 17,000 new listings per month.

87. In this analysis, I compared the percentage of non-ERTS listings for MLSs with no discriminatory access restrictions with the percentage of non-ERTS listings for MLSs with discriminatory access restrictions for the entire period 2002 through 2006 (cross-section analysis). Exhibit 26 contains average new monthly percentage listings based on volume weighted averages for MLSs with and without restrictions. The data show that, on average, the percentage of non-ERTS listings for MLSs where restrictions are in effect are substantially lower than the percentage of non-ERTS listings for MLSs with no restrictions over the period. In addition, the trend in percentage of non-ERTS listings trends upward gradually increasing over the period on average for MLSs where there are no access restrictions. In contrast, the average percentage of new monthly non-ERTS listings consistently decreases over the same period for MLSs where access restrictions are in place.

88. A probit analysis was used to estimate the probability of observing a non-ERTS listing conditional on the presence or absence of discriminatory access restrictions, controlling for other factors. The parameters of the probit model were estimated using a panel data set that takes into account both the cross-sectional and time series differences in the imposition of discriminatory access restrictions. The data set includes data from 10 different MLSs (including Realcomp), 4 with restrictions at some time during the estimation period, and 6 with no restrictions during the estimation period.¹⁰² Of the 4 MLSs with restrictions at some time during the estimation period, 2 had restrictions throughout and 2 had restrictions during part of the estimation period.¹⁰³ Appendix D contains a detailed description of the model estimated

¹⁰² Dayton, Memphis, Toledo, Wichita, Denver, and Charlotte did not have any restrictions against non-ERTS listings.

¹⁰³ The Realcomp MLS and the Green Bay/Appleton MLS had restrictions against the dissemination of non-ERTS listings to public websites throughout the relevant period. The Boulder MLS implemented restrictions on April 30,

including a list of explanatory variables and the results of the estimation procedure including standard errors.

89. The results of the statistical analysis are consistent with results presented above. The coefficient on the indicator variable for whether or not a discriminatory access rule is in effect is equal to -5.5 percent (standard error 2.0 percent), which is statistically significant at the 99.99 percent level of confidence. The interpretation of this estimate is the discriminatory access rule is associated with a statistically significant decrease in the percentage of non-ERTS listings equal to 5.5 percent.¹⁰⁴

90. Based on the data and analysis set forth above, it is my opinion that Realcomp's discriminatory access restrictions are associated with a significant reduction the supply of brokerage contracts of the non-ERTS type.

VI. Realcomp's Discriminatory Access Restrictions Have Significant Anticompetitive Effects

A. Economic framework for assessing anticompetitive effects of discriminatory access to an input joint venture

91. An input joint venture can engage in conduct that has anticompetitive effects in an output market by restricting the access of competitors to a necessary input. A joint venture can refuse to admit member firms that would compete with current members or it can admit potential competitors but only on discriminatory terms that disadvantage certain members in other ways. Outright exclusion can reduce competition in the output market and lead to higher output prices

2003, and eliminated such restrictions in July 2006 pursuant to a consent agreement with the FTC. The Williamsburg MLS had restrictions against non-ERTS listings throughout most of the period, but eliminated its restrictions in June 2006. *See* Complaint in the Matter of Realtors Association of Northeast Wisconsin, p. 3, Complaint in the matter of Information and Real Estate Services LLC, November 22, 2006, p. 3 and Complaint in the Matter of Williams Area Association of Realtors, Inc., November 22, 2006, p. 3.

¹⁰⁴ For completeness I estimated the model using alternative specifications. For example, one specification controlled for the asking price of the property. Another specification added several characteristics of the home and the geographic area, including the number of bedrooms, the size of the home, and the population density in the area where the home is located. These specifications, which are also shown in Appendix D, do not change the qualitative result reported here. The coefficient estimate in these alternative specifications indicate that the access restriction is associated with a statistically significant decrease in the percentage of non-ERTS listings. (The coefficient estimates were equal to -5.47 percent and -6.15 percent, respectively, and significant at a 99.99 percent level of confidence.)

than would occur otherwise. However, even admission to the joint venture on discriminatory terms can adversely affect competition in the output market compared to the state of competition had potential competitors been admitted on nondiscriminatory terms. Members of the joint venture may have incentives to anticompetitively restrict the access of competitors to an input if there are significant private gains of reduced competition in an output market.

92. Competition among some members of the joint venture may not be an adequate substitute for competition from rivals that are potentially more efficient or offer differentiated services. If excluded rivals are more efficient than joint venture members, provide a different product (such as a la carte services), or have a different business strategy (such as providing discount services), the exclusion of such rivals can lead to consumer harm even if there is competition among other members within the joint venture.

93. Access restrictions are more likely to have anticompetitive effects when there is insufficient inter-system competition. Network joint ventures heighten competitive concerns because network externalities can lead to large economies of scale in the provision of an input. When network effects are significant, inter-system competition (i.e., competition between MLS systems) will be less effective than where network effects are not present and large.

B. Realcomp's access restrictions inhibit intra-system competition by brokers supplying low-cost unbundled brokerage services

1. A description of the cooperative price-setting structure

94. Because home sellers and home buyers respectively may be represented by a broker, the total brokerage commission can be thought of as consisting of two parts—a commission paid to the listing broker (representing a home seller) and a commission paid to a cooperating broker (representing a home buyer). The cooperating broker's commission takes the form of an offer of compensation made by the listing broker or made directly by the home seller. Offers of compensation are published on the MLS and are known to cooperating brokers before they schedule any appointments or devote time and effort to marketing the listed property. As a result, a given offer of compensation must be competitive with other offers of compensation published on the MLS. Compensation offers to cooperating brokers are customarily 3 percent of

the selling price of the property. Compensation offers for less than the customary 3 percent commission are commonly thought to be less attractive to cooperating brokers who can observe and compare offers associated with each listing on the MLS. As a result, offers to cooperating brokers tend to be uniform and clustered around 3 percent. More than ■ percent of new listings on Realcomp's MLS had offers exactly equal to 3 percent for the period 2002 to 2006.¹⁰⁵

95. When there is a full service brokerage contract such as required by Realcomp for ERTS listings, the home seller negotiates and contracts for the full amount of any brokerage commissions that may be paid as part of the listing agreement. The listing contract negotiation between the home seller and the listing broker takes into account *the expectation that the listing broker will be required to compensate a cooperating broker* representing a home buyer. In addition, the home seller is obligated to pay the full amount of any brokerage commission that is negotiated as part of the listing agreement. Because the listing broker (and not the home seller) makes an offer of compensation to a cooperating broker, the (marginal) costs of the listing broker consist of the sum of the marginal costs of the services offered by the listing broker plus the expected payment of compensation to a cooperating broker.

96. The fact that the cooperating broker is paid by the listing broker such that the listing broker effectively negotiates on behalf of the cooperating broker and the fact that the negotiations take place before it can be known if a cooperating broker will be the procuring cause of the sale results in a de facto price floor. These aspects of the full service brokerage arrangement ensure that the listing broker's expected marginal cost at the time when the brokerage fee is negotiated (i.e., before the property is listed and before a cooperating broker's role can be determined) includes the expected compensation to a cooperating broker, regardless of whether or not this payment occurs ex post. As a result, the listing broker's expected marginal cost at the time of the negotiation is equal to 3 percent of the selling price (the competitively determined share payment to the cooperating broker) *plus* the marginal cost of all services provided by the listing broker.¹⁰⁶ In this case, Realcomp's minimum service requirements add to

¹⁰⁵ Source: Realcomp listing data. See Appendix E for notes on data analysis.

¹⁰⁶ In theory, competition could cause the negotiated price to be discounted to take into account that no compensation will be paid to cooperating brokers. In this case, the listing broker would collect the fees shared on average. But, in practice, averaging across transactions requires that the number of transactions is large. In this market, the number of transactions is too small to average across transactions.

and increase the price floor by setting a minimum level of brokerage services that must be offered by the listing broker and thus effectively setting a minimum marginal cost corresponding to the minimum level of services that must be offered.

2. *Competition from traditional, full-service brokers does not occur in a way that circumvents the effective price floor on real estate brokerage commissions created by the cooperative price-setting structure*

97. Competition among traditional brokers that occurs within the structure of the cooperative payment system just described cannot eliminate the de facto price floor because the full service contract effectively raises the (expected) marginal costs of listing brokers. Price competition among traditional full service brokers can drive the price of listing services down to their marginal costs but such competition cannot compete away the expected cost of compensation to a cooperating broker. Moreover, the auction-like competition that governs offers of compensation to cooperating brokers is a countervailing force against those offers falling below the customary 3 percent offer.¹⁰⁷ The net result is that, despite the large number of brokers that compete on traditional terms, many of which may offer discounts to home sellers when negotiating a listing contract, this form of competition cannot reduce the contractual brokerage rate to an amount that is substantially less than the expected compensation to the cooperating broker of 3 percent of the selling price plus the marginal cost of all services provided by the listing broker, which in this case is the marginal cost of full service by the listing broker because of Realcomp's minimum service rule.

3. *By inhibiting the unbundling of brokerage services, Realcomp's access restrictions protect and maintain an effective price floor on real estate brokerage commissions*

98. Competition from nontraditional brokers is not subject to the de facto price floor because the listing agreements between unbundled service brokers and home sellers typically do not obligate home sellers to pay to the listing broker the expected compensation to a cooperating broker regardless of whether or not a cooperating broker is the procuring cause of the sale.

¹⁰⁷ In effect, the current structure does not permit price competition to occur over the price of brokerage services on the buying side. However, the buying side is precisely where the Internet has had a large impact by enabling home buyers to search independently.

Nontraditional brokers offer listing contracts that permit payments to cooperating brokers to be contingent upon whether or not a cooperating broker actually contributes to the transaction. That is, a home seller is permitted to observe whether or not a cooperating broker is the procuring cause for the sale before the home seller's obligation to pay a commission to a cooperating broker is triggered.¹⁰⁸ As a result, when the listing broker is an unbundled service broker using a non-ERTS listing contract, the listing broker's expected marginal cost at the time of the negotiation only depends on the marginal cost of listing services. Any payment of a commission to a cooperating broker is paid directly by the seller but only if the cooperating broker is the procuring cause. The decoupling of the listing agent's commission and the cooperating broker's commission permits home sellers (and home buyers) to avoid the payment of a cooperating brokerage fee whenever it has not been earned. Furthermore, by unbundling the full set of services supplied by listing brokers, nontraditional brokers do not offer to home sellers an 'all-or-nothing' choice but instead allow home sellers to purchase a subset of brokerage services, if they desire. The net effect is that brokerage commissions can fall substantially below the de facto price floor created by the structure of the cooperative payment system that governs ERTS brokerage contracts.

99. The listing contracts of nontraditional brokers are similar to those of full service brokers in important ways. For instance, there is typically an offer of compensation to a cooperating broker, just as is the case with a traditional brokerage contract. The offer is published in the MLS and competition dictates that the offer be competitive which usually implies a 3 percent offer, just as with offers by traditional brokers. This is confirmed by Realcomp's listing data which shows that the percentage of compensation offers equal to 3 percent is not significantly different for ERTS [REDACTED] and non-ERTS listing contracts [REDACTED].¹⁰⁹ Moreover, the cooperating broker has the same protection from the risk of

¹⁰⁸ For example, the listing contract for Help-U-Sell states a commission to a cooperating broker "shall be paid by the seller upon closing of the property listed above, if a licensed real estate agent has procured the buyer." Similarly, the listing contract for AmeriSellRealty, another limited service broker states that, "Seller also agrees to pay a commission of ____% of the gross sales price of the property to the broker that procures the buyer.... If the seller finds their own buyer, no commission is owed." In contrast, the ERTS contract requires an unconditional payment of a commission to a cooperating broker. It states, "Seller will pay "Broker a commission of \$ ____ or ____% of the sales price if, during the term of this contract (1) anyone sells or trades the property...." CX 175; CX 187; CX 285; CX 329.

¹⁰⁹ Source: Realcomp listing data. See Appendix E for notes on data analysis.

nonpayment of a compensation offer because the listing broker is liable for the payment, just as is the case under the full service contract.¹¹⁰

100. To summarize, suppliers of unbundled brokerage services do not merely intensify the rivalry that exists among joint venture members, they change the dynamics of competition within the joint venture. In this sense, the suppliers of unbundled brokers are ‘maverick’ competitors whose exclusion significantly alters the competitive landscape to the detriment of home sellers and home buyers, the consumers of brokerage services. By imposing minimum service requirements and imposing access restrictions that inhibit the ability of incumbent nontraditional brokers to compete, while deterring entry by nontraditional brokers in the future, Realcomp’s policies protected and maintained its cooperative price-setting system and the de facto price floor on brokerage commissions to which it gives effect.

C. Realcomp’s access restrictions cause buyers and sellers to use and pay for brokerage services that they would not purchase but-for the restrictions

- 1. Home sellers are forced to purchase more full-service bundles of brokerage services than would be the case in the absence of Realcomp’s access restrictions*

101. The results of the analyses contained in Section V uniformly support the conclusion that but-for Realcomp’s access restrictions, the percentage of non-ERTS listings in the relevant market would be greater. The competitive implication of this result is that percentage of brokerage contracts offered by low-cost, unbundled service brokers would also be greater because Realcomp’s minimum service requirement ensures a close correspondence between the percentage of non-ERTS listings and the percentage of nontraditional brokerage contracts. By way of example, the results of the probit analysis suggests that the percentage of nontraditional brokerage contracts that would be demanded and entered into by home sellers would increase by about 5.5 percent, more than twice the current average percentage, and that the percentage of full service contracts would be lower. This suggests that home sellers within the relevant market purchase enter into more full service contracts than they would but-for Realcomp’s access restrictions.

¹¹⁰ See e.g., Bowers Deposition, p. 48. See also, Realcomp II Ltd. Rules and Regulations, October 2006, RC1337-1363 at 1346.

2. Home buyers are forced to pay for more brokerage services than otherwise but-for Realcomp's access restrictions

102. It has been shown that ERTS listings correspond to full service brokerage contracts under Realcomp's minimum service requirement. As discussed above, under the terms and structure of the full-service brokerage listing contract, the home seller is obligated to pay a commission that includes the commission to the listing agent and the expected commission to a cooperating broker, even if no cooperating broker is the procuring cause of the transaction. Any home buyer that identifies a house that has been listed under a full service brokerage without the assistance of a cooperating broker is effectively required to pay for brokerage services that they did not use. The full-service brokerage contract effectively contains a take-or-pay provision with respect to the commission for a cooperating broker. Unbundled brokerage contracts, which correspond to non-ERTS listings on the Realcomp MLS, do not require the home seller to commit to an unconditional payment of the expected commission to a cooperating broker. To the extent that Realcomp's access restrictions decrease unbundled brokerage contracts and increase full-service contracts on the Realcomp MLS, home buyers face a higher proportion of take-or-pay provisions than they would but-for the access restrictions. By inhibiting non-ERTS listings, Realcomp's access restrictions anticompetitively force home buyers and home sellers to pay for the services of a cooperating broker, even the home buyer does not use such services.

D. Realcomp's access restrictions create entry barriers and deter entry by low-cost, unbundled service brokers

103. Realcomp's access restrictions require that unbundled brokers can only have access to the Realcomp MLS by using a non-ERTS listing. Moreover, Realcomp has implemented rules that severely restrict or otherwise impede the ability of brokers that access the Realcomp MLS using non-ERTS listings to reach home buyers on behalf of the home sellers that they represent. Realcomp's Website Policy prevents non-ERTS listings, and thus unbundled brokers, from being disseminated to public websites that reach home sellers directly. Realcomp's Search Function Policy, by establishing the default search results on the Realcomp MLS to exclude only non-ERTS, gives non-ERTS listings a lower priority in the search architecture hierarchy than is given to listings that fail to identify the listing type at all.

Realcomp's MLS search function affects the listings that cooperating brokers view and thus affects the other means of reaching home buyers.

VII. The Procompetitive Justifications Offered by Respondents Are Inconsistent with the Facts

A. Realcomp's procompetitive justifications for its Website Policy

104. In response to an interrogatory requesting "all facts supporting Respondent's contention... that 'the challenged conduct at issue in the Complaint has significant pro-competitive efficiencies that outweigh any alleged anti-competitive effects,'" Realcomp cites as a problem the fact that with an Exclusive Agency Listing, if "a potential buyer independently locates a home" and purchases it but "had been working with a REALTOR® prior to independently locating the property, the buyer's agent likely would not receive any compensation after potentially investing considerable time with the buyer."¹¹¹ According to Realcomp, the consequence of a buyer's agent not receiving any compensation under these circumstances is that "it takes away the incentive for buyer agents to work with persons interested in purchasing a home."¹¹² Realcomp claims that the challenged conduct in this case serves to alleviate or eliminate the risk of a home buyer acting as described. Finally, Realcomp alludes to a free-rider problem but its response is unclear as to the precise nature of the alleged free-rider problem.¹¹³

1. *Realcomp's procompetitive rationale for its Website Policy based on deterring home buyers from independently identifying and purchasing residential property fails because the problem described is not a free-rider problem*

105. In the context of this case, free-riding on the efforts of a cooperating broker occurs when a cooperating broker, through an investment of time and effort, identifies a property that the home buyer purchases but avoids paying the broker's commission by dealing directly with the home seller, thereby depriving the broker of a return on his investment of time and

¹¹¹ Respondent's Responses and Objections to Petitioner's First Set of Interrogatories, interrogatory No. 5, p. 4.

¹¹² *Id.*

¹¹³ *Id.*

effort. In its interrogatory responses, Realcomp indicates that its access restrictions, particularly its Website Policy, are intended to prevent the type of free-riding just described as well as to prevent home buyers from *independently* identifying and purchasing residential property in circumstances where the home buyer has begun working with a cooperating broker. I address the latter issue first.¹¹⁴

106. In both its first set of interrogatory responses (No. 5) and its second set of interrogatory responses (No. 9), Realcomp describes a factual scenario where a home buyer independently identifies and purchases a house after the home buyer had begun to work with a cooperating broker.¹¹⁵ But this factual scenario is not an economic free-rider problem. Home buyers who identify a property through their own time and effort are benefiting from their own investments in searching, not the investments of time and effort by a broker. Moreover, the fact that a cooperating broker invested time and effort in an unsuccessful attempt to identify a property that the home buyer was willing to purchase is unfortunate but does not describe an economic problem that requires joint action to solve. This so-called problem arises in many sales jobs where the salesperson is compensated by a sales commission. Applying Realcomp's reasoning, industry associations representing commission salespersons throughout the economy would be justified in collectively acting to restrict the supply of consumer information produced and disseminated by competitors in the industry in order to increase reliance on their member salespersons and increase industry profits.

107. Not only are access restrictions to prevent home buyers from independently identifying and buying residential property not justified on free-rider grounds, they are not justified under Realcomp's own rules which require that a cooperating broker be the "procuring cause" of a sale in order to justify the payment of a commission.¹¹⁶ Thus, if a buyer independently locates a property by searching a website, the buyer's agent would not be a "procuring cause" of the sale and would therefore not be entitled to a commission. This is true

¹¹⁴ *Id.*

¹¹⁵ Respondent's Responses and Objections to Petitioner's First Set of Interrogatories, interrogatory No. 5, p. 4; Respondent's Responses and Objections to Complaint Counsel's Second Set of Interrogatories, interrogatory No. 9, p. 5.

¹¹⁶ *Supra* note 18.

regardless of the amount of time that agent devoted to unsuccessful attempts to identify a property that the buyer desired to purchase.

108. In a further attempt to offer a procompetitive justification for its Website Policy, Realcomp offers another variant of the same argument focusing on the home seller instead of the home buyer. In its second set of interrogatory responses (No. 9), Realcomp suggests that a home seller who lists a property using a MLS Entry Only listing has somehow unjustly benefitted from the use of the MLS if the transaction is consummated without compensating a cooperating broker.¹¹⁷ But in this scenario the home seller *pays* the listing broker, a Realcomp member, for the right to list on the MLS and makes an offer of compensation to a cooperating broker that is the procuring cause of the sale. Given that the home seller pays for the benefit of listing, to the extent that the access restrictions reduce the quality of the listing and thus increase the quality-adjusted price, it is the home seller that being harmed, not Realcomp.

109. Finally, it is worth noting that Realcomp's Website Policy does not address the potential risk of a home buyer actually free-riding on the efforts of a cooperating broker.¹¹⁸ The Website Policy is intended to prevent home buyers from independently viewing non-ERTS listings on a Realcomp affiliated websites. But this restriction does not affect the ability or incentive of a home buyer to free-ride because the opportunity to free ride on the efforts of a cooperating broker only exists after a home owner has been informed of the existence of the property by a broker. Preventing a home buyer from viewing the listing for the home *after* they have been informed by the broker of its existence does not in any way deter the home buyer from opportunistically contacting the home seller. And, since home buyers are free to independently identify potential homes to purchase, and if successful in doing so without broker input cannot be accused of free riding, then preventing a home buyer from viewing the listing for a property *before* they have been informed by the broker of its existence does not serve to prevent free

¹¹⁷ Respondent's Responses and Objections to Complaint Counsel's Second Set of Interrogatories, Interrogatory No. 9, p. 5.

¹¹⁸ Recall that free-riding on the efforts of a cooperating broker occurs when a cooperating broker, through an investment of time and effort, identifies a property that the home buyer purchases but avoids paying the broker's commission by dealing directly with the home seller, thereby depriving the broker of a return on his investment of time and effort. This differs from the problem proffered by Realcomp as justification for its Website Policy where a home buyer independently identifies and purchases a house. Nevertheless, I address the issue of the Website Policy as it relates to an actual free-rider problem here for completeness, even though based on my reading of their responses, Realcomp has not offered this particular justification.

riding. In short, since the opportunity and hence the risk of free riding arises only after a home buyer has been informed of a property by a broker, a restriction, such as Realcomp's Website Policy, that prevents a home buyer from becoming informed about the existence of a property does not, and cannot, affect the risk of free riding.

110. In sum, if a buyer independently finds a house on a Realcomp affiliated Website and then contacts the home seller or listing agent directly, the home buyer benefited from his own investments of time and effort and the home buyer is the procuring cause of the sale. Hence, both as a matter of economics and according to Realcomp's rules, a cooperating broker is not entitled to receive a commission from the home buyer or the home seller if a non-ERTS listing is used. Therefore, the fact that a commission is not paid to the cooperating broker does not constitute a free-rider problem by either the home buyer or the home seller, and Realcomp's access restrictions based on this rationale are not economically justified.

2. Realcomp's access restrictions are not required to protect the interest of cooperating brokers because there exist contractual solutions that can be independently entered into by cooperating brokers

111. Even if it were procompetitive, which it is not, Realcomp's goal of ensuring all home buyers who have worked with a cooperating broker pay a commission regardless of who was the procuring cause does not require collective action by competitors.¹¹⁹ This goal can be accomplished by individual brokers through contractual means. A buyer agency contract is an exclusive contract between the home buyer and cooperating broker that entitles the broker to a commission if a house is purchased by the home buyer during the term of the contract, even if a home buyer independently identifies and purchases the house. The buyer agency contract explicitly grants to buyer agents the right to capture a return on time and effort invested regardless of whether or not the investment leads directly to a purchase.¹²⁰

¹¹⁹ Buyer agency contracts are used in practice. According to David Elya, owner of Realty Executives Group, his brokerage firm enters into agency agreements that guarantee their compensation with 95 percent of their customers. Elya Deposition, p. 11. Douglas Whitehouse, partner and broker at Hannet, Wilson & Whitehouse, L.L.C. Realtors, testified that he entered into buyer agency agreements approximately 50 percent of the time. Whitehouse Deposition, pp. 32-33.

¹²⁰ Realcomp's alleged pro-competitive efficiencies overstate the actual efficiency gain, if any, because they fail to take into account the benefits of entering into a buyer agency contract. When weighing the anti-competitive and pro-competitive effects of Realcomp's access restrictions, only the incremental efficiency gains above what could be achieved from relying on buyer agency contracts is a gain to society.

3. *Realcomp's access restrictions could only generate the claimed pro-competitive efficiencies if Realcomp has market power in listing services*

112. Realcomp claims that home buyers and home sellers have a “wide variety of options available to them” to list houses and where listed houses can be viewed by potential home buyers. But if Realcomp is just one of many options, then its access restrictions could not prevent home buyers from independently viewing listings that Realcomp’s restrictions are intended to conceal. If Realcomp’s restrictions are ineffective at preventing home buyer access to listings, then they cannot generate the pro-competitive justifications that Realcomp alleges. Only if Realcomp has market power such that its restrictions significantly limit home buyers’ ability to independently identify its listings can the claimed efficiency justifications be achieved. Thus, Realcomp’s contention that home buyers have numerous substitutes to the Realcomp MLS for access to Realcomp listings is inconsistent with its claimed pro-competitive justification for those restrictions if, in fact, the problem Realcomp described were a free rider problem.

4. *Realcomp's access restrictions are overly broad*

113. Realcomp’s restrictions are overly broad because they restrict access to listing information to all home buyers, not just home buyers who are represented by a broker and therefore might benefit from a broker’s investments. Home buyers who wish to gather information about buying opportunities before hiring a broker and home buyers who prefer not to use brokerage services at all are inhibited by Realcomp’s Website Policy from viewing properties advertised using non-ERTS listings. Home buyers who are not represented by a cooperating broker stand to gain the most from access to non-ERTS listings because the typical non-ERTS listing does not force them to pay for cooperating brokerage services that they do not use.

B. Realcomp’s procompetitive rationale for its Search Function Policy based on deterring home buyers from free-riding on the time and effort of cooperating brokers fails because collective action is not required to prevent this type of free-riding

114. In its first set of interrogatory responses (No. 12), Realcomp attempted to justify its Search Function Policy based on a claimed need for cooperating brokers to be notified of the

listing type in advance of initiating efforts to sell a property.¹²¹ Realcomp indicated that prior knowledge of the listing type is needed to (1) to give the selling agent an opportunity to solicit business from the seller for services that are not contracted for with the listing agent and (2) to alert the selling agent to the fact that the listing agent is providing limited services to the home seller. In response to these concerns, Realcomp (1) “added listing type fields to the search screen to facilitate retrieval of [listing type] information” and (2) decided to change the default setting for search results to include only ERTS or ‘Unknown’ listing types because “an overwhelming majority of the listings were in one of these two categories.”¹²²

115. In its second set of interrogatory responses (No. 9), Realcomp attempts to justify its Search Function Policy based on a need to prevent home buyers from identifying a property “through [the] agent’s efforts and participation in the MLS” and then negotiating a deal directly with the home seller that “would exclude a commission to the selling agent”—that is, based on a free-rider problem (see definition above). Realcomp goes on to explain that “[b]y setting the defaults to ERTS, an agent makes a conscious decision to include EA listings and can make sure that their interests are protected prior to distributing this data to their buyer.”¹²³

116. When evaluating the Realcomp’s procompetitive justifications for its access restrictions, the question is not whether Realcomp’s access restrictions benefit Realcomp members, since restrictions that increase member profits through anticompetitive foreclosure or price-fixing satisfy that criteria. The economic question is whether the access restrictions are necessary to achieve the efficiencies of cooperation and whether the solution to the problem at issue cannot be efficiently solved by competitors acting individually but requires collective action. Realcomp’s so-called procompetitive justifications for its Search Function Policy satisfy neither of these criteria. Consider Realcomp’s claim that cooperating brokers need to be notified of the listing type in advance of initiating efforts to sell a property. Such notification is accomplished by the fact that the listing types are observable by individual brokers using the

¹²¹ According to Realcomp, selling agents need to know the listing type “prior to initiating efforts to show or sell the property” and “prior to scheduling an appointment.” Respondent’s Responses and Objections to Petitioner’s First Set of Interrogatories, Interrogatory No. 12, pp. 6-7.

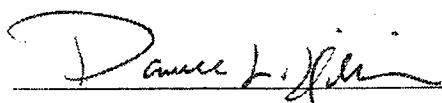
¹²² *Id.*

¹²³ Respondent’s Responses and Objections to Complaint Counsel’s Second Set of Interrogatories, Interrogatory No. 9, p. 5.

Realcomp MLS. The same is true of the need to notify cooperating brokers of the listing type to avoid the risk of free-riding on the efforts of the cooperating broker by home buyers.

Identification of listings by listing type is sufficient to make individual brokers aware of the risk of free-riding by home buyers to the extent that the risk varies by listing type. Indeed, Realcomp effectively acknowledges that the risks of free-riding by home buyers are ultimately assessed and acted upon by individual agents acting independently. In its response, Realcomp refers to “an [individual] agent” making a “conscious decision to include EA listings” so that an individual agent “can make sure that their interests are protected....” Given that the notification that cooperating brokers require is accomplished by identifying listings by listing type on the Realcomp MLS, as is currently the case, and that cooperating brokers even have the ability to include listing type among their search criteria if they independently deem it necessary to protect their individual self-interest in avoiding free-riding, there are no cognizable efficiencies from collectively restricting the search function to exclude non-ERTS listings by default.

117. Even if economic efficiencies were generated by collectively restricting access to non-ERTS listings in the default search results, and there are none, their existence are not sufficient to justify Realcomp’s decision to exclude non-ERTS listings on the basis of a need to notify cooperating brokers of listing types because Realcomp includes “Unknown” listing types among the default settings. That is, Realcomp’s Search Function Policy excludes non-ERTS listings from Realcomp’s default search results allegedly based on a need to ensure that cooperating brokers are notified and informed in advance of the listing type but then, in direct contradiction, includes listings of unknown listing type. Realcomp gives as the reason for its decision to include only “Exclusive Right to Sell (ERTS) or ‘Unknown’ listing type[s]” among its default search results as: “[s]ince an overwhelming majority of the listings were in one of these two categories, Realcomp decided to default the search to include these two types,” an explanation that completely undermines Realcomp’s own stated procompetitive justification.



Darrell L. Williams

4-3-07

Date

Appendix A

Darrell L. Williams, Director, LECG

2049 Century Park East, Suite 2300
Los Angeles, CA 90067
USA

Phone: 310.556.0709
Fax: 310.300.2244
Email: dwilliams@lecg.com

SUMMARY

Professor Williams has extensive experience in antitrust litigation consulting. He worked as an expert on issues such as exclusive dealings, exclusive territories, price fixing, joint ventures, and damages. He was previously a staff economist with the President's Council of Economic Advisors where he analyzed microeconomic issues, including industrial organization and regulation. He was also a Financial Economist at the Securities and Exchange Commission where he analyzed issues of securities fraud, corporate control, and regulation of financial markets. He teaches courses on antitrust, securities markets and regulation. He has taught at the Economics Institute for Federal Judges and has served as Vice-Chair of the Economics Committee, Antitrust Section of the American Bar Association. Professor Williams currently is engaged in research on industrial organization, contractual relations between firms, the internal organization of firms and markets, and the regulation of markets. He has litigation consulting experience in a number of industries, including telecommunications, healthcare, and petroleum. He has also served as consultant to the Federal Trade Commission and the Securities and Exchange Commission.

EDUCATION

Ph.D., Economics, Washington University, St. Louis, 1991.

M.A., Economics, Washington University, St. Louis, 1984.

B.S., Economics, Gatton College of Business and Economics, University of Kentucky, 1983.

PROFESSIONAL EMPLOYMENT

Academic:

Visiting Professor of Economics, University of California, Los Angeles, 1998-2002.

Teaching includes "Monopoly and Competition," a course dealing with economic and legal analysis of antitrust, markets and the competitive process; "Public Utility Regulation," a course dealing with the economic analysis of regulation of public utilities including the telecommunications, electricity and transportation industries; and "Centralized Financial Markets," a course dealing with the organization, operation and regulation of financial markets and exchanges.

Assistant Professor of Economics, University of California, Los Angeles, 1990-1998.

Appendix A

Teaching included antitrust economics, economic regulation and securities markets. Faculty Lecturer, The Basic Economics Institute for Federal Judges, George Mason University School of Law, Law and Economics Center. Teaches antitrust economics and regulatory economics to Federal judges from throughout the U.S.

Senior Research Fellow, Center for Economic Studies, U.S. Census Bureau, Washington, D.C., 1994-995:

Conducted research on the role of franchise relationships in the process of firm evolution including analyzing factors that explain why it benefits some entrepreneurs to operate within a vertically integrated firm while others chose disintegrated firms; examined the effect of risk on the decision to franchise; and analyzed the consequences of state franchise termination laws on the distribution of new franchise firms and the probability of discontinuation.

Research Associate, Center for Economic Studies, U.S. Census Bureau, Washington, D.C., Summer 1993.

Conducted research on the effect of state/local government programs on the entry and exit patterns of U.S. small businesses.

Research Associate, Center for Economic Studies, U.S. Census Bureau, Washington, D.C., Summer 1992.

Conducted research on the consequences of alternative forms of ownership on the efficiency of firms.

Instructor, Department of Economics, Washington University, St. Louis, Missouri, 1985-1986.

Consulting/Government:

Director, LECG, Los Angeles, California, March 2004-present.

Serve as a consultant to counsel and expert witness on antitrust issues including vertical restraints, mergers, tying, price discrimination, distribution, and franchising as well as on financial market regulation and securities fraud issues.

Principal, Economic Analysis LLC, Los Angeles, California, 2000-2004.

Vice President, Economic Analysis LLC, Los Angeles, California, 1998-2000.

Senior Consultant, Economic Analysis Corporation, Los Angeles, California, 1990-1998.

Served as consultant to counsel and expert witness on antitrust and securities market issues.

Research Economist, Office of the Chief Economist, U.S. Securities and Exchange Commission, Washington, D.C., 1987-1990.

Specialist on capital market issues including the structure, performance and regulation of securities markets. Provided economic analysis to the Division of Enforcement in cases involving insider trading, market manipulation and fraud on the market.

Junior Staff Economist, President's Council of Economic Advisers, Executive Office of the President, Washington, D.C., 1986-1987.

Worked on issues in industrial organization, regulation, and financial markets.

Appendix A

AREAS OF SPECIALIZATION

Industrial Organization
Antitrust

Regulation
Securities Markets

PROFESSIONAL ACTIVITIES

Teaching:

Graduate: Regulation
Undergraduate: Financial Markets, Antitrust Economics

Editorial:

Journal of Corporate Finance, Referee
Journal of Industrial Economics, Referee
Franchising Research: An International Journal, Editorial Review Board
Rand Journal of Economics, Referee
Journal of Business Venturing, Referee
University of California, Berkeley, Energy Institute, Referee

PROFESSIONAL AFFILIATIONS

National Economic Association, Board of Directors, 1997-2000
American Economic Association, Member
American Finance Association, Member
National Association of Securities Professionals, Member
Society of Franchising, Member
Black Enterprise Magazine, Board of Economists, 1999-present
American Bar Association, Vice-Chair, Economics Committee, Antitrust Section, 1999-2002
Los Angeles County Bar Association, Executive Committee, Antitrust and Trade Regulation
Section, 2002-Present
American Bar Association, Member, Joint Venture Task Force, 1999

HONORS AND AWARDS

Warren C. Scoville Distinguished Teaching Award, University of California, Los Angeles:
1992, 1993, 1995, 1997
Bradley Fellowship, The Mont Pelerin Society, Summer 1992
Beta Gamma Sigma, National Business Honorary
Omicron Delta Epsilon, National Economics Honorary
Omicron Delta Kappa, National Leadership Honorary
Research Assistantship, Department of Finance, Washington University, Spring 1985-Summer 1986
Research Assistantship, Department of Finance, Washington University, Fall 1984
Washington University Fellow, Washington University, 1984-1985
Washington University Fellow, Washington University, 1983-1984
James W. Martin Award, University of Kentucky, Outstanding Senior in Economics, 1983

Appendix A

RESEARCH GRANTS

American Statistical Association/National Science Foundation grant to study, "Entrepreneurship in the U.S. Economy: The Role of Franchising," 1994-1995.

Minority Business Development Agency (U.S. Department of Commerce) grant to study, "State and Local Minority Business Development Policies," 1993-1994.

Institute of American Cultures (UCLA Center for Afro-American Studies) grant to study, "Government Aid and Small Business Development," 1993-1994.

Institute of American Cultures (UCLA Center for Afro-American Studies) grant to study, "Government Aid and Small Business Development," 1992-1993.

PUBLICATIONS/RESEARCH PAPERS

"The Economics of Innovation: A Survey," *American Bar Association, Section of Antitrust Law*, (with Phil Nelson, Stuart Gurrea, Gloria Hurdle, Kevin Marshal, David Smith, and Robert Stoner) July 2002.

"Estimating Shareholder Losses in the New Economy," *PLI Conference Proceedings*, July 17, 2002.

"Why Do Entrepreneurs Become Franchisees?: An Empirical Analysis of Organizational Choice," *Journal of Business Venturing*, Vol. 14, No. 1, January 1999.

"Market Participation Rights and the Allocation of Government Procurement" (with Timothy Bates), *American Economic Review Proceedings*, July 1996.

"Preferential Procurement Programs Do Not Necessarily Help Minority-Owned Businesses" (with Timothy Bates), *Journal of Urban Affairs*, Vol. 17, No. 1, September 1995.

"Preferential Procurement, A Rejoinder" (with Timothy Bates), *Journal of Urban Affairs*, Vol. 17, No. 1, September 1995.

"Franchise Contract Terminations: Evidence on the Efficacy of Self-Enforcing Mechanisms," Working Paper, Center for Economic Studies, U.S. Census Bureau, September 1995.

"New Evidence on the Method of Payment in Corporate Takeovers," unpublished manuscript, University of California, Los Angeles, Department of Economics, July 1995.

"Internal Monitoring of Firms in the Absence of an Active Takeover Market," Working Paper, Center for Economic Studies, U.S. Census Bureau, January 1995.

"Franchise Contract Terminations: Is There Evidence of Franchisor Abuse?," *10th Annual Proceedings of the Society of Franchising*. Lincoln: International Center for Economic Franchise Studies, College of Business Administration, University of Nebraska, 1996.

"State Franchise Termination Laws: A Cross-Sectional Comparison of Entry and Exit by Franchise Businesses," *9th Annual Proceedings of the Society of Franchising*. Lincoln: International Center for Economic Franchise Studies, College of Business Administration, University of Nebraska, 1995.

"Risk, Entrepreneurship, and the Form of Business Ownership," Working Paper, Center for Economic Studies, U.S. Census Bureau, August 1994.

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"Assessment of State and Local Government Minority Business Development Programs" (with Timothy Bates), a report to the U.S. Department of Commerce, Minority Business Development Agency, September 1993.

"Racial Politics: Does It Pay?" (with Timothy Bates), *Social Science Quarterly* 74, No. 3, September 1993.

"A Case Study of the Los Angeles Small and Minority Business Assistance Programs," Manuscript, January 1993.

"Government Aid and Small Business Survival," Manuscript, December 1992.

"Soft Dollars: The Currency of Unpriced Exchange" (with D. Bruce Johnson), Manuscript, 1991.

"Block Trades and Ownership Concentration: New Tests of the Ownership Endogeneity Hypothesis," Manuscript, 1991.

Appendix A

CONSULTING AND TESTIMONY: ANTITRUST AND INTELLECTUAL PROPERTY CASES

James Clayworth, et al., v. Pfizer, Inc., et al., Superior Court of the State of California in and for the County of Alameda, Case No. RG04-172428. [Provided analysis of damages related to alleged conspiratorial overcharge of pharmaceutical wholesale prices.] Summary Judgment, December 15, 2006.

DAG Petroleum Suppliers, LLC v. BP P.L.C. and BP Products North America Inc., U.S. District Court for the Eastern District of Virginia, Alexandria Division, Case No. 1:05-CV-1323. [Provided analysis of damages related to alleged exclusion from an auction of automotive service stations.] Expert Report, June 19, 2006. Deposition testimony, July 28, 2006.

ChoiceParts v. OEConnection, et al., U.S. District Court for the Northern District of Illinois, Case No. 01 C 0067. [Provided analysis of damages related to a refusal-to-deal claim by a joint venture in the automotive parts industry.] Expert report, November 14, 2003. Deposition testimony, December 17-18, 2003.

Mike Farmer, et al., v. Medo Industries, Inc., et al., U.S. District Court for the Central District of California, Case No. 01-10248 LGB (FMOx). [Provided analysis of damages related to patent infringement in the manufacturing industry.] Expert report, January 21, 2003. Deposition testimony, February 21, 2003.

A.O. Smith Corporation, et al., v. Perfection Corporation, et al., Civil District Court for the Parish of Orleans, State of Louisiana, Case No. 99-15646. [Provided analysis of brand damages related to the production of defective products in the consumer durables industry.] Deposition testimony, July 29-30, 2002 and September 18-19, 2002. Affidavit, October 2, 2002. Trial testimony, March 22-23, 2004.

Rowe Entertainment, Inc., et al., v. The William Morris Agency, Inc., et al., U.S. District Court for the Southern District of New York, Case No. 98 Civ. 8272 (RPP). [Provided economic analysis related to conspiracy to boycott trade in the entertainment industry.] Expert report, December 12, 2002.

Innomed Labs, LLC v. Alza Corporation, U.S. District Court for the Southern District of New York, Case No. 01 Civ. 8095 (HB). [Provided economic analysis related to price discrimination claim in connection with the distribution of over-the-counter pharmaceutical products.] Expert report, August 20, 2002. Deposition testimony, September 6, 2002. Trial testimony, November 25, 2002.

Spirit Airlines, Inc., v. Northwest Airlines, Inc., U.S. District Court for the Eastern District of Michigan, Case No. 00-71535. [Provided damage analysis in case involving claim of predatory pricing in the airline industry.] Expert reports, April 5, 2002 and May 31, 2002. Deposition testimony, June 13, 2002.

Nicholas J. Hingel, Gremillion Enterprises, Inc., Grayson Enterprises, Inc., et al. v. Exxon Corporation, d/b/a Exxon Company, U.S.A., Division, and Retif Oil & Fuel, Inc., Civil District Court for the Parish of Orleans, State of Louisiana, Case No. 99-10449. [Provided economic analysis related to franchising, vertical restrictions, and tying in the petroleum industry.] Expert report, December 31, 2001. Deposition testimony, February 8, 2002. Trial testimony, May 27, 2002.

Holiday Wholesale Grocery Co., et al. v. Philip Morris, et al., U.S. District Court, Northern District of Georgia, Atlanta Division, Case No. CV-447-JOF. [Provided economic analysis related to horizontal

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conspiracy claim in the retail industry.] Expert report, December 19, 2001. Deposition testimony, January 8, 2002.

Independent Ink, Inc. v. Trident, Inc., U.S. District Court, Central District of California, Los Angeles, Case No. CV 98-6686-NM [Provided economic analysis related to tying claims in the manufacturing industry.] Expert report, April 6, 2001. Deposition testimony, May 25, 2001.

Muze Inc. v. Alliance Entertainment Corp., et al., U.S. District Court, Central District of California, Los Angeles, Case No. 00-00620 RSWL [Provided economic analysis related to tying and below cost selling claims in the retail services industry.] Expert report, April 4, 2001.

Oakland Raiders v. National Football League, et al., Los Angeles, California, [Provided economic analysis related to horizontal restraints in the sports industry.] Deposition testimony, February 7, 2001.

Starsight Telecast, Inc. v. General Instruments Corporation, Arbitration, San Francisco, California, [Provided damage analysis on trademark and patent infringement in the market for electronic program guides] Expert designation, October 2000.

The Coca-Cola Company, et al. and Coca-Cola Enterprises v. Omni Pacific Company, et al. [Provided damage analysis in case involving territorial restrictions in the beverage industry.] Deposition, September 2000.

James 3 Corporation et. al. v. The Coca-Cola Company, U.S. District Court for the Northern District of California, San Jose Division, Case No. C-97-20716 JW [Provided economic analysis related to market foreclosure and tying claims in the beverage industry.] Expert report, July 21, 2000.

Collins v. International Dairy Queen, Inc., U.S. District Court for the Middle District of Georgia, Case No. 5:94-CV-95-4 [Provided economic analysis related to tying claims in the restaurant industry.] Expert Designation, June 2000.

Kropinski, et al. v. Johnson & Johnson, et al., Superior Court of New Jersey, Case No. 8886-96 [Provided economic analysis related to price discrimination claim in connection with the sale of contact lens products.] Expert report, November 19, 1999. Deposition Testimony, January 13, 2000.

GOTO.COM, INC., a Delaware corporation v. The Walt Disney Co., et al., United States District Court, Central District of California, Case No. 99-01674-TJH (RCs) [Provided damage analysis for alleged trademark infringement.] Expert report, September 3, 1999.

Chevron U.S.A. Inc. v. Alberto Rodriguez, United States District Court, Central District of California, Case No. CV 98 5779 [Provided economic analysis related to gasoline dealer termination under the Petroleum Marketing Practices Act] Expert designation.

Alberto Rodriguez v. Chevron U.S.A. Inc. et al., Superior Court of California, County of Santa Barbara, Case No. 225048 [Provided economic analysis related to price discrimination and vertical price fixing claims in gasoline retailing] Expert Declaration, July 17, 1999.

Metropolitan News Company v. Daily Journal Corporation, Superior Court of California, County of Los Angeles, Case No. BC 161334 [Provided economic analysis on below cost selling and locality discrimination claims in the market for legal notices] Trial testimony, December 11, 1998. Jury dismissed without verdict. Trial testimony, July 6, 1999.

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Sure Safe Industries, Inc. and Torrey Pines Capital Group v. McGrath Rentcorp, et al., Superior Court of California, County of San Diego, Case No. 707595 [Provided economic analysis and testified on group boycott and tying claim in the market for anchoring systems] Deposition testimony, June 18, 1998. Trial testimony, October 8, 1998.

Darkhor v. Mobil Corporation, Superior Court of California, County of Santa Barbara, Civil Case No. 215013 [Provided economic analysis and testified on predatory pricing and price discrimination claims in gasoline distribution] Expert report submitted, deposition testimony, February 4, 1998. Trial testimony, September 16, 1998.

People of the State of California v. Speedee Oil Change Systems, Inc., et al., Superior Court of California, County of Los Angeles, Case No. BC-109765 [Provided economic analysis and testified on tying claim in the market for franchise contracts] Affidavit, March 1997. Deposition testimony, April 20, 1998.

Barr v. Orco Construction Supply, Arbitration, San Diego, California, [Provided economic analysis of non-compete covenant] Expert report submitted, August 1997.

Senate Committee on Energy, Utilities and Communications, Sacramento, California, submitted expert report entitled, "Government Regulation and the Market for Retail Gasoline". [Analyzed the effects of proposed open supply regulation in gasoline retailing.] Expert report. Senate Hearing testimony, April 1997.

Wilson, et al. v. Mobil Oil Corporation, et al., U.S. District Court for the Eastern District of Louisiana, New Orleans, Civil Case No. 95-4174 [Provided economic analysis and testified on tying claim in the market for franchise contracts] Expert report, April 15, 1997.

Consultant to the U.S. Federal Trade Commission as economic expert in investigation of merger of American Home Products Corporation and American Cyanimid Corporation, November 1994.

American Hardware Mutual Insurance v. Ninety-Nine Cents Only Stores, Inc. [Analyzed insurance liability and damages issues.] Deposition Testimony, February 17, 1993.

CONSULTING AND TESTIMONY: SECURITIES AND FINANCIAL MARKETS CASES

Securities and Exchange Commission v. Adrian A. Alexander, et al., U.S. District Court for the Southern District of New York, [Provided market analysis related to insider trading claims] Expert report, April 29, 2002.

Securities and Exchange Commission v. Michael R. Hendrix, et al., U.S. District Court, Northern District of California, San Jose Division, Case No. CV C 00-20655(JW) [Performed damage analysis on insider trading litigation.] Expert report, August 2001.

SEC v. Ogle et al., U.S. District Court for the Northern District of Illinois. [Provided market analysis and testified on stock market manipulation claims.] Expert report, April 28, 2000.

Aron Parnes v. James Harris, Purus, Inc. et al., U.S. District Court for the Northern District of California, Oakland Division, Case No. C-95-02715-SBA [Provided market analysis related to allegations of missed earnings announcements.] Deposition testimony, June 21, 2002.

Appendix A

SEC v. Cortland Capital Corporation et. al., U.S. Securities and Exchange Commission, Administrative Proceeding, New York, NY File No. 3-9444 [Provided economic analysis and testified on stock market manipulation claims] Written direct testimony, March 2, 1998.

Jay Goldinger, et al. v. Securities and Exchange Commission. [Analyzed insider trading.] February 1995.

SEC v. GAF Corp. [Provided economic analysis on the effect of stock manipulation claim on stock prices as SEC Economist] December 1989.

SEC v. Stone Container Corp. [Provided economic analysis to the Division of Enforcement on the effect of stock manipulation claim on stock prices as SEC Economist] January 1989.

SEC v. Clemente Global Growth Fund, Inc. [Provided economic analysis to the Division of Enforcement on the effect of disclosure regulation violation claim on stock prices as SEC Economist] January 1989.

SEC v. Certain Issuers (Boyd Jeffries and Salim B. Lewis) [Provided economic analysis on insider trading claim as SEC Economist] August 1990.

SEC v. the Great Atlantic & Pacific Tea Company ("A&P") [Provided economic analysis on the effect of stock manipulation claim on stock prices as SEC Economist] June 1990.

SEC v. International Broadcasting Corp. [Provided economic analysis to the Division of Enforcement on the effect of stock manipulation claim on stock prices as SEC Economist] May 1989.

PARTICIPATION AT CONFERENCES AND PROFESSIONAL MEETINGS

Panel Discussion: American Bar Association Antitrust Litigation Committee Program, Los Angeles, CA, April 22, 2006 (Best Practices for Examining and Cross-Examining Expert Witnesses at Trial)

Mock Trial Participant: American Bar Association Section of Antitrust Law – Annual Spring Meeting, Washington, DC, March 29-31, 2006 (Expert Witness for Defendant in Mock Jury Trial)

Panel Discussion: UCLA Law First Annual Institute on US and EU Antitrust Aspects of Mergers and Acquisitions, Marina Del Rey, CA, February 28, 2004 (Joint Ventures: Preliminary Evidence on Innovation Efficiencies)

Paper Presentation: American Bar Association Section of Antitrust Law – Annual Spring Meeting, Washington, DC, March 28-30, 2001 (Issues in the Economics of Franchising)

Faculty Lecturer: Practicing Law Institute Antitrust Litigation Program, New York, NY, November 30 – December 01, 2000.

Faculty Lecturer: Public Law Institute for Federal Judges, Tucson, AZ, October 23, 2000

Discussant: American Bar Association Section of Antitrust Law Post – Annual Leadership Meeting, New York, NY, July 12-13, 2000.

Moderator: American Bar Association 48th Annual Spring Meeting, Washington, DC, April 5-7, 2000.

Faculty Lecturer: American Bar Association Antitrust Conference, Scottsdale, AZ, February 23 - 25, 2000.

Discussant: Society of Franchising Conference, Las Vegas, NV, March 6-7, 1998.

Session Chair: American Economic Association Meetings, New Orleans, LA, January 4-6, 1997 (Vertical and Horizontal Firm Relations)

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- Discussant: American Economic Association Meetings, New Orleans, LA, January 4-6, 1997.
- Invited Discussant: Brookings Institution, Microeconomics Conference, Washington, DC, July 17-20, 1996.
- Paper Presentation: Stanford University, Department of Economics, Palo Alto, CA, May 14, 1996 (Incomplete Contracting and Ex Post Opportunism: Evidence from Franchise Contract Terminations)
- Invited Participant: National Bureau of Economic Research, Industrial Organization Program, Palo Alto, CA, February 1996.
- Paper Presentation: Society of Franchising Conference, Honolulu, Hawaii, February 17-18, 1996 (Franchise Contract Terminations: Is There Evidence of Franchisor Abuse?)
- Paper Presentation: University of Arizona, Department of Finance, Tucson, Arizona, February 15, 1996 (The Internal Monitoring of Firms in the Absence of an Active Takeover Market)
- Paper Presentation: American Economic Association Meetings, San Francisco, CA, January 5-7, 1996 (Franchise Contract Terminations: Evidence on the Efficacy of Self-Enforcing Mechanisms)
- Invited Participant: National Bureau of Economic Research, Industrial Organization Program, Boston, MA, August 1995.
- Paper Presentation: Center for Economic Studies, U.S. Census Bureau, September 14, 1995 (Franchise Contract Terminations: Evidence on the Efficacy of Self-Enforcing Mechanisms)
- Paper Presentation: Western Economic Association Meetings, San Diego, CA, July 7, 1995 (State Franchise Termination Laws and Exit)
- Discussant: Western Economic Association Meetings, San Diego, CA, July 7, 1995.
- Session Organizer: Western Economic Association Meetings, San Diego, CA, July 7, 1995.
- Paper Presentation: Western Economic Association Meetings, San Diego, CA, July 6, 1995 (Resolving Information Asymmetries: The Case of Takeovers)
- Paper Presentation: University of Southern California, School of Business, Department of Finance, April 28, 1995 (Why Do Entrepreneurs Become Franchisees?)
- Paper Presentation: U.S. Department of Justice, Antitrust Division, Washington, DC, April 11, 1995 (Why Do Entrepreneurs Become Franchisees?)
- Paper Presentation: U.S. Federal Trade Commission, Bureau of Economics, Washington, DC, April 6, 1995 (Why Do Entrepreneurs Become Franchisees?)
- Paper Presentation: National Bureau of Economic Research, Industrial Organization Program, Palo Alto, CA, February 24, 1995 (Why Do Entrepreneurs Become Franchisees?)
- Paper Presentation: Society of Franchising Conference, San Juan, Puerto Rico, January 22-25, 1995 (A Comparison of Business Discontinuations in States With and Without Franchise Termination Laws)
- Paper Presentation: Center for Economic Studies, U.S. Census Bureau, Washington, DC, October 7, 1993 (Why Do Entrepreneurs Become Franchisees?)
- Paper Presentation: American Economic Association, January 5-7, 1993, Anaheim, California (Set-Asides, Ownership Restrictions, and Firm Performance)
- Invited Participant: Bradley Fellow, The Mont Pelerin Society General Meetings, Vancouver, Canada, August 30-September 4, 1992
- Paper Presentation: UCLA, Department of Economics, Industrial Organization Workshop, March 13, 1992 (Block Trades and Ownership Concentration: New Tests of the Ownership Endogeneity Hypothesis)
- Paper Presentation: University of California, Santa Barbara, Department of Economics, Industrial Organization Workshop, March 9, 1992 (Block Trades and Ownership Concentration: New Tests of the Ownership Endogeneity Hypothesis)
- Paper Presentation: American Economic Association, January 2-5, 1992, New Orleans, Louisiana (Soft Dollars: The Currency of Unpriced Exchange)

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- Paper Presentation: Washington University, Industrial Organization Workshop, St. Louis, Missouri, October 18, 1991 (Block Trades and Ownership Concentration: New Tests of the Ownership Endogeneity Hypothesis)
- Paper Presentation: Western Economic Association International, June 29-July 3, 1991, Seattle, Washington (Soft Dollars: The Currency of Unpriced Exchange)
- Invited Participant: Committee on Labor Market Dynamics, Planning Conference for Urban Inequality Study, June 14-15, 1991, sponsored by the Center for the Study of Urban Poverty, University of California at Los Angeles.
- Paper Presentation: Columbia University, School of Law, New York, New York, October 26, 1989 (The Influence of Information Asymmetries and Monitoring Costs on Corporate Ownership Structure)

OTHER ACTIVITIES

Insider Trading, Fraud, and Fiduciary Duty under the Federal Security Laws, co-sponsored by the American Law Institute-American Bar Association (ALI-ABA) Committee on Continuing Professional Education and the Securities Law Committee of the Federal Bar Association, May 3-4, 1990, Washington, D.C.

Appendix B

Documents Considered

Complaint In the Matter of Realcomp II, Ltd., United States of America, Before Federal Trade Commission, October 10, 2006.
 Respondent's Responses and Objections to Petitioner's First Set of Interrogatories, January 11, 2007.
 Realcomp II Ltd.'s Response to Claimant Counsel's Second Request for Production of Documents and Things, January 17, 2007.
 Respondent's Responses and Objections to Complaint Counsel's Second Set of Interrogatories, February 16, 2007.

Albert Hepp Deposition & Exhibits	02/14/07
Alissa Nead Deposition & Exhibits	01/22/07
Anita Groggins Deposition & Exhibits	02/07/07
Carl Williams Deposition & Exhibits	01/17/07
Clifford D. Niersbach Deposition	03/09/07
Craig Mincy Deposition & Exhibits	02/28/07
Dale Smith Deposition & Exhibits	01/16/07
Daniel Mulvihill Deposition & Exhibits	01/31/07
Darralyn Bowers Deposition & Exhibits	02/21/07
David Elya Deposition & Exhibits	01/22/07
Denise Moody Deposition & Exhibits	02/09/07
Douglas Hardy Deposition & Exhibits	02/21/07
Douglas Whitehouse Deposition & Exhibits	02/22/07
Dreu Adams Deposition & Exhibits	02/07/07
Gary Moody Deposition & Exhibits	02/09/07
Gerald Burke Deposition & Exhibits	01/30/07
Jeff Keramat Deposition & Exhibits	02/06/07
John Cooper Deposition & Exhibits	01/23/07
John R. Kersten Deposition & Exhibits	03/01/07
Karen Kage Deposition & Exhibits	02/20/07
Kelly Sweeney Deposition & Exhibits	03/01/07
Mark Lesswing Deposition	03/08/07
Martin M. Nowak Deposition & Exhibits	01/30/07
Michelle Brant Deposition & Exhibits	01/17/07
Patricia Jacobs Deposition	01/16/07
Paul Bishop Deposition	03/08/07
Paul Edward Simos Deposition	03/20/07
Philip Dawley Deposition	03/20/07
Robert A. Goldberg Deposition	03/08/07
Robert Gleason Deposition & Exhibits	02/23/07
Robert Greenspan Deposition	03/20/07
Robert Taylor Deposition	03/14/07
Ryan Tucholski Deposition & Exhibits	01/23/07
Thomas R. Rademacher Deposition & Exhibits	01/31/07
Virginia Bratt Deposition & Exhibits	02/27/07
Walter Baczkowski Deposition & Exhibits	01/29/07
Wayne Aronson Deposition	02/16/07
Karen S. Kage Investigational Hearing & Exhibits	08/23/06
CX 15 (RC0210)	
CX 175	

Appendix B

Documents Considered

CX 175
 CX 187
 CX 211
 CX 220
 CX 249 ("Realcomp Online Basics, Training Workbook," June 30, 2005)
 CX 285
 CX 329
 CX 82
 CX 88 ("Realcomp Revision," April 21, 2006)
 CX 88 (Realcomp, Revision: April 21, 2006)
 CX 99 ("Statement of Real Property Information Services," Realcomp, May 2006)
 Exhibit 17 (RealFax Nov. 17, 2003)
 NARFTC 0001997-2092 (The 2006 National Association of Realtors, Profile of Home Buyers and Sellers, November 2006 (2006 NAR Survey))
 RC Exhibit 2
 RC Exhibit 9
 RC Exhibit 16
 RC Exhibit 26, RC 0211 – 21
 RC0178-0187 (Plans for Implementing "Listing Type" Data in the Realcomp MLS, November/December 2003)
 RC0300 – RC0331 (Fifth Amended Bylaws of Realcomp II Ltd., Adopted November 2004)
 RC1337-1363 (Realcomp II Ltd. Rules and Regulations, Revised October 6, 2006)
 RC1364-RC1375 (Realcomp II Ltd. Policy Handbook, Revised October 6, 2006)
 RX 45
 Realcomp Listing Data
 MiRealSource Listing Data
 Realcomp's Data Sharing Listing Data
 Realcomp Data. (Emails, Agent Views)
 Boulder MLS Listing Data
 Dayton MLS Listing Data
 Memphis MLS Listing Data
 Charlotte MLS Listing Data
 Denver MLS Listing Data
 Toledo MLS Listing Data
 Wichita MLS Listing Data
 Williamsburg MLS Listing Data
 Green Bay/Appleton MLS Listing Data
 MiRealSource BDS Data
 Maureen K. Ohlhausen, "Competition Issues in Real Estate Brokerage," The Antitrust Source, November 2005.

 "Real Estate Brokerage, Factors That May Affect Price Competition," United States Government Accountability Office, Report to the Committee on Financial Services, House of Representatives, GAO-05-947, August 2005 (GAO Report).

 "REALTOR Consumed Services Outlook White Paper," Center for REALTOR Technology, October 8, 2003.
 "Realcomp Rules," AmeriSellRealty.com.
 AmeriSellRealty.com, accessed on March 28, 2007.
 Chang-Tai Hsieh, The Tragedy of the Commission.
 Colin Cameron and Pravin K. Trivedi "Microeconometrics: Methods and Applications," Cambridge University Press: New York, 2005.

Appendix B

Documents Considered

GreaterMichiganRealty.com (<http://www.greatermichiganrealty.com/packages/>).

Horizontal Merger Guidelines, U.S. Department of Justice and The Federal Trade Commission, Revised April 8, 1997.

<http://www.newswiretoday.com/news/5497>.

<http://www.realcomp.com/company>.

<http://www.realcomp.com/company>.

Mark S. Nadel, "A Critical Assessment of the Standard, Traditional Residential Real Estate Broker Commission Rate Structure, AEI-Brooking Joint Center for Regulatory Studies, October 2006.

Michigan Department of Labor and Economic Growth (http://www.michigan.gov/cis/0,1607,7-154-35299_35414_35475-115121--,00.html; <http://www.cis.state.mi.us/bcsc/forms/real/lre035.pdf>).

Michiganlisting.com accessed on March 28, 2007 (<http://michiganlisting.com/ForSellers.html>).

Robert W. Hahn, Robert E. Litan, and Jesse Gurman, "Bringing More Competition to Real Estate Brokerage," AEI-Brooking Joint Center for Regulatory Studies, Working Paper 05-11.

Complaint in the Matter of Information and Real Estate Services LLC., November 22, 2006.

Complaint in the Matter of Realtors Association of Northeast Wisconsin, November 11, 2006.

Complaint in the Matter of Williams Area Association of Realtors, Inc., November 22, 2006.

Appendix C

Methodology Used to Rank MSAs Without Restrictions

I. General

- 1 MSAs were ranked according to their "similarity" to Detroit in terms of certain economic and demographic characteristics of the area.
- 2 Only MSAs with Population greater than 500,000 were included.
- 3 MSAs in states with Minimum Service Requirements were excluded (MO, IN, TX, UT, AL, IA).
- 4 MSAs with any known restrictions on non-ERTS listings were excluded.

II. Economic and demographic characteristics used

- 1 1 Year Home Price Change (Source: Office of Federal Housing Enterprise Oversight.)
- 2 5 Year Home Price Change (Source: Office of Federal Housing Enterprise Oversight.)
- 3 Median Single Family Home Price (2005) (Source: National Association of Realtors)
- 4 % High School Degree (Source: 2000 Census)
- 5 % Bachelor Degree (Source: 2000 Census)
- 6 Median Income (Source: 2000 Census)
- 7 Population (Source: 2000 Census)
- 8 Population density (Source: 2000 Census)

III. Estimation of "similarity" to Detroit

- 1 For each variable, the standard deviation in the sample of MSAs was estimated.
- 2 The difference between Detroit and each MSA was estimated for each variable, measured in standard deviations.
- 3 The differences in standard deviations were summed up for each MSA.
- 4 The MSAs were ranked according to the sum of the differences (in standard deviations).
- 5 (This methodology gives each economic and demographic variable equal weight.)

IV. Selection of MSAs

- 1 The top 7 ranking MSAs were selected.
- 2 No data was received from the Philadelphia-Camden-Wilmington MLS.

Appendix D

Probit Regression Results

Variables	Regression 1		Regression 2		Regression 3	
	df/dx	Robust Std. Error	df/dx	Robust Std. Error	df/dx	Robust Std. Error
rule	-0.0551	0.0202	-0.0547	0.0203	-0.0615	0.0197
bedrooms					0.0022	0.0007
homearea					0.0000	0.0000
landarea					0.0000	0.0000
pop. density					0.0000	0.0000
listprice			0.0000	0.0000		
y2004	-0.0031	0.0041	-0.0031	0.0042	-0.0049	0.0048
y2005	-0.0070	0.0054	-0.0070	0.0054	-0.0051	0.0088
y2006	-0.0078	0.0059	-0.0078	0.0059	-0.0065	0.0091
m02	-0.0001	0.0012	-0.0001	0.0012	-0.0008	0.0012
m03	-0.0013	0.0015	-0.0013	0.0015	-0.0021	0.0016
m04	-0.0008	0.0012	-0.0007	0.0012	-0.0015	0.0013
m05	-0.0004	0.0011	-0.0004	0.0011	-0.0007	0.0011
m06	0.0003	0.0011	0.0004	0.0011	-0.0004	0.0012
m07	-0.0038	0.0012	-0.0038	0.0012	-0.0036	0.0009
m08	-0.0025	0.0013	-0.0024	0.0013	-0.0018	0.0018
m09	-0.0029	0.0015	-0.0028	0.0015	-0.0020	0.0017
m10	-0.0028	0.0015	-0.0027	0.0014	-0.0014	0.0021
m11	-0.0033	0.0013	-0.0032	0.0013	-0.0015	0.0027
m12	0.0001	0.0031	0.0002	0.0031	0.0017	0.0044
# of Obs.	1,076,538		1,073,860		806,315	
Pseudo R²	0.0684		0.0682		0.0868	
obs. P	0.0398		0.0395		0.0364	
pred. P	0.0296		0.0294		0.0253	

Appendix E

Notes to Exhibits and Appendices

Exhibits 1 to 8

1. Data was compiled from Residential Data.

Exhibits 9 and 16

1. Data was compiled from Residential Data.
2. Map was created using MapInfo.
3. All zip codes that began with 48--- and 49--- were included in the data.
4. The Realcomp, MiRealSource, and Realcomp's Data Sharing Partners databases contained Enclosed Zip Codes, which are typically hospitals, colleges, government organizations, non-profits, or possibly old zip codes that have since been changed. Accordingly, Mapinfo indicates these zip codes as covering 0.0 square miles. These Enclosed Zip Codes were therefore, excluded.
5. Zip codes not recognized by Mapinfo or the postal service were excluded. (e.g., 48010 and 48087). Zip codes that were blank, had four digits or less, or were non-Michigan zip codes were excluded. The following describes this in more detail:
 - A. Realcomp had 4,084 zip codes that were blank or missing; 265 zip codes with four digits; 212 zip codes that began with 41--- through 47---, and 33 zip codes that began with 50--- and up.
 - B. MiRealSource had 41 zip codes that were blank or missing, 55 zip codes with four digits or less, 87 zip codes that began with 41--- through 47---, and 33 zip codes that began with 50--- and up.
 - C. Realcomp's Data Sharing Partner had 528 zip codes that were blank or missing, 33 zip codes with four digits or less, 35 zip codes that began with 41--- through 47---, and 11 zip codes that began with 50--- and up.

Exhibits 10 to 15

1. Data was compiled from Residential Data.
2. 2,997 observations were dropped due to missing parcel numbers.
3. 33,745 observations were dropped because the listing dates were either before 2002 or after 2006.
4. 1,735 observations were dropped because the listing dates were missing.
5. There were a total of 863,914 observations after filtering out the aforementioned criteria. There were 540,771 unique and 323,143 non-unique parcel numbers for all counties from 2002-2006.
6. The "unique" number of listings for each database (Realcomp, MiRealSource, and Realcomp's Data Sharing Partners) contains only unique new listings by county and by year.

Exhibits 19 to 20

1. Data was compiled from Residential Data.
2. NON-ERTS Listings are defined as Exclusive Agency (EA), Limited Service (LS), or MLS Entry Only (MEO) listing types.
3. Listings that were categorized as "Unknown" listing types were excluded.
4. Average Number of ERTS Agent Views = (ERTS Agent Views/DOM) / (Total Number of ERTS Listings with Agents Views in that month).
5. Average Number of NON-ERTS Agent Views = (NON-ERTS Agent Views/DOM) / (Total Number of NON-ERTS Listings with Agents Views in that month).

Exhibits 21 to 22

1. Data was compiled from Residential Data.
2. NON-ERTS Listings are defined as Exclusive Agency (EA), Limited Service (LS), or MLS Entry Only (MEO) listing types.
3. Listings that were categorized as "Unknown" listing types were excluded.
4. Average Number of ERTS Emails = (Sum of ERTS (Emails/DOM)) / (Total Number of ERTS Listings).

Appendix E

Notes to Exhibits and Appendices

5. Average Number of NON-ERTS Emails = (Sum of NON-ERTS (Emails/DOM)) / (Total Number of NON-ERTS Listings).

Exhibits 23-25

1. Data was compiled from Residential Data.
2. NON-ERTS Listings are defined as Exclusive Agency (EA), Limited Service (LS), or MLS Entry Only (MEO) listing types.

Exhibit 26

1. Data from various MLS Residential Data.
2. A weighted average was used to calculate the listings for MLSs with Restrictions and for MLSs without Restrictions.
3. MLSs with restrictions include: Greenbay/Appleton MLS and Williamsburg MLS.
4. Access restrictions in the Williamsburg MLS were eliminated in June of 2006. The weighted average for MLSs with Restrictions includes the Williamsburg MLS from January 2002 to June 2006.
5. MLSs without restrictions include: Charlotte MLS, Dayton MLS, Denver MLS, Memphis MLS, Toledo MLS, and Wichita MLS.

Appendix D

1. Data contains information from 10 MLSs.
2. Each data point is a particular listing in a particular MLS on a particular date.
3. All regressions are probit models, with marginal effects reported.
4. Regression was ran from October 2003 to October 2006.
5. A dependent variable of 0 indicates that the listing was not a Exclusive Agency (EA) Listing, while a 1 indicates that it was an EA.
6. The main independent variable, whether an MLS had rule restrictions, was assigned a dummy variable, where a 0 indicated that no rules restrictions were in place, while a 1 meant that there were rule restrictions.
7. For MLSs without restrictions, this variable is 0 throughout the sample period.
8. For Greenbay/Appleton, this variable is 1 throughout the sample period.
9. For Williamsburg, this variable is 1 until June 2006, when the MLS eliminated the restrictions, and 0 thereafter.
10. For Boulder the variable is 0 before May 2003 and after June 2006. Within this period, the rule variable is 1.
11. Standard errors are adjusted for intra-mls correlation (clustering).
12. Observations with "blank" listing types were dropped.

Exhibit 1

Percentage of Realcomp Listings by County (2002-2006)

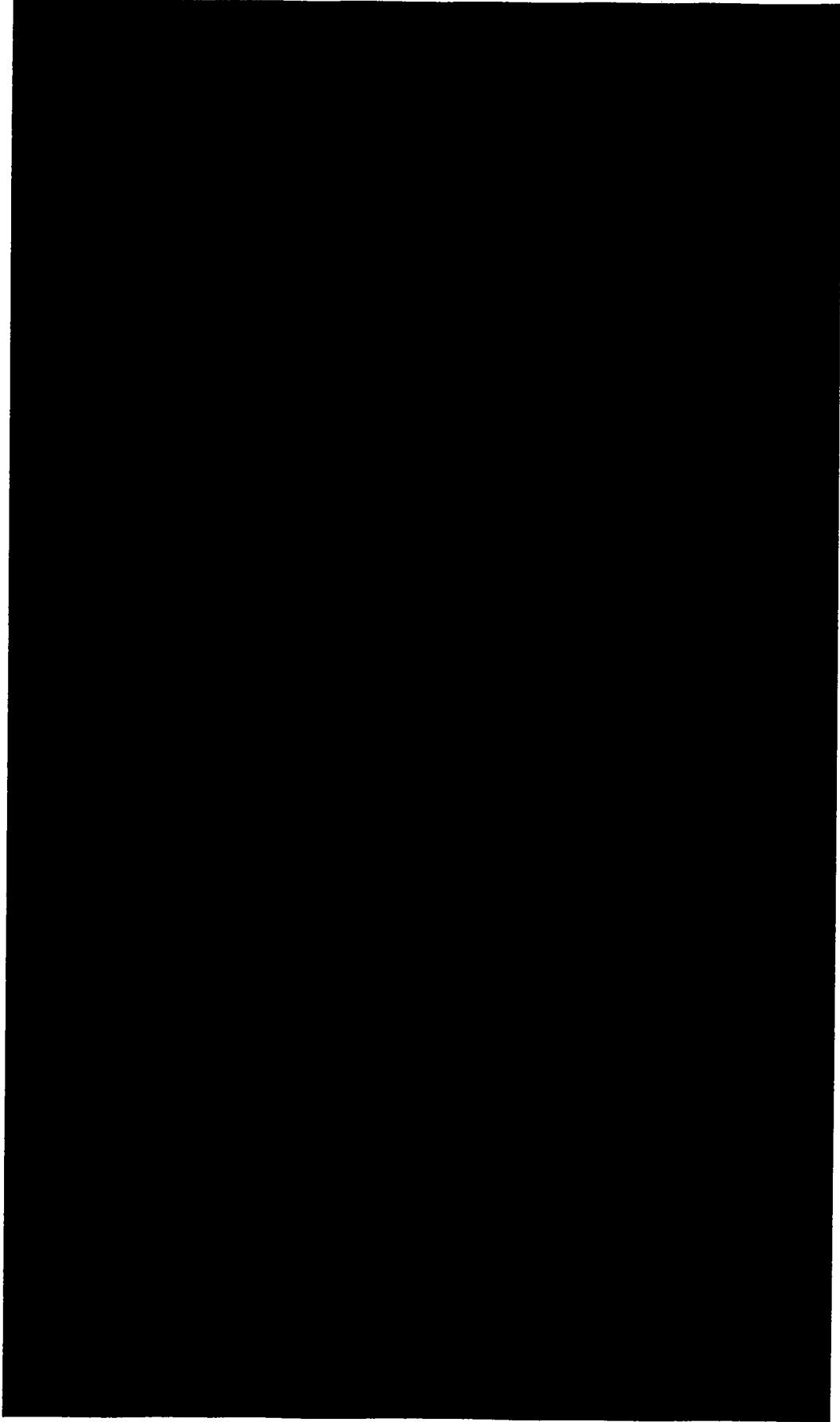


Exhibit 2

Percentage of Realcomp Listings by County (2002-2006)

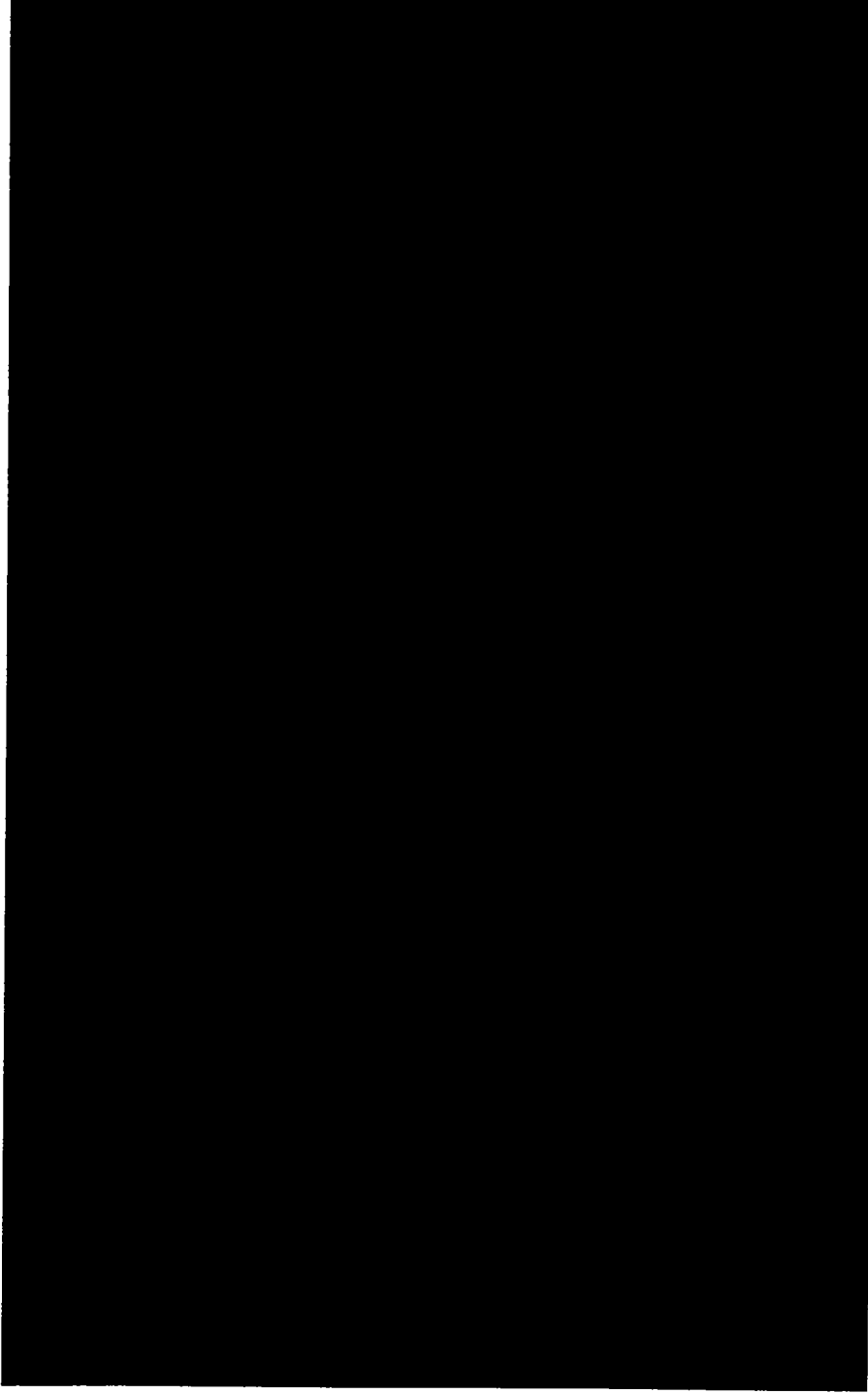


Exhibit 3

**Realcomp's Share of New Listings
Wayne County (2002-2006)**

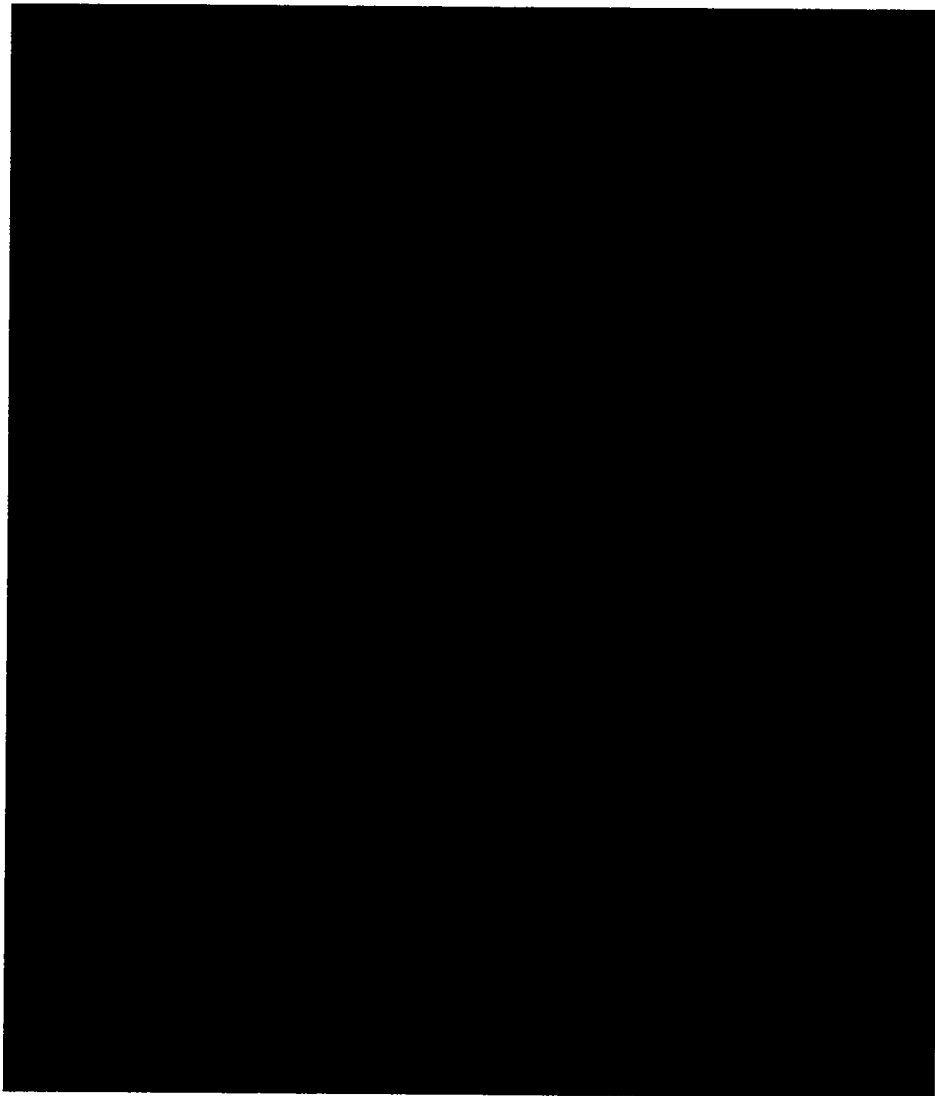


Exhibit 4

**Realcomp's Share of New Listings
Oakland County (2002-2006)**

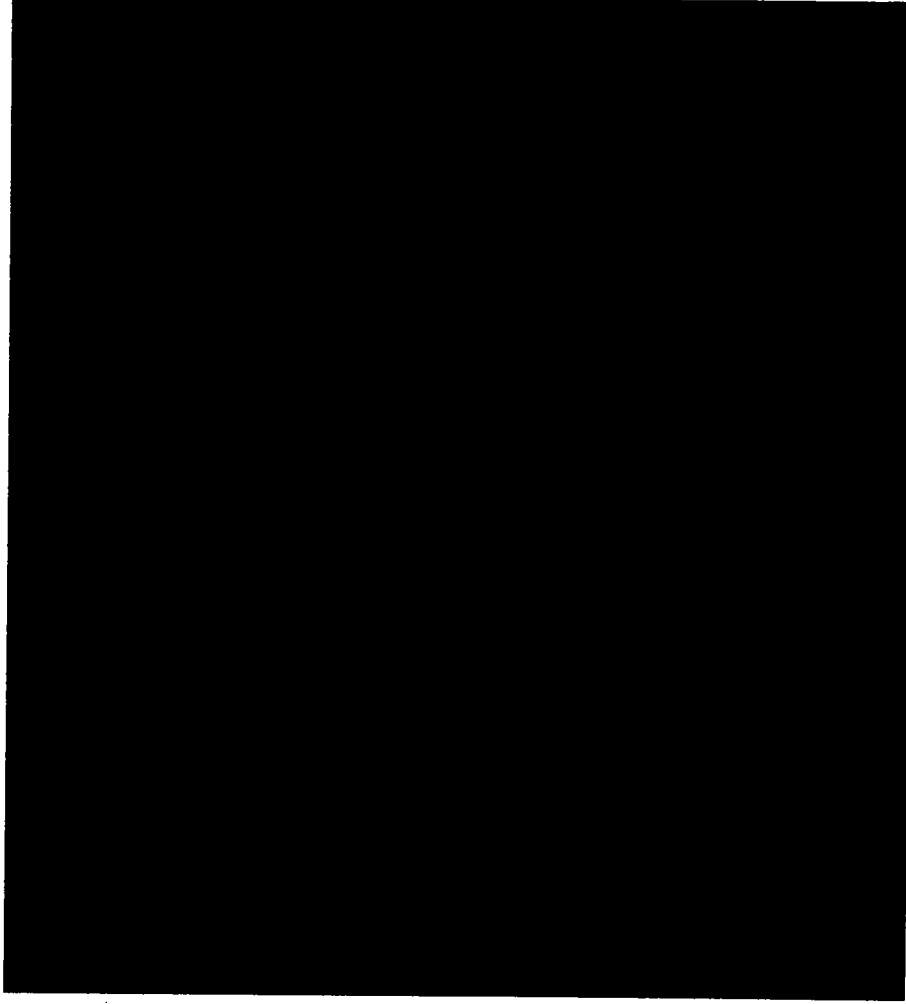


Exhibit 5

**Realcomp's Share of New Listings
Macomb County (2002-2006)**

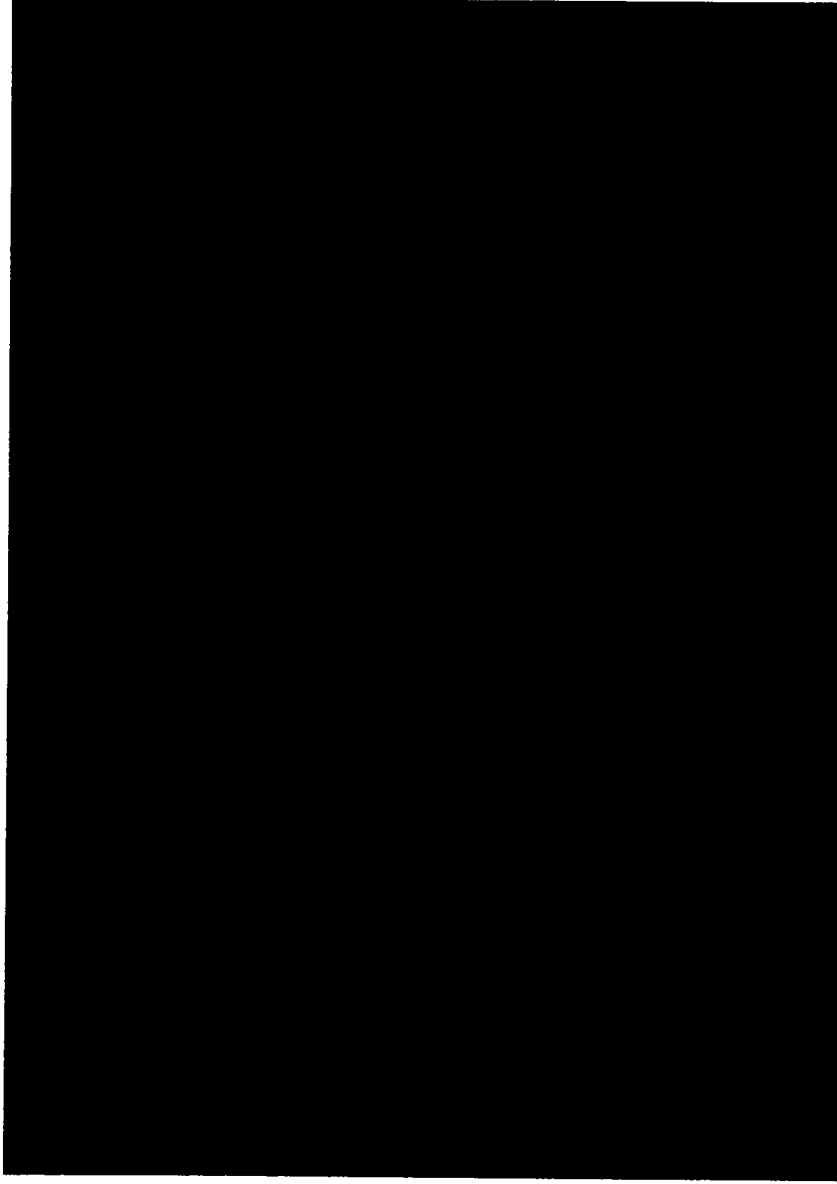


Exhibit 6

**Realcomp's Share of New Listings
Livingston County (2002-2006)**

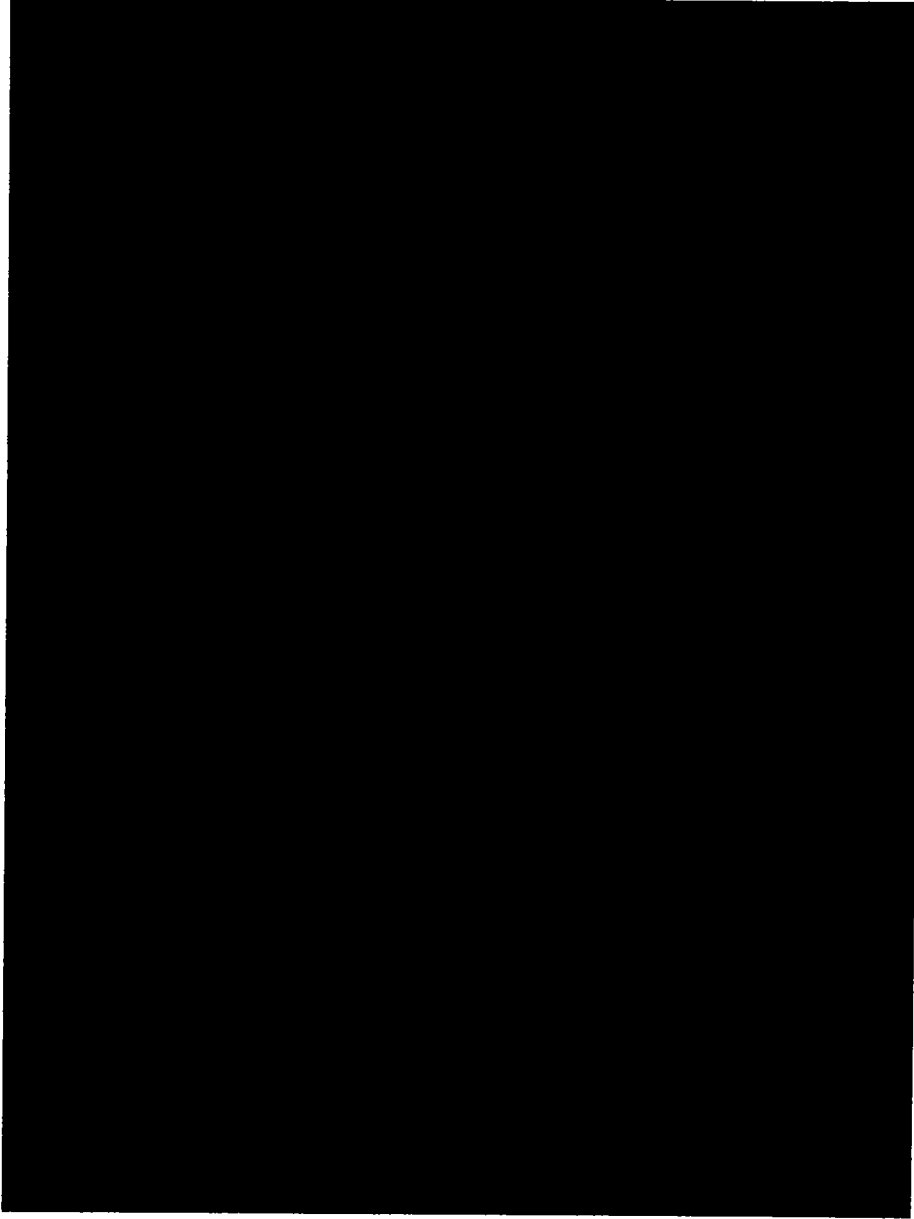


Exhibit 7

**Realcomp's Share of New Listings
Wayne, Oakland, Livingston, and Macomb Counties (2002-2006)**

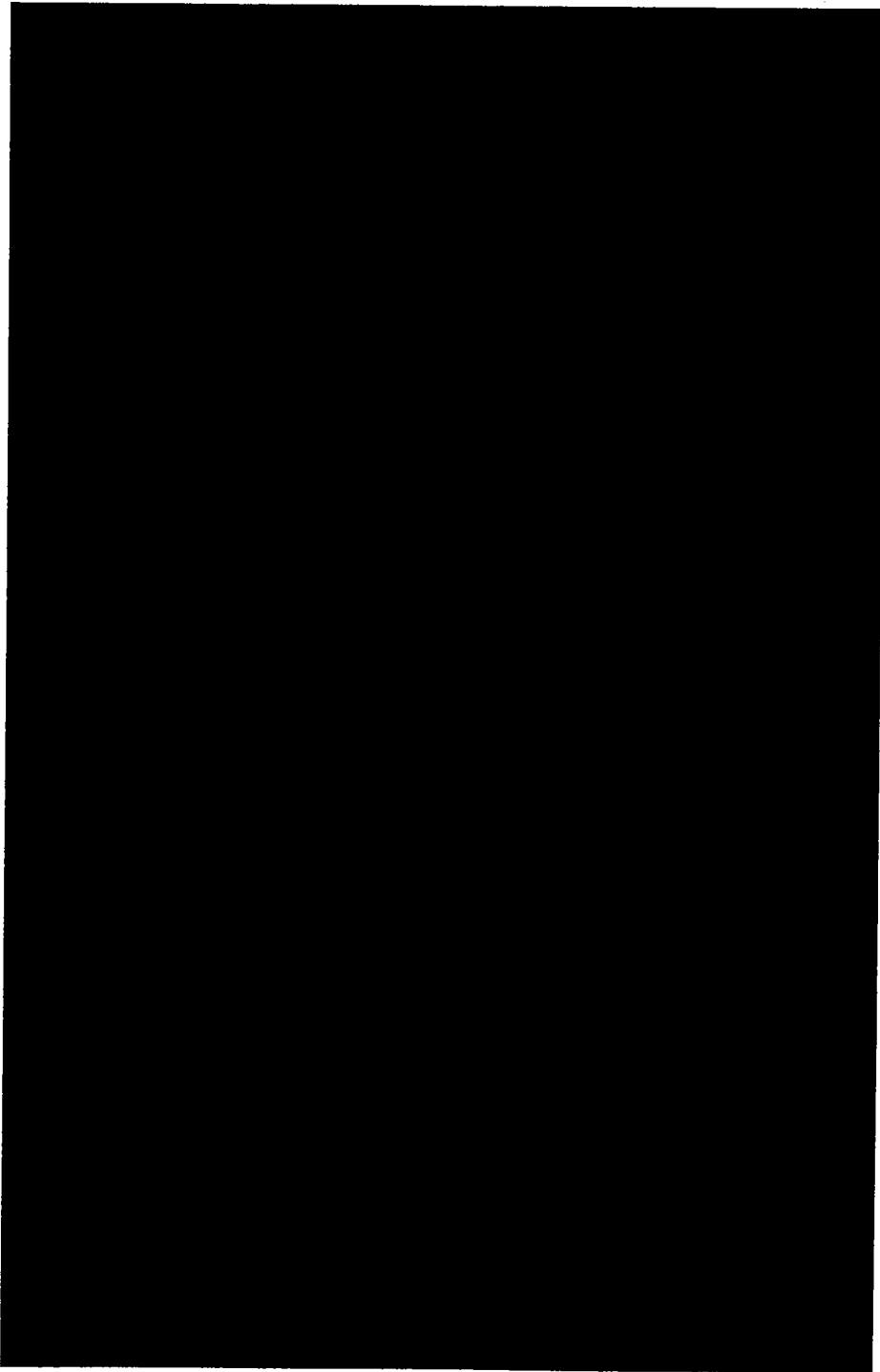


Exhibit 8

**Realcomp's Shares of New Listings
Wayne, Oakland, Livingston, Macomb Counties (2002-2006)**

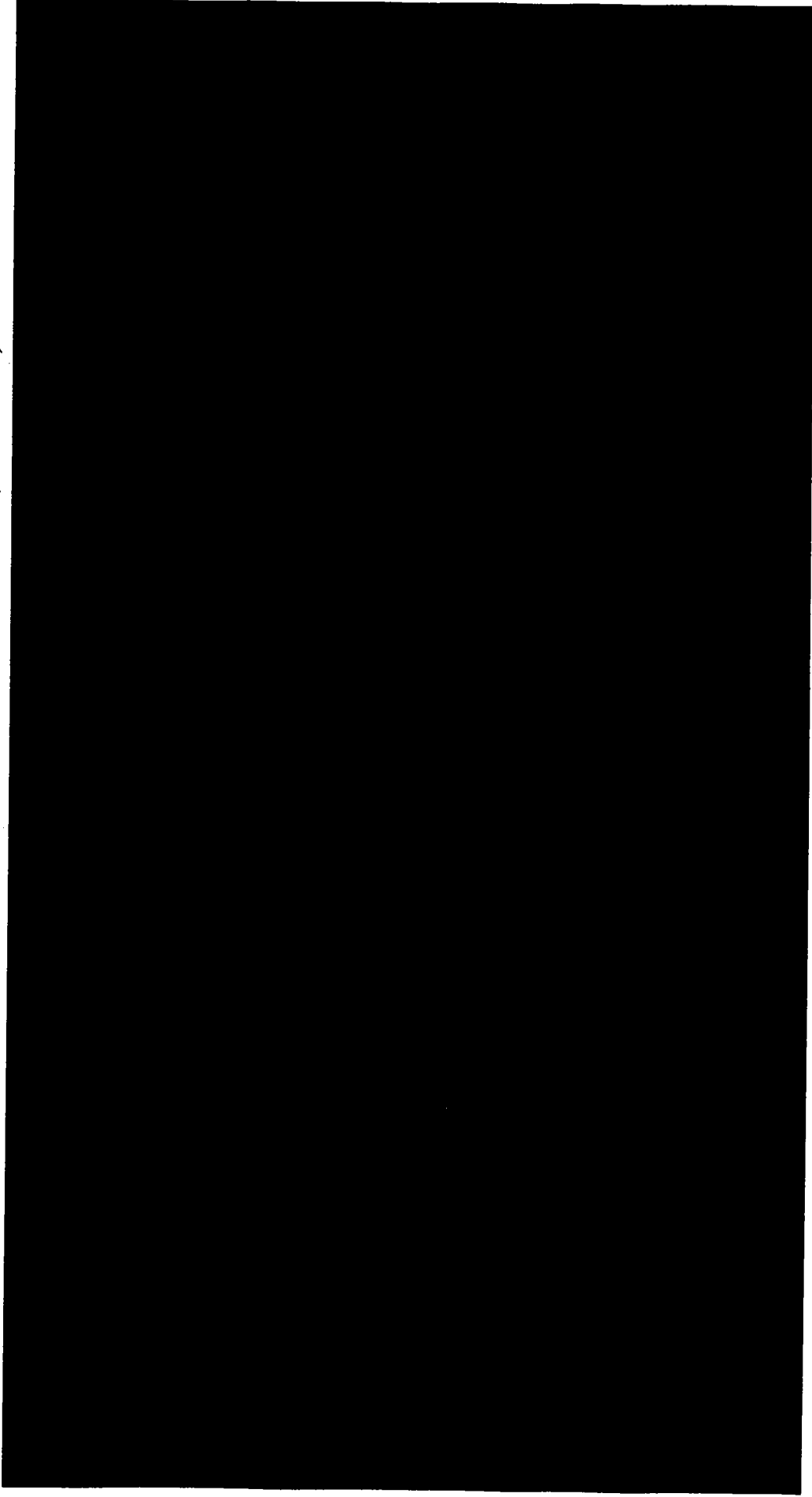


Exhibit 9

**Realcomp's Share of New Listings by Zip Code
(2002-2006)**

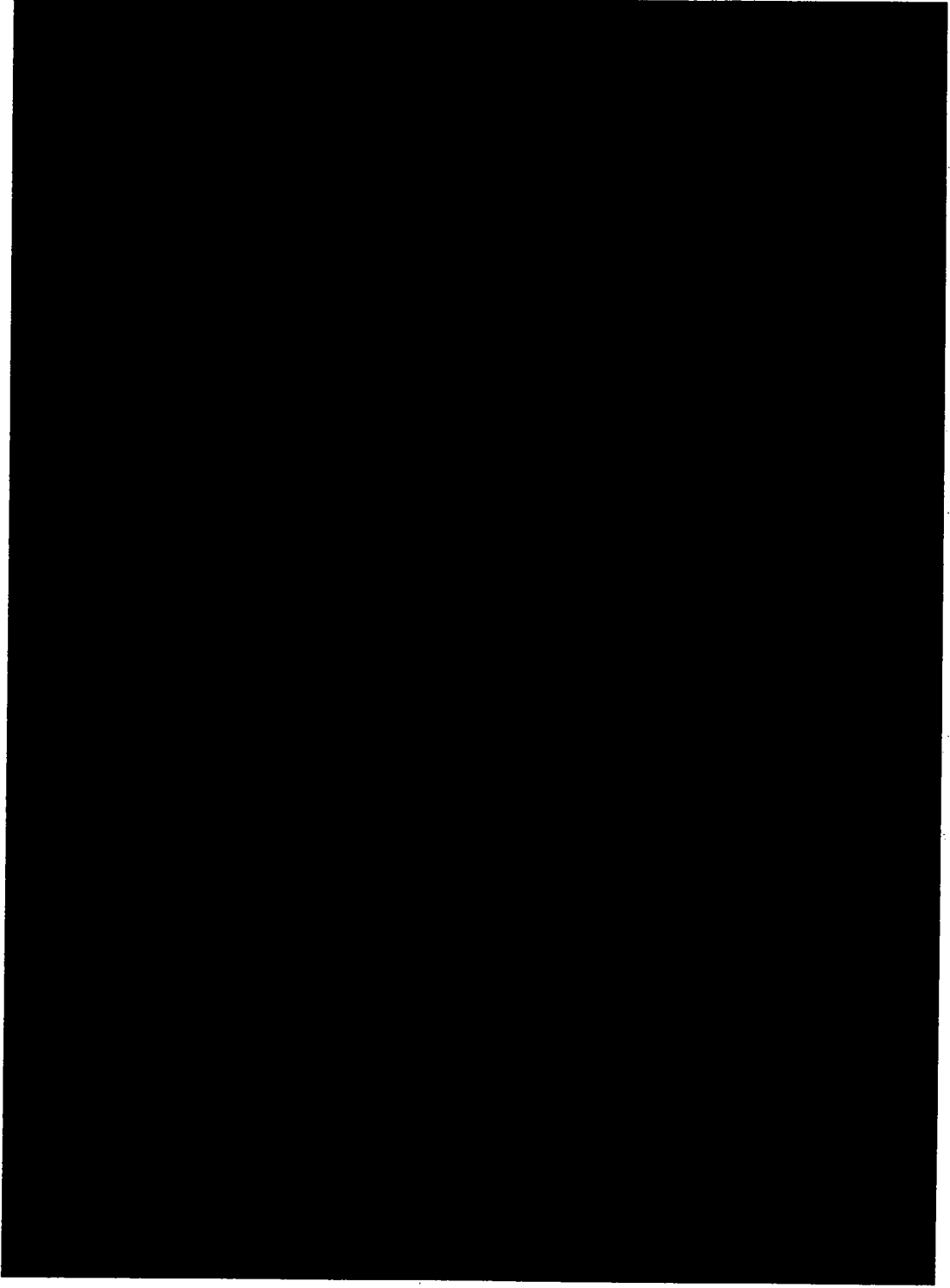


Exhibit 10

**Realcomp's Share of "Unique" New Listings
Wayne County (2002-2006)**

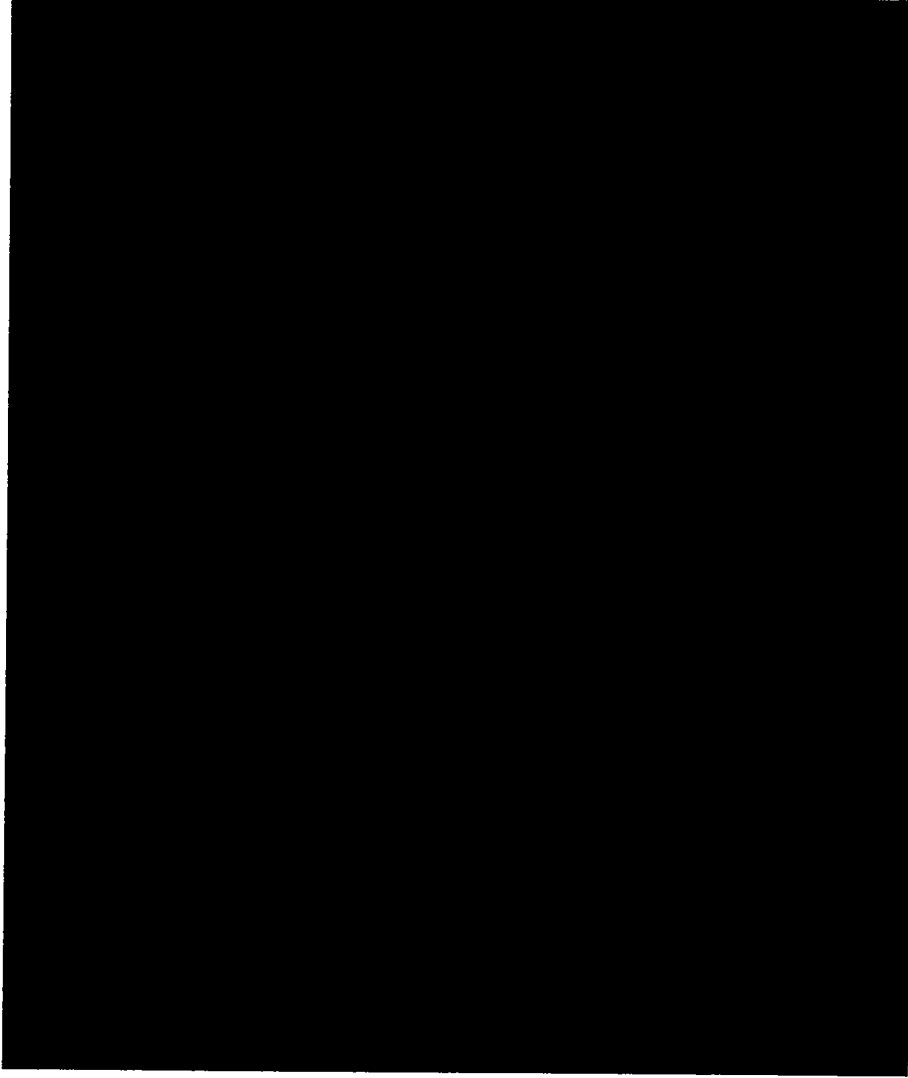


Exhibit 11

**Realcomp's Share of "Unique" New Listings
Oakland County (2002-2006)**

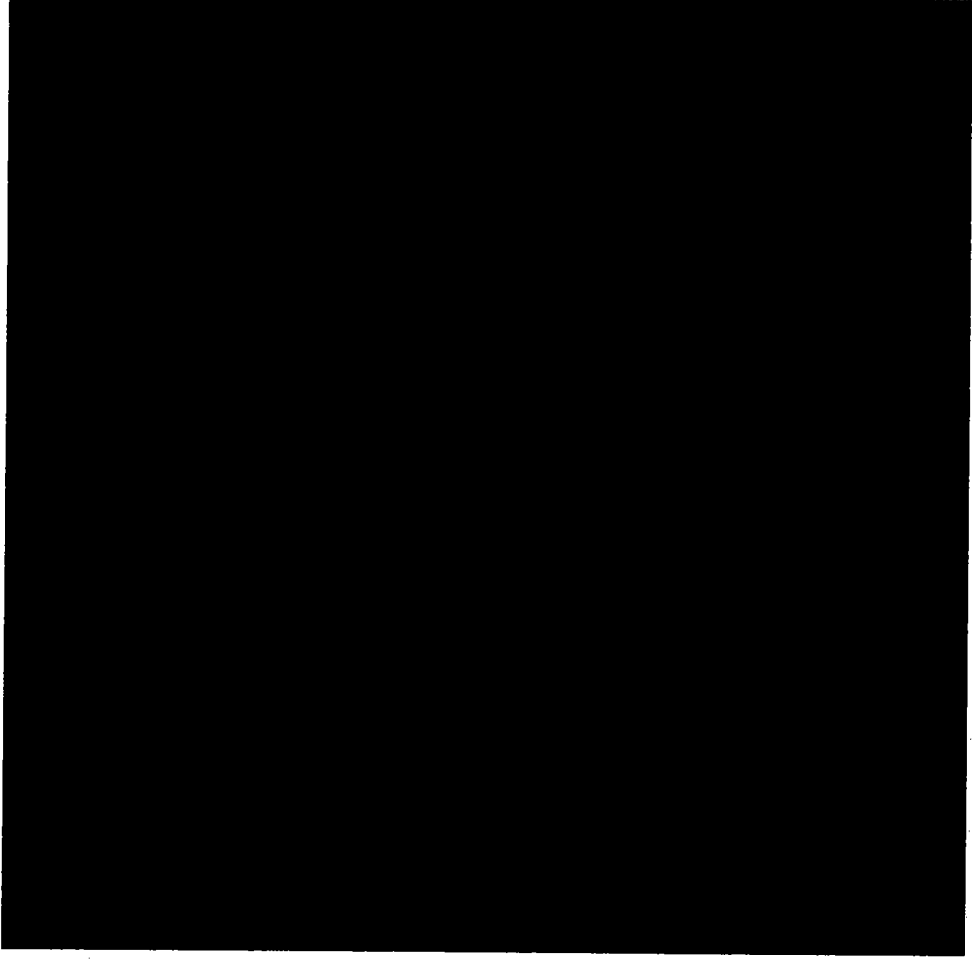


Exhibit 12

**Realcomp's Share of "Unique" New Listings
Macomb County (2002-2006)**

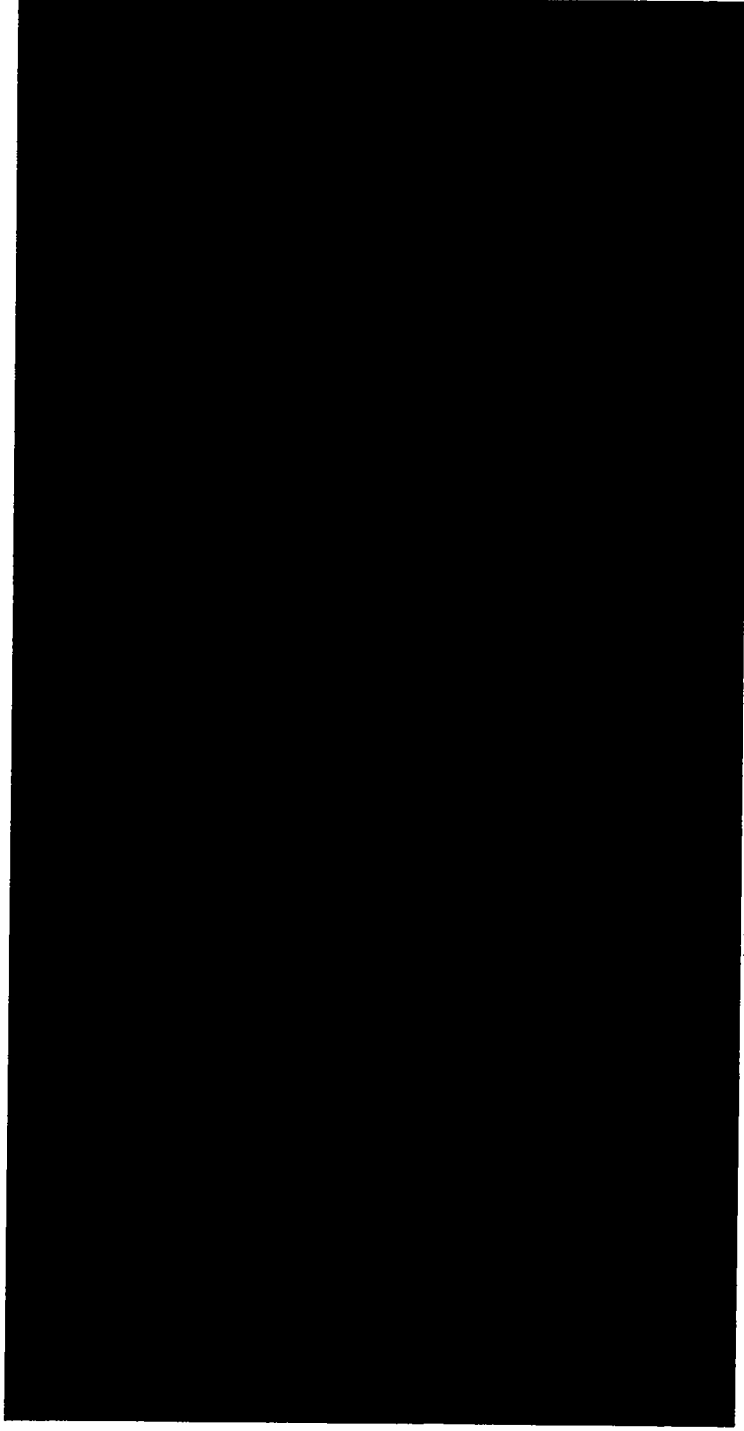


Exhibit 13

**Realcomp's Share of "Unique" New Listings
Livingston County (2002-2006)**

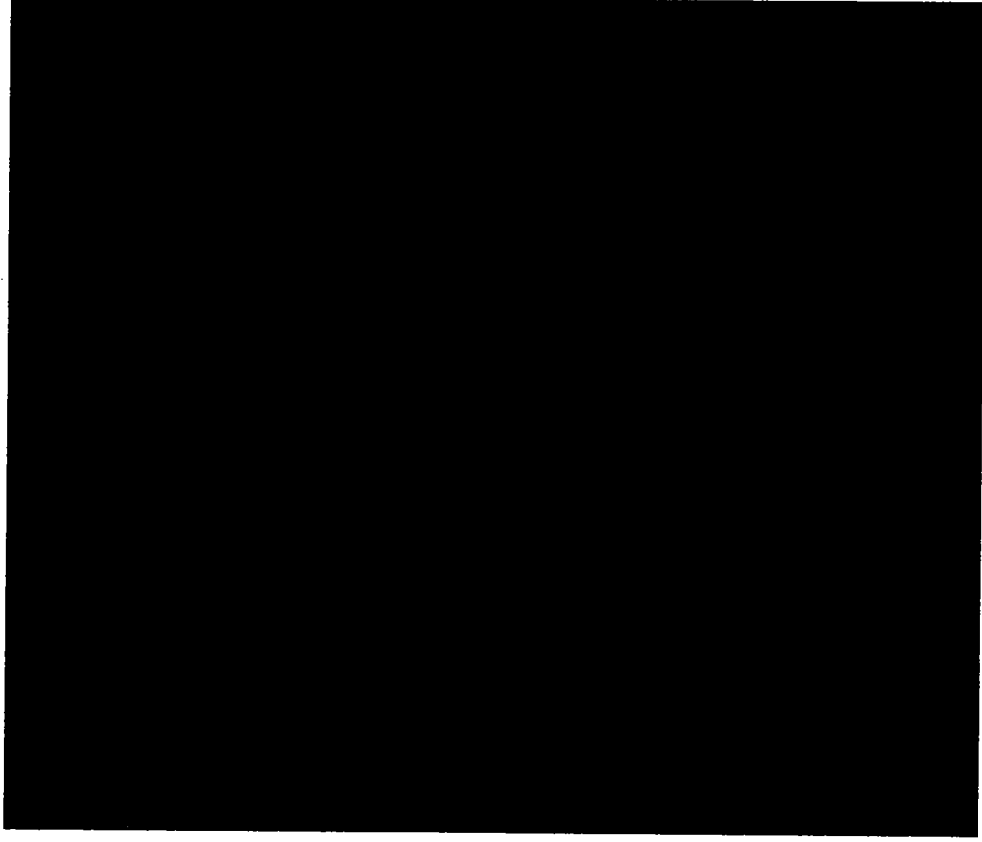


Exhibit 14

**Realcomp's Share of "Unique" New Listings
Wayne, Oakland, Livingston, and Macomb Counties (2002-2006)**

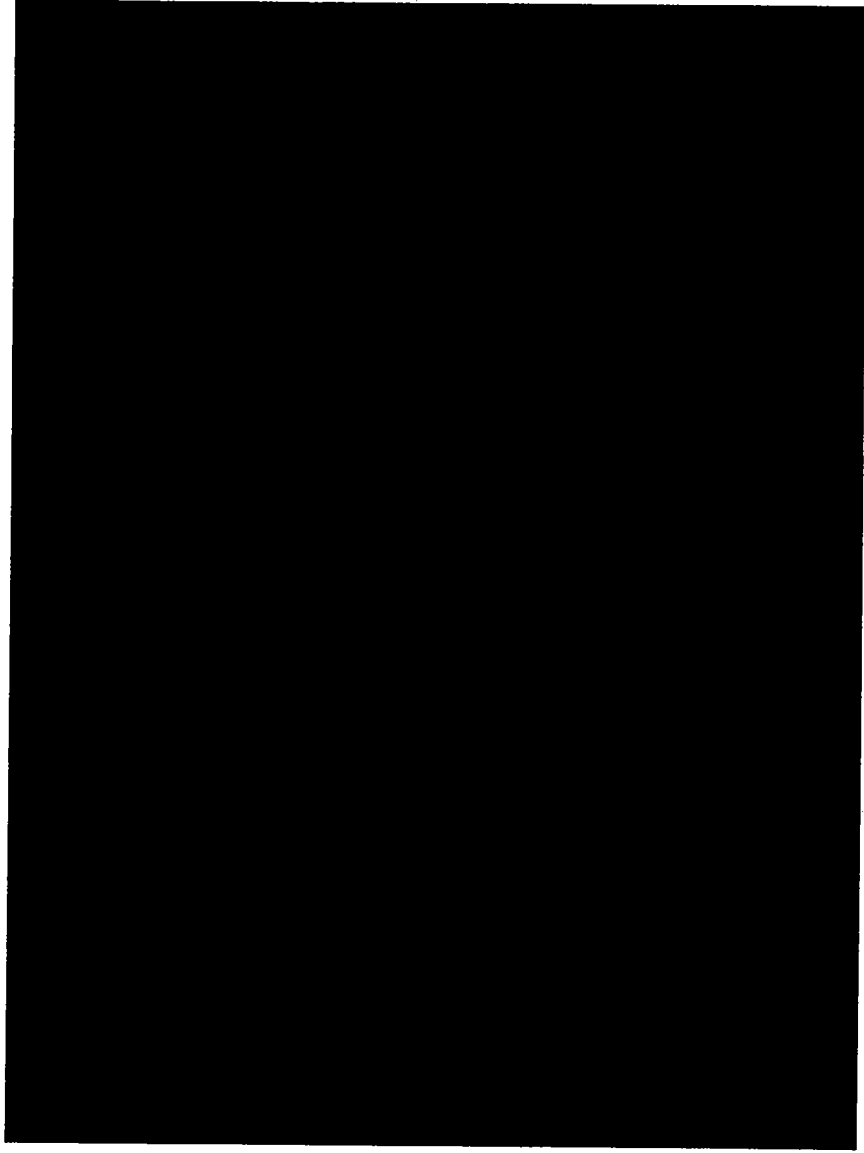


Exhibit 15

**Realcomp's Shares of "Unique" New Listings
Wayne, Oakland, Livingston, Macomb Counties (2002-2006)**

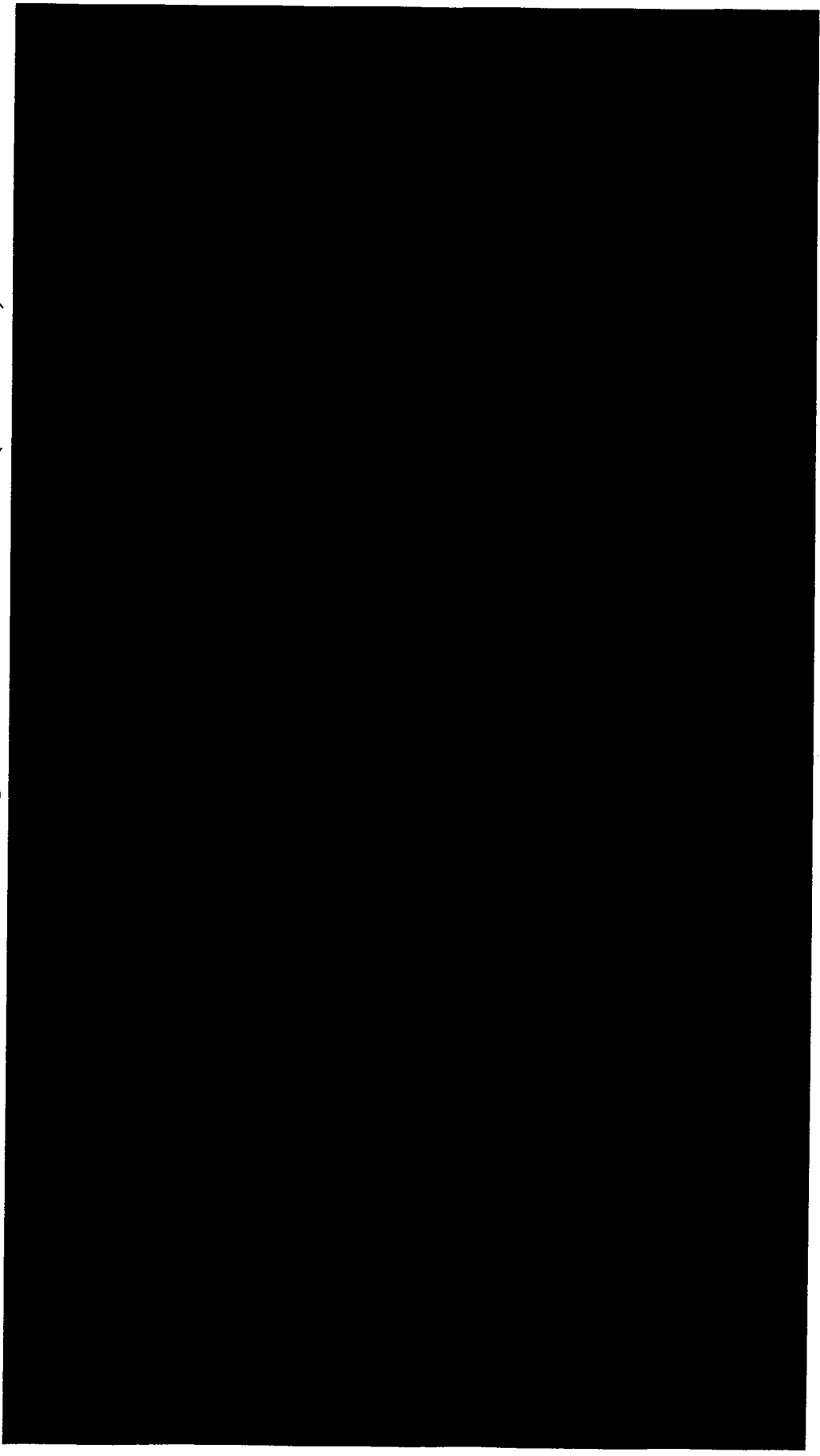


Exhibit 16

**Realcomp's Share of "Unique" New Listings
(2002-2006)**

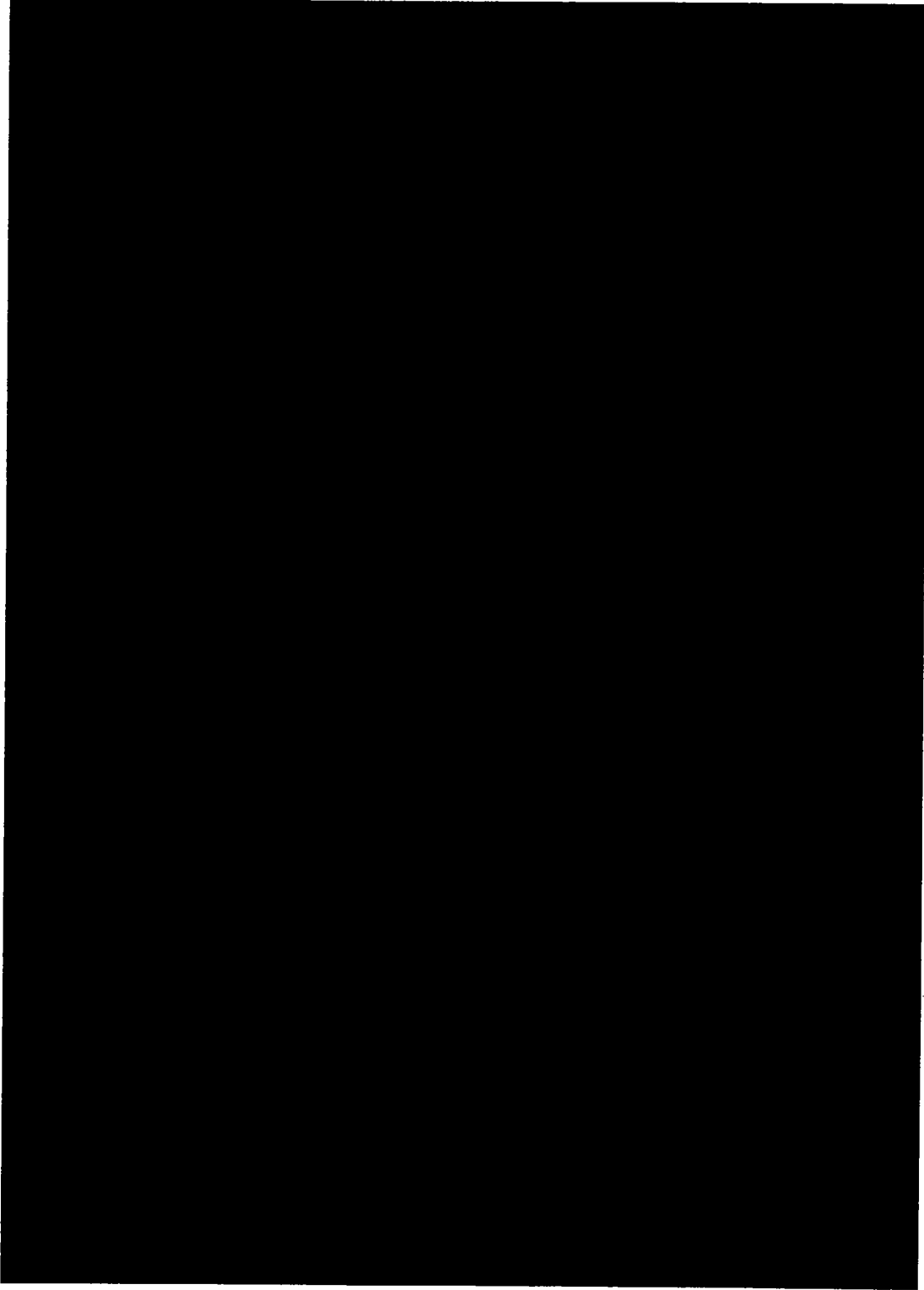
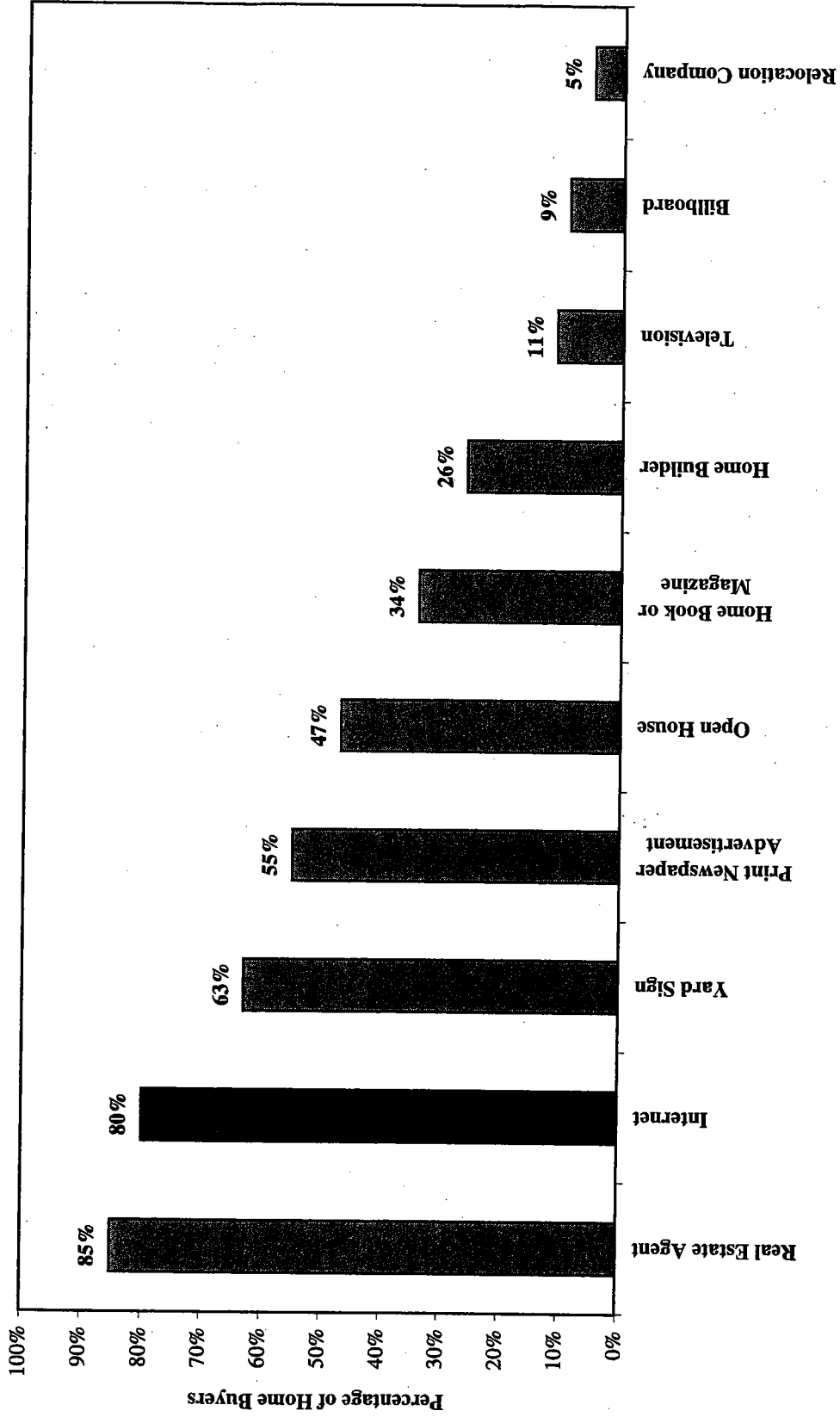


Exhibit 17

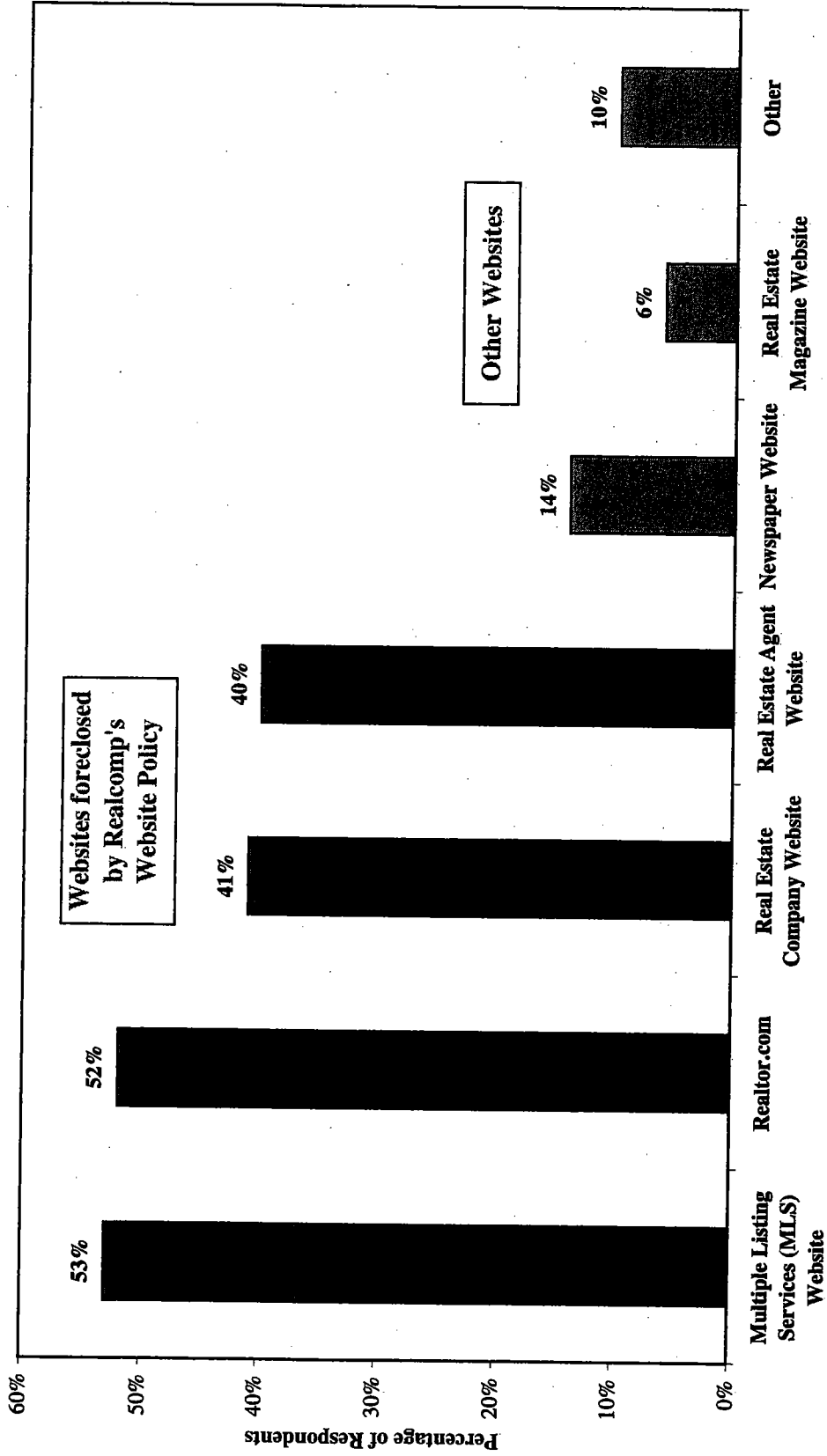
Information Sources Used by Buyers to Search for Homes



Source: Exhibit 3-4, The 2006 National Association of Realtors® Profile of Home Buyers and Sellers, p. 34.

Exhibit 18

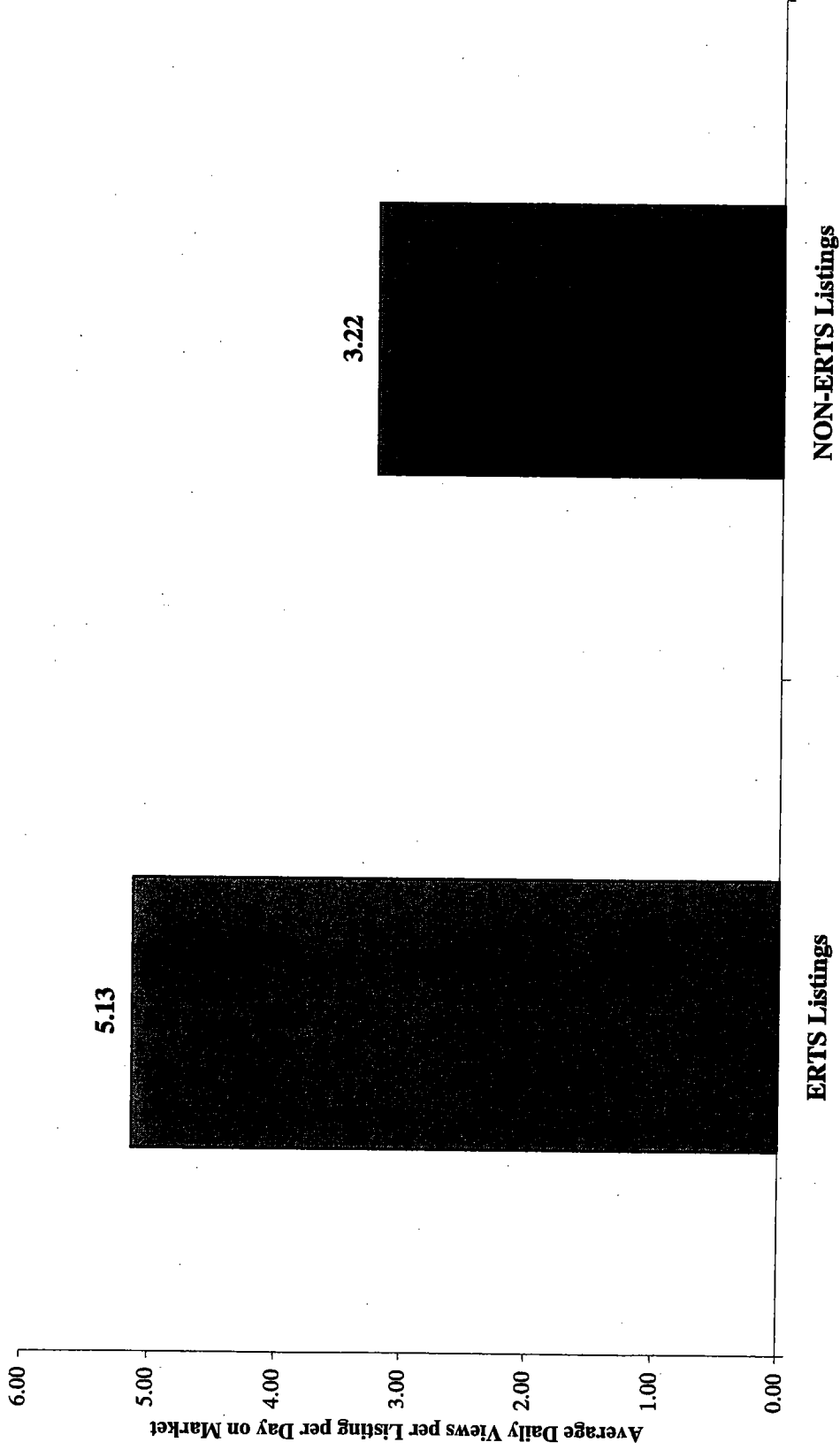
The Types of Websites to Which Realcomp Sends ERTS Listings but Not NON-ERTS Listings Are the Types of Websites Most Used by Home Buyers



Source: Exhibit 3-22, The 2006 National Association of Realtors® Profile of Home Buyers and Sellers, p. 44.

Exhibit 19

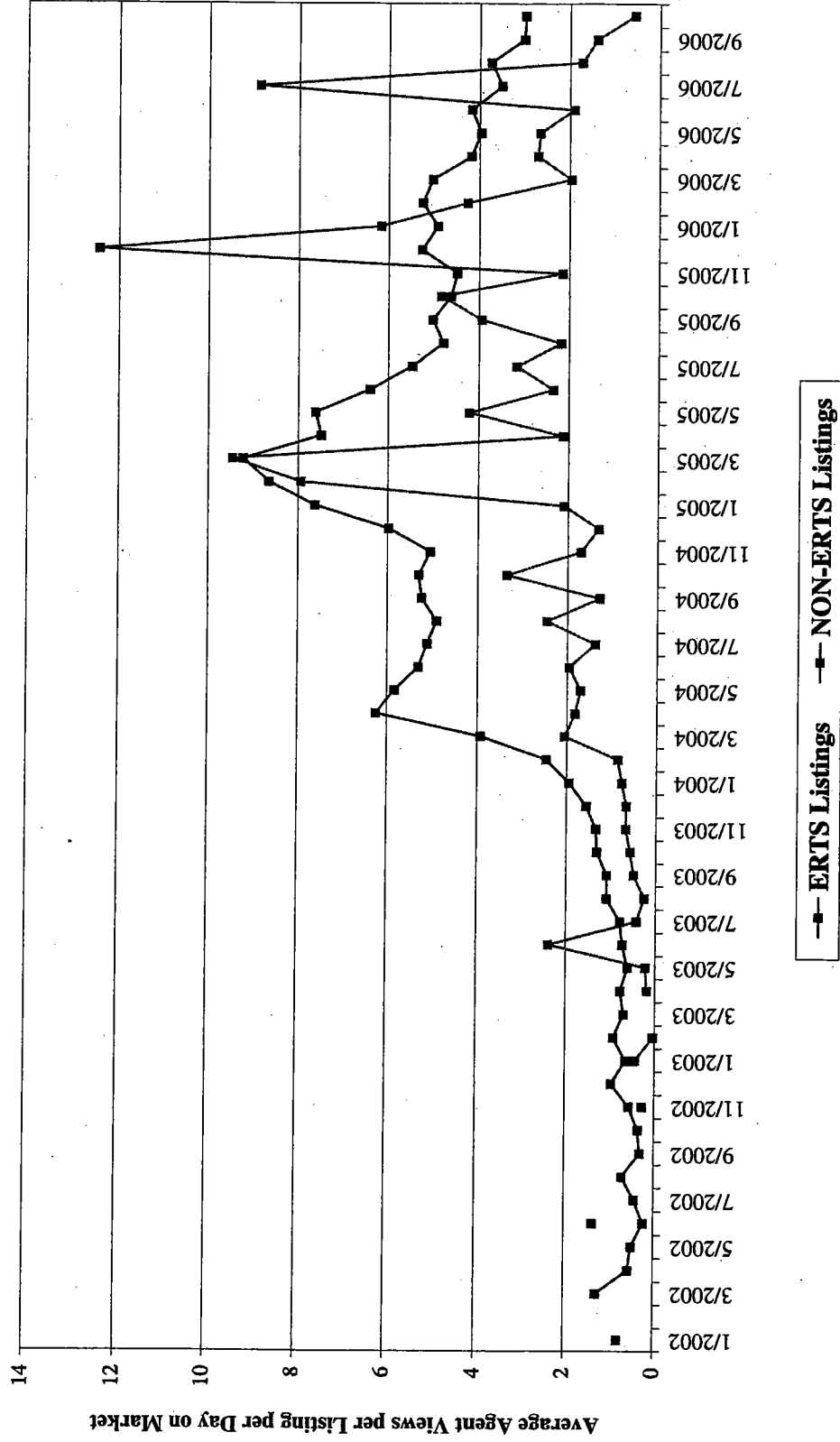
NON-ERTS Listings Are Viewed Less Often by Brokers Searching the Realcomp MLS than Are ERTS Listings (2004-2006)



Source: Realcomp Data.

Exhibit 20

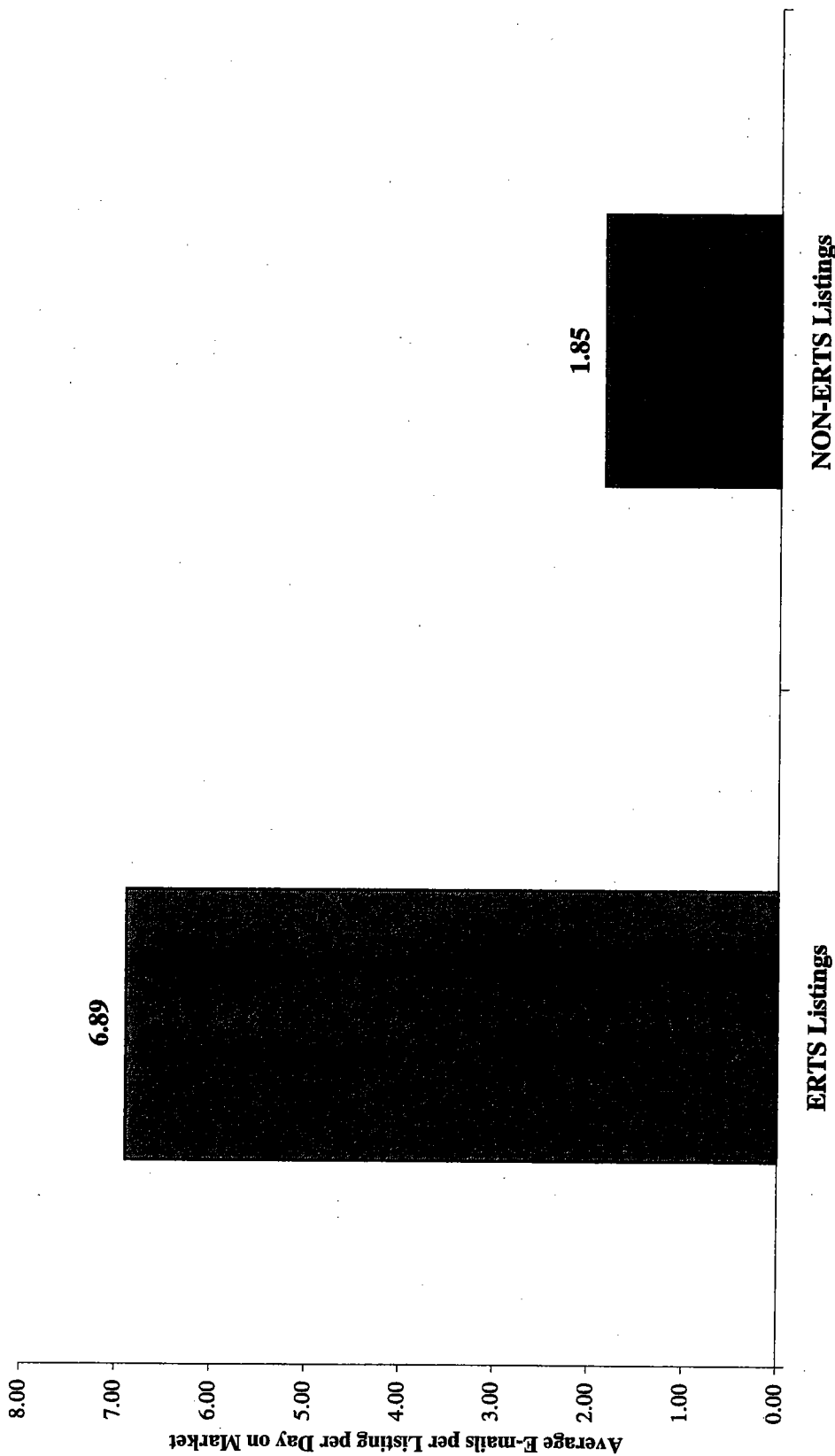
Average Number of Daily Agent Views per Listing ERTS versus NON-ERTS Listings



Source: Realcomp Data.

Exhibit 21

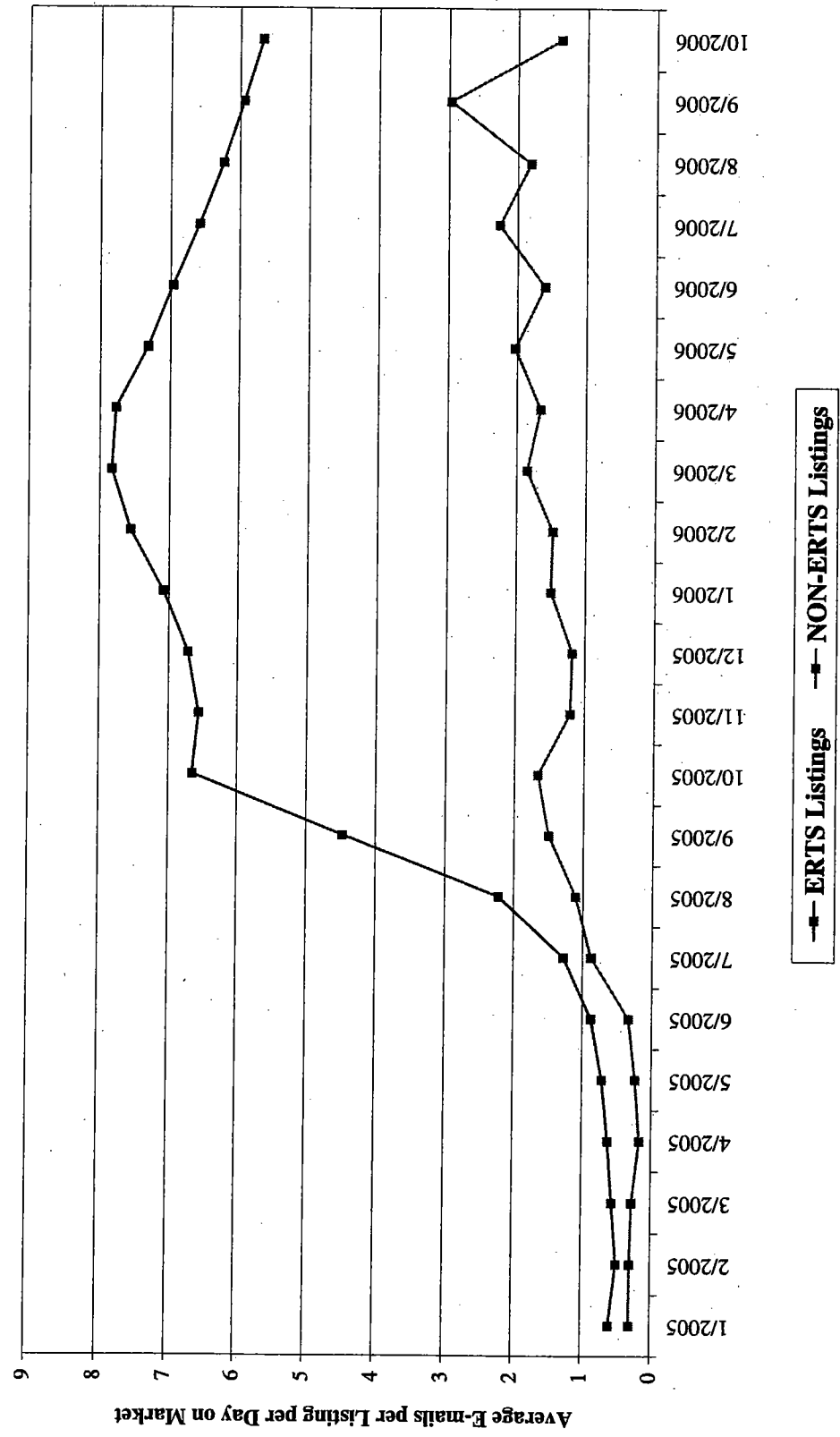
NON-ERTS Listings Are E-mailed by Brokers to Home Buyers Less Often than ERTS Listings (2006)



Source: Realcomp Data.

Exhibit 22

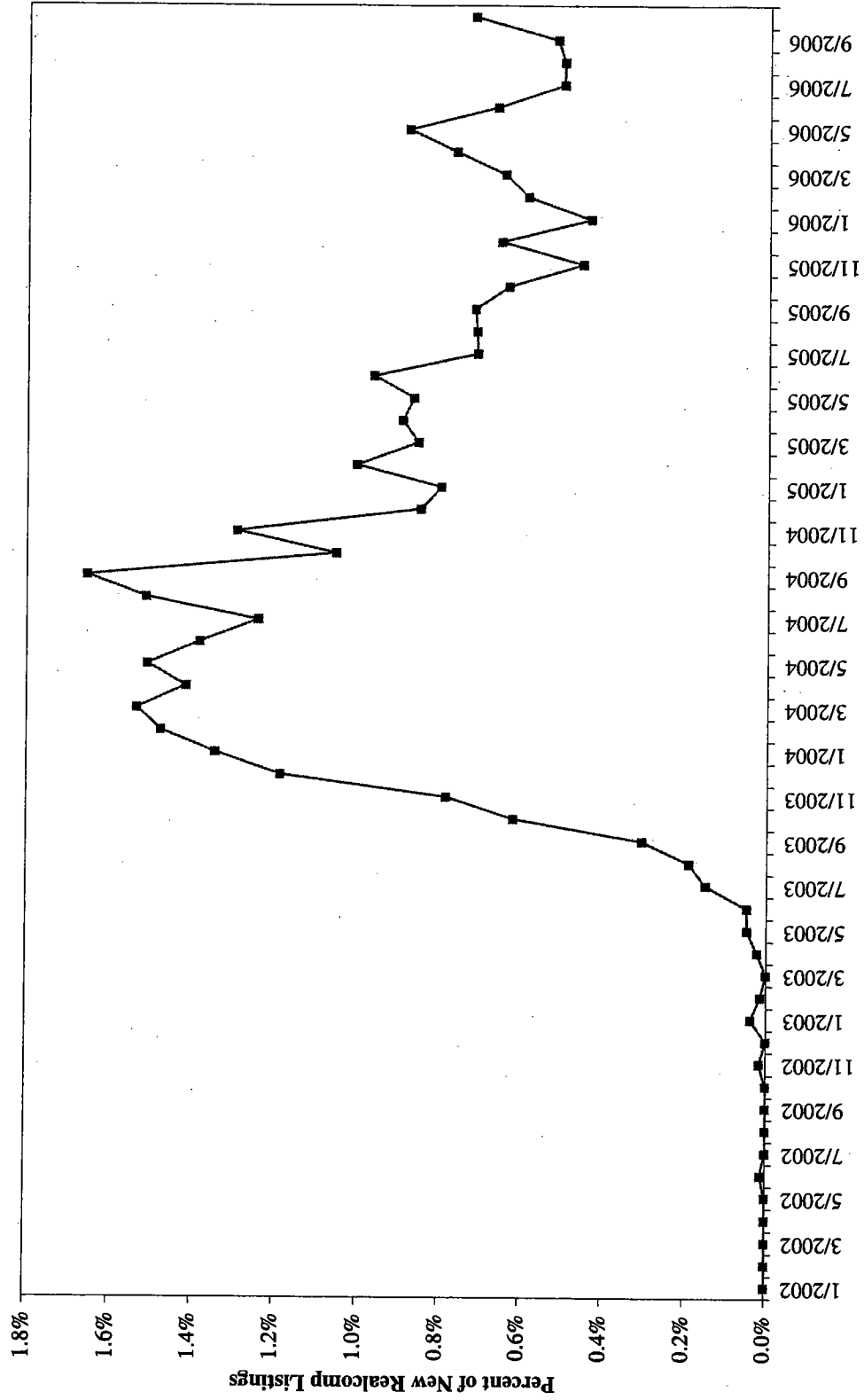
Average Number of Daily E-mails per Listing
ERTS versus NON-ERTS Listings



Source: Realcomp Data.

Exhibit 23

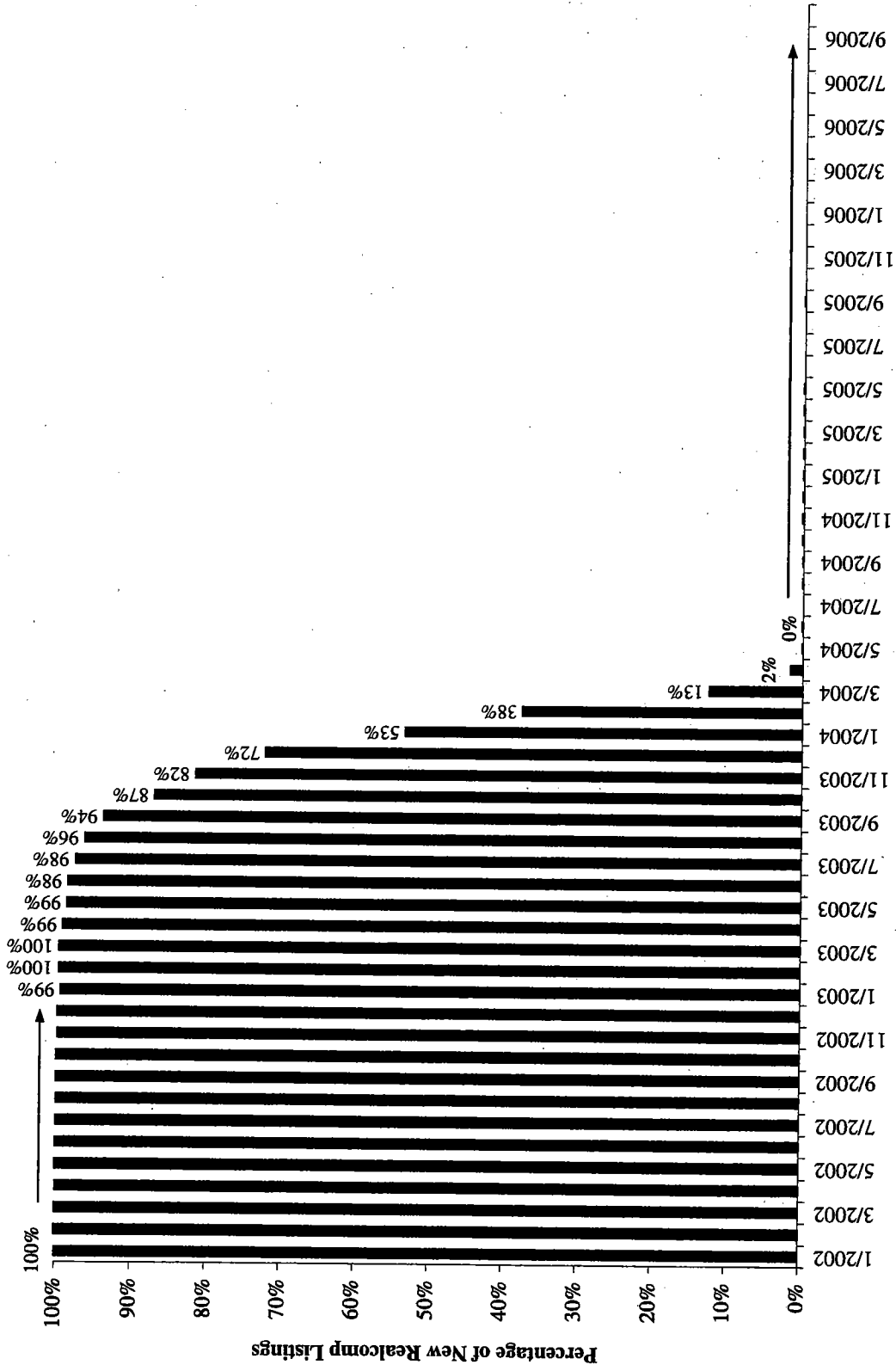
Percent of NON-ERTS New Listings in the Realcomp MLS



Source: Realcomp Listing Data.

Exhibit 24

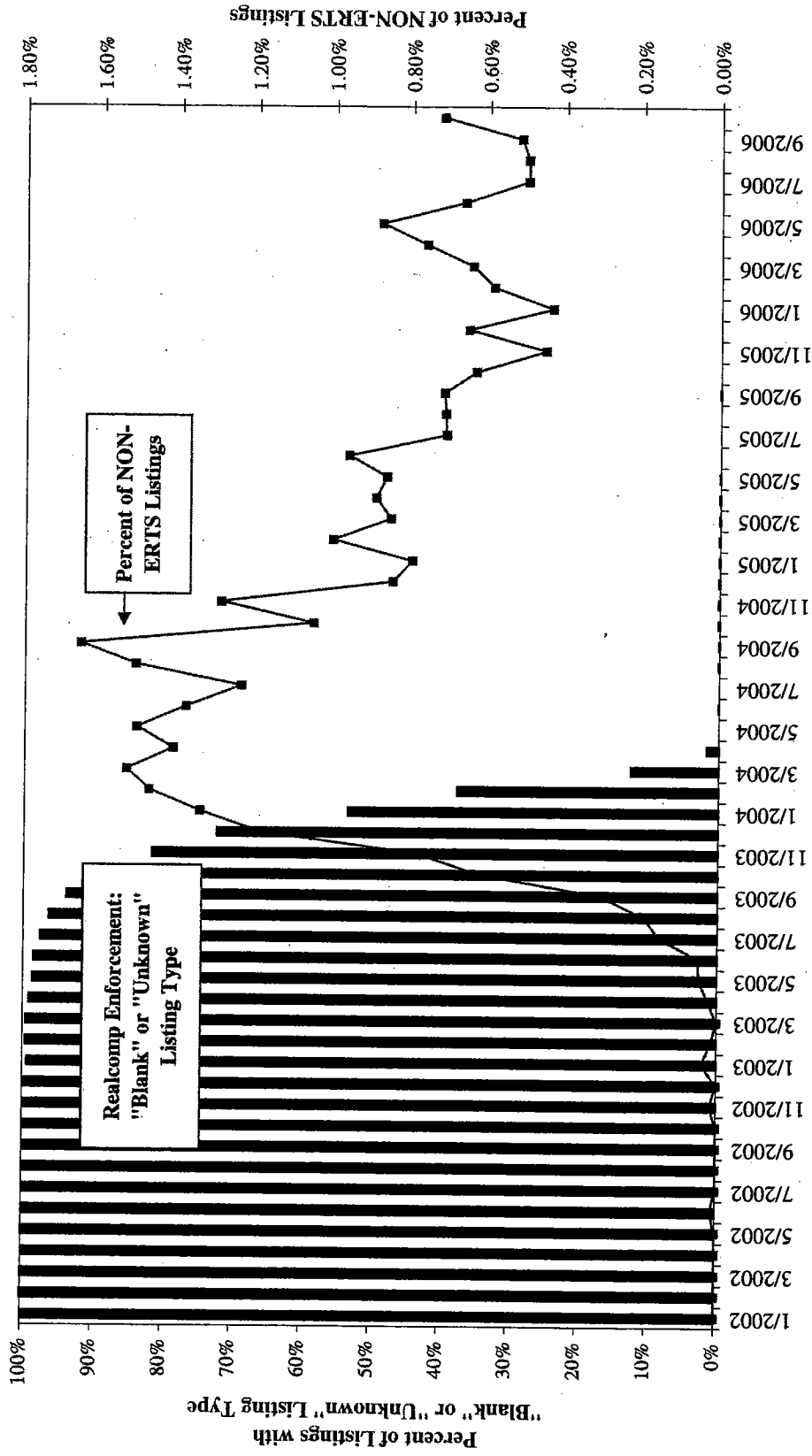
Percent of Realcomp Listings with "Blank" or "Unknown" Listing Type



Source: Realcomp Listing Data.

Exhibit 25

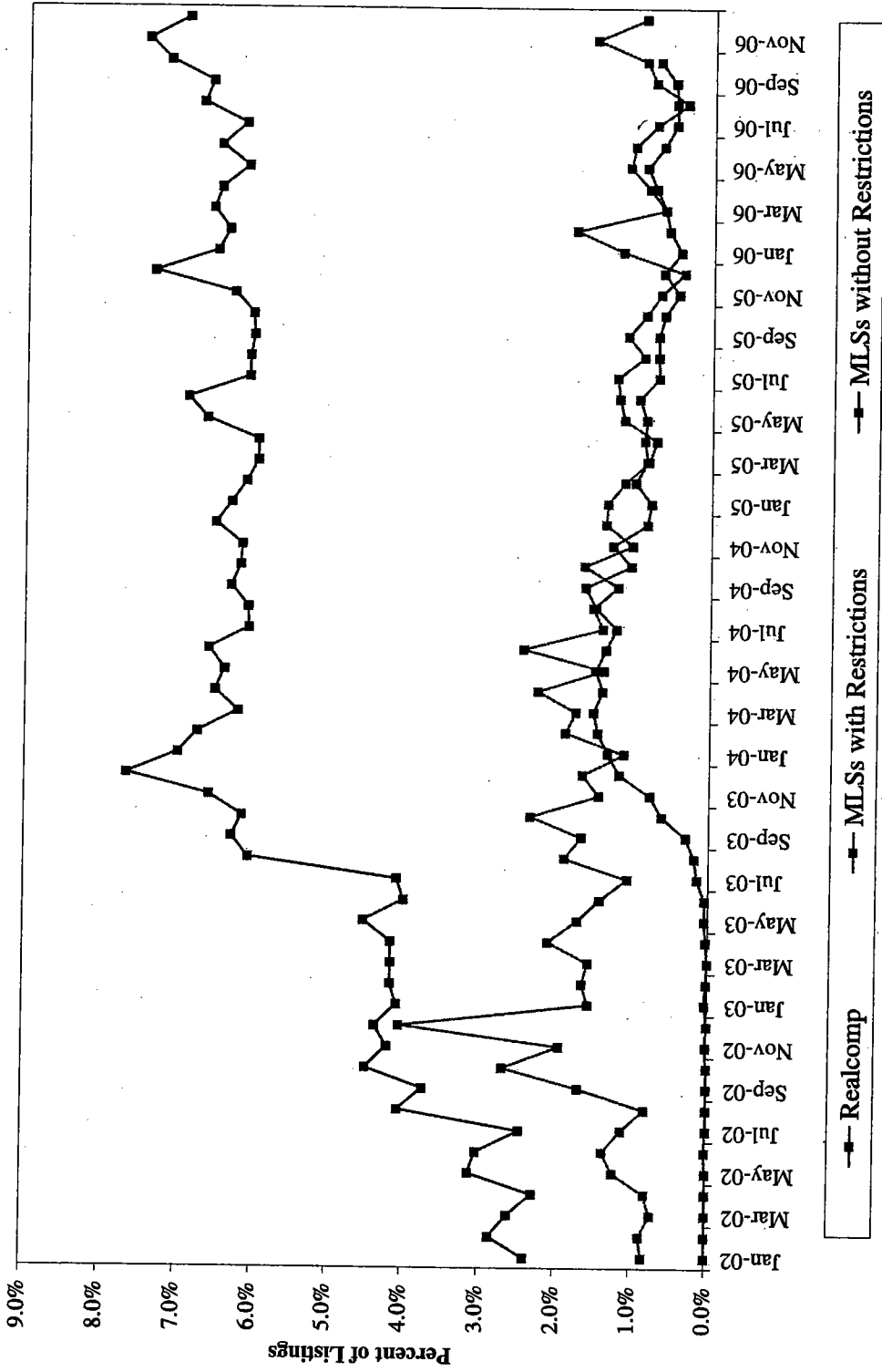
The Percent of NON-ERTS Listings in the Realcomp MLS Decreased Steadily Since Realcomp Began to Enforce that Brokers Indicate the Listing Type



Source: Realcomp Listing Data.

Exhibit 26

Comparison of MLSs With and Without Access Restrictions Percent of NON-ERTS Listings



Source: MLS Listing Data from various MLSs.

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

REBUTTAL REPORT OF DARRELL L. WILLIAMS, Ph.D.

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I. Introduction

A. Qualifications

1. I am a Director at LECG, where I have conducted economic analyses on commercial and antitrust matters in various industries. I possess a B.S. degree in Economics from the University of Kentucky, and M.A. and Ph.D. degrees in Economics from Washington University. Prior to my current position, I was an economics professor of Economics at the University of California at Los Angeles. I also previously worked (1) at the President's Council of Economic Advisors, where I analyzed economic policy issues, including antitrust and regulatory issues, and (2) at the U.S. Securities and Exchange Commission, where I conducted analyses on the performance and regulation of securities markets. My professional activities in the antitrust and economics fields include faculty lecturer for the Basic Economics Institute for Federal Judges (sponsored by George Mason Law School); faculty lecturer for the Practicing Law Institute; Vice-Chair of the Economics Committee of the Antitrust Section of the American Bar Association; and membership in the American Economics Association. I previously submitted an expert report in this litigation, dated April 3, 2007.¹ A copy of my curriculum vitae was included with that report. I am billing for my services at \$565 per hour.

B. Summary of opinions

2. I have been asked to address the claims contained in the report of Realcomp's economic expert, Dr. David M. Eisenstadt ("Dr. Eisenstadt").² This report summarizes my current opinions based on the evidence I have reviewed to date. My review has included the Complaint, the Eisenstadt Report, interrogatory responses, other legal filings in the case, deposition transcripts, produced documents, various sources of publicly available information, listing data from the Realcomp MLS, data provided by Dr. Eisenstadt, and a real estate records

¹ In the Matter of REALCOMP II LTD., United States of America, Before the Federal Trade Commission, Expert Report of Darrell L. Williams, Ph.D., April 3, 2007 ("Williams Report").

² In the Matter of REALCOMP II LTD., United States of America, Before the Federal Trade Commission, Expert Report of Dr. David M. Eisenstadt, April 17, 2007 ("Eisenstadt Report").

database provided by First American. A list of the materials I have relied upon is attached as Appendix A.

3. Based on my experience, education, and general knowledge of economics as well as my review of documents produced in this case, I conclude the following:

- 1) Dr. Eisenstadt does not dispute my opinion that Realcomp possesses market power in the relevant markets, and he acknowledges that his own market share estimates show that Realcomp has “by any measure, a significant share.”
- 2) After correcting for errors in Dr. Eisenstadt’s market share calculations, the results support the inference that Realcomp possesses market power in the relevant markets.
- 3) Dr. Eisenstadt’s attempt to show that there are effective alternatives to Realcomp for the purpose of disseminating listing information is factually incorrect and conceptually flawed.
- 4) Dr. Eisenstadt’s competitive effects analysis aimed at estimating the percentage of non-ERTS listings but-for the Realcomp restrictions contain several flaws, yet the general conclusions from his analysis are consistent with the conclusion that the Realcomp restrictions impeded the use of non-ERTS listings.
- 5) The results of Dr. Eisenstadt’s competitive effects analysis examining the relationship between the sale price of homes and Realcomp’s restrictions are inconsistent with his procompetitive justifications, but consistent with an anticompetitive effect.
- 6) Dr. Eisenstadt’s procompetitive justifications are predicated on false assumptions and are inconsistent with the results of his own analysis.

II. Dr. Eisenstadt's Opinions Regarding Realcomp's Market Power

A. Dr. Eisenstadt does not dispute that Realcomp has market power in the relevant geographic markets

1. *Dr. Eisenstadt does not dispute any of my conclusions regarding the relevant antitrust markets.*

4. In my initial report, I opine that the relevant output market is real estate brokerage services, which is the output supplied by the Realcomp joint venture members. In addition, I opine that the relevant input market is MLS listing services, a critical input in the provision of brokerage services by joint venture members.³ Dr. Eisenstadt's report is silent on these opinions. He merely quotes statements from "Complaint Counsel's Objections and Responses to Respondent's First Set of Interrogatories" as if no expert report had been submitted on behalf of complaint counsel. I can find no mention of my opinions regarding the relevant antitrust markets, not even an indirect mention anywhere in Dr. Eisenstadt's report let alone a refutation of my opinions on the subject.

5. Even in his discussion of market power, Dr. Eisenstadt does not contradict my opinions regarding the relevant market definitions. For example, consistent with my geographic market opinion, he reports market shares for Livingston, Oakland, Wayne, and Macomb counties separately. He also reports a market share estimate for Livingston, Oakland, Wayne, and Macomb counties combined.⁴ But that fact alone does not imply that he has defined the relevant geographic market as such.

³ Briefly, I explained that MLS listing services are a critical input because of network effects. Dr. Eisenstadt agrees that network effects are present in MLS listing services, such that the value of a particular MLS listing service increases with the number of listings and with the number of cooperating brokers viewing those listings. (*See Eisenstadt Report*, p. 36 and *Williams Report*, pp. 24-25.) An important implication of network effects is that the existence of network effects will likely lead to a dominant MLS listing service since quality (or value) is increasing in the size of the MLS listing service. Thus, a consequence of network effects in this case is that an MLS listing service with a 50% market share will not be equally valuable to brokers as five MLS listing services each with 10% market shares. For this same reason, alternative means of listing a property where network effects are not as strong such as newspapers, yard signs, real estate magazines will not be as valuable as the MLS listing service with a large market share. It is for all of these reasons that the Realcomp MLS listing service is a critical input to brokers supplying brokerage services within the relevant geographic markets where Realcomp has a large market share.

⁴ Eisenstadt Report, p. 10 and Exhibit 1.

2. *Dr. Eisenstadt does not dispute my conclusion that Realcomp has market power*

6. In my initial report, I concluded that “Realcomp has market power in the relevant markets.”⁵ I based this conclusion on market share estimates showing that, on average, Realcomp listings represented [REDACTED] percent of new monthly listings and [REDACTED] percent of unique new monthly listings for the period 2002-2006 in Wayne, Oakland, Livingston, and Macomb counties combined.⁶

7. Using a different calculation, which I discuss below, Dr. Eisenstadt estimates that Realcomp’s market share in the same four counties for the period November 2004 through October 2006 is as high as [REDACTED].⁷ While his estimates likely substantially understate Realcomp’s actual market share for reasons that will be explained below, it is noteworthy that it is Dr. Eisenstadt’s opinion that [REDACTED] is, by any measure, a significant share...⁸

8. In addition, his market share estimate for Oakland county (which I have opined is a separate relevant geographic market, an opinion that Dr. Eisenstadt does not dispute) ranges from [REDACTED]. If a market share equal to [REDACTED] is “a significant share” in Dr. Eisenstadt’s view, then the [REDACTED] market share in Oakland county certainly exceeds Dr. Eisenstadt’s “significant share” threshold.

9. More to the point, Dr. Eisenstadt avoids rendering the opinion that his market share is sufficient to show the absence of no market power. Instead, he concludes only that “Realcomp is not a *monopoly* supplier of the services at issue (*i.e.* information inputs used by real estate brokers) in the territory it serves.”⁹ (emphasis added) But it is widely known in economics and in antitrust that a firm can have considerable market power without being a

⁵ Dr. Eisenstadt seems to agree that the correct standard is whether Realcomp has market power: “Unless Realcomp possesses significant market power over the supply of real estate listings in its territory, *none* of the Realcomp policies which are the subject of this Complaint could cause significant competitive harm...”. Eisenstadt Report, pp. 8-9.

⁶ Williams Report, Exhibits 8 and 15.

⁷ Eisenstadt Report, p. 13 and Exhibit 2.

⁸ Eisenstadt Report, p. 13.

⁹ Eisenstadt Report, p. 7.

monopoly. This is particularly true in the case of MLS listing services that exhibit network effects. Due to network effects, the value of the MLS to brokers is directly related to the number of listings in the MLS on the selling side and the number of cooperating brokers on the buying side, conclusions with which Dr. Eisenstadt agrees.¹⁰ Thus, within a given geographic market, the value of an MLS with a high market share will be much greater to brokers and to the home buyers and sellers that they assist compared to the value of an MLS with a small market share. Moreover, as I explained in my initial report, the viability of competitive threats to an incumbent MLS from entrants diminishes as market share increases. This is the case because the incentive to switch between MLSs requires individual users to overcome collective switching costs, the magnitude of which increases as the number of users (reflected by market share) increases.

10. Given the broad scope for the existence of market power between Dr. Eisenstadt's pronouncement that his own market share estimate "is, by any measure, a significant share..." and his conclusion that Realcomp is "not a monopoly supplier," the possession of market power by Realcomp cannot be ruled out based on Dr. Eisenstadt's market share estimates or his own inferences about the significance of those estimates as an indication of market power.

B. Dr. Eisenstadt's share calculations are flawed and significantly understate Realcomp's market share

1. Dr. Eisenstadt's market share calculations

11. Dr. Eisenstadt's market share calculations are based on "deeds recorded in the public record database ('PRD')." ¹¹ He provides two market share estimates by county and a subtotal for Livingston, Oakland, Macomb, and Wayne counties. For each county separately and the four-county subtotal he provides what he refers to as a "Low Estimate" and a "High Estimate." He calculates the "High Estimate" as the total number of single-family homes sold that were listed in the Realcomp MLS ("Realcomp Total MLS Sales") divided by the total number of real estate transactions contained in the deeds database ("Total Deeds") for the period November 2004 through October 2006. For the same period, he calculates the so-called "Low

¹⁰ Eisenstadt Report, p. 36.

¹¹ Eisenstadt Report, p. 11.

Estimate” by dividing the same numerator used in the calculation of the “High Estimate” – that is, the total number of single-family homes that are denoted as sold in the Realcomp MLS (“Realcomp Total MLS Sales”) – by “Total Deeds” plus the sum of all listings contained in the Realcomp MLS that are denoted as sold but which he was unable to match with a deed from the public records database.¹²

2. *Dr. Eisenstadt’s market share calculations make no economic sense*

12. Generally, the goal of a market share analysis is to estimate the share of output in the relevant market that is accounted for by a particular seller or group of sellers. The focus of the calculation in this case should be the estimation of Realcomp’s share of output in the market for MLS listings services—*i.e.* its share of residential property listings—which corresponds to the relevant product market definitions offered in this case.¹³ But Dr. Eisenstadt’s calculation is conceptually different. Instead of calculating Realcomp’s share of property listings, he calculates Realcomp’s share of listings for *properties that were sold*. If a Realcomp listing did not result in the property being sold, Dr. Eisenstadt treats that listing as if it never existed on the Realcomp MLS despite the incontrovertible fact that it did. Clearly, listings for unsold properties—such as property listings on Realcomp that never result in property sales because the offer to sale was eventually withdrawn and listings that have yet to result in a property sale but will eventually do so—represent output in a relevant market for listing services. Just as television advertisements that do not result in product sales represent output in a relevant market for television advertising. Because Dr. Eisenstadt’s market shares do not correspond to any market definition that has been offered in this case and ignores a portion of the relevant output, they cannot be indicative of market power even if the calculation itself were correct.

¹² Eisenstadt Report, p. 12.

¹³ As discussed above, Dr. Eisenstadt does not offer an independent opinion regarding the relevant product market definition. He merely responds to statements about the relevant product market definition provided by Complaint counsel. In Complaint counsel’s Objections and Responses to Respondent’s First Set of Interrogatories, p. 9, Complaint counsel refers to “mechanism for publicizing and distributing real estate listings to real estate web sites for purposes of advertising listings to the general public.” In my initial report, I opined that the relevant output market is “the supply of real estate *brokerage* services to sellers and buyers of residential real estate.” Williams Report, p. 22. No other relevant product market definitions have been offered in this case. Therefore, regardless of whether Dr. Eisenstadt intends to calculate market shares based on a statement about relevant market definition in Complaint counsel documents or the relevant market definition provided in my initial report, the relevant product is listing services.

13. Moreover, the method of calculation itself is conceptually flawed and therefore incorrect. His so-called “Low Estimate” will always result in double counting whenever Dr. Eisenstadt is unable to match a listing for a sold property on the Realcomp MLS to a record in the deeds database. The double counting occurs because a sold, but unmatched property will likely show up in the denominator twice—once as an unidentified record in the deeds database and again as an unmatched record of a sold property in the Realcomp MLS. Because matching involves overcoming coding and programming errors, mismatches are virtually inevitable and hence double counting is virtually inevitable. To his credit, Dr. Eisenstadt admits to the double counting error.¹⁴ But unfortunately his admission does not eliminate the systematic bias inherent to his method of calculation.

14. To see this, recall that his so-called “Low Estimate” is calculated by adding to the denominator the sum of all properties that were denoted as sold in the Realcomp MLS but for which he was unable to match to a deed in the PRD database. Now, suppose that a total of 100 houses were sold within a relevant geographic market serviced by Realcomp and all 100 houses sold were listed on Realcomp. If Dr. Eisenstadt correctly matched the sales to the deeds in this example, his “Low Estimate” would yield a 100% market share for Realcomp in a relevant market for *sold* properties.¹⁵ Suppose, for example, that Dr. Eisenstadt was able to match only 75 of the 100 properties sold to deeds, then his so-called “Low Estimate” would yield a market share equal to only 80% ($100/(100+25)$) because he adds the 25 sold properties that he is unable to match to a deed to the denominator. If Dr. Eisenstadt were able to match only 60 of the 100 properties sold to deeds, his so-called “Low Estimate” would be equal to 71% ($100/(100+40)$).

¹⁴ Dr. Eisenstadt admits that the low estimate is an “underestimate of Realcomp’s actual share because, for example, including all mismatches in the denominator may result in double counting for some deeds.” Eisenstadt Report, p. 12. Dr. Eisenstadt himself points out that a property recorded as an MLS sale is unlikely to match for two reasons. First, “data might have been entered incorrectly in either the public record database or the MLS.” *Id.*, p. 12, fn. 25. But data entered incorrectly in either database is not missing data, and thus does not mean that any additional property sales should be added to the deeds database. Second, Dr. Eisenstadt explains that there may exist a time lag between the date the property was sold and the date when the deed was included in the deeds database such that no matching deed exists in the database when an attempt to match sales and deeds occurs. *Id.* But such a lag is unlikely to be long enough to affect the sales counts. The period for which Dr. Eisenstadt calculates market shares ends in October 2006, but he used sales data going all the way to February 2007. Only if the lag in sales appearing in the deeds database is longer than four months would this affect the shares calculated by Dr. Eisenstadt. But this is unlikely to be the case. Moreover, if this was an issue, Dr. Eisenstadt could have checked or controlled for this by using a time period that ended prior to October 2006.

¹⁵ Again, there has been no opinion rendered in this case that the relevant product market is the market for listings for *sold* properties.

15. This example illustrates several flaws in Dr. Eisenstadt's method of calculation. First, the double counting error that is inherent to his "Low Estimate" causes the market share calculation to be biased downward. Second, the magnitude of the bias will increase with the number of properties that were sold but that Dr. Eisenstadt was unable to match to deeds. Third, and most important, the "Low Estimate" will always lie below the feasible range for the actual market share estimate.

16. A range of estimates often is provided in economics and statistics when there is uncertainty about economic conditions that will affect the outcome of interest. For example, an economist might offer a range of damage estimates, all of which are feasible depending on the market conditions that would prevail in a but-for world. More formally, a confidence interval may be reported for statistical results which again represents the feasible range of possible outcomes given the variation in certain explanatory variables. But Dr. Eisenstadt's "Low Estimate" does not represent a lower limit on the range of feasible market share estimates as his label implies. If mismatches occur, which I have argued is highly probable given the size of the datasets, then his calculation will diverge from the actual market share and the magnitude of the divergence will increase as the number of mismatches increases. The resulting "Low Estimate" does not represent one of several feasible outcomes because the calculation systematically diverges from the actual market share as the mismatches and resulting double counting increase. The only conclusion that can be made with certainty is that the "Low Estimate" is less than the actual market share by an indeterminate amount. Consequently, the value of the "Low Estimate" does not represent an "estimate" at all.

17. Thus, even if his so-called "Low Estimate" corresponded to a relevant market definition that has been proffered in this case, and it does not, the method of calculation is inherently flawed and thus cannot be relied upon to inform the question of market power.

3. *Both Dr. Eisenstadt's "Low Estimate" and "High Estimate" systematically understate Realcomp's market share*

18. There is one simple but important reason why both the "Low Estimate" and the "High Estimate" provided by Dr. Eisenstadt substantially understate Realcomp's market share: the public records database (PRD) used by Dr. Eisenstadt includes many records that are not comparable to the type of transactions that he includes from the Realcomp MLS. First, the PRD includes transactions that are not arms-length transactions between home buyers and home sellers. For instance, it includes transfers between family members, quitclaim deeds, gifts, and trusts.¹⁶ Second, although Dr. Eisenstadt claims to have included only "single family residential" transactions, further analysis reveals that many observations included by Dr. Eisenstadt do not fit that description.¹⁷ The inclusion of non-arms-length transactions and non-residential properties in the denominator of Dr. Eisenstadt's market share calculations causes both his "Low Estimate" and "High Estimate" to be systematically biased downwards.

19. In order to assess the magnitude of the bias created by the error, I re-calculated the market share estimates using Dr. Eisenstadt's approach, but excluded non-arms-length transactions and non-residential properties. To do this, I merged Dr. Eisenstadt's PRD with a database of real estate property records supplied by First American, a leading provider of information on real estate. The First American database contains information that is not available in the PRD. This additional information allows me to identify whether a transaction was arms-length. Additionally, it contains more detailed information regarding the type of property compared to the data that Dr. Eisenstadt used.

20. The First American records database contains a field that indicates whether the transaction was an arms-length transaction.¹⁸ I use this variable to screen non-arms-length transactions. The First American records database also contains a field that identifies the

¹⁶ A quitclaim deed is a term used in property law to describe a transfer in which a person (the "grantor") does not guarantee that the grantor's claim is actually valid. In contrast, a warranty deed, which is normally used for real estate sales between unrelated parties, contains certain guarantees by the grantor. Quitclaim deeds are sometimes used for transfers between family members, gifts, or in other special circumstances.

¹⁷ Eisenstadt Report, p. 11. Neither do these observations pertain to multi-family residential units, for which Dr. Eisenstadt tries to account. Eisenstadt Report, p. 11, fn. 26.

¹⁸ First American refers to this variable as "pricatcode" (which stands for primary category code).

property type. This property type variable indicates whether the property is, for example, single family residential (SFR), multi-unit residential, commercial, industrial, restaurant, shopping center, farm, or various other types. Using this variable, I identify and exclude properties that were clearly not residential.

21. The result of these corrections uniformly support the conclusion that by including transactions that were not arms-length and properties that were not residential, Dr. Eisenstadt's calculations understate Realcomp's market share.

- The result of only excluding transactions that First American identifies as non-arms-length is that Dr. Eisenstadt's "High Estimate" of Realcomp's market share in the four counties combined (Oakland, Wayne, Livingston, Macomb) increases from [REDACTED] Dr. Eisenstadt's "High Estimate" in Oakland county increases from [REDACTED]
- The result of only excluding transactions that are clearly not residential, as identified by the property type variable in the First American database, is that Dr. Eisenstadt's "High Estimate" of Realcomp's market share in the four counties combined (Oakland, Wayne, Livingston, Macomb) increases from [REDACTED] Dr. Eisenstadt's "High Estimate" in Oakland county increases from [REDACTED]
- The result of excluding both transactions that are not arms-length and those that are clearly not residential, is that Dr. Eisenstadt's "High Estimate" of Realcomp's market share in the four counties combined (Oakland, Wayne, Livingston, Macomb) increases from [REDACTED] Dr. Eisenstadt's "High Estimate" in Oakland county increases from [REDACTED]

22. These estimates, and the revised share calculations for Livingston, Wayne, and Macomb, are shown in Exhibit 1. It is important to note that these revised estimates of Dr. Eisenstadt's market shares include FSBO properties. As I discuss in my initial report, FSBO properties are not in the relevant product market (which includes only real estate brokerage services), a conclusion that Dr. Eisenstadt does not seem to dispute. Accordingly, if FSBO

properties are removed from the denominator of Dr. Eisenstadt's calculations, the revised market shares would be even higher.

23. These revised estimates of Dr. Eisenstadt's market shares confirm the conclusions detailed in my initial report.¹⁹ In particular, they strongly support the inference that Realcomp has market power in Wayne, Oakland, and Livingston counties, and suggests that Realcomp has market power in Macomb county, although to a lesser extent.

4. *Dr. Eisenstadt's attempt to justify the downward bias in his market share calculations is conceptually incorrect*

24. Dr. Eisenstadt attempts to justify the downward biases discussed above in part by arguing that properties that were listed on the Realcomp MLS but which were "sold via a different MLS or through a channel other than an MLS" cause "the share of sales made through (*i.e.*, attributable to) the Realcomp MLS" to be overstated.²⁰ But this justification applies only to Realcomp's share of listings for *sold* properties, which as I explained above, does not correspond to any relevant market definition proffered in this case. In a relevant market for listing services, a Realcomp listing represents output in that relevant market and is correctly included in any market share calculation regardless of whether or not the procuring broker identified the property through a source other than the Realcomp MLS. Consequently, there is no basis for the argument that certain Realcomp listings—namely, Realcomp listings that do not lead to property sales—cause Dr. Eisenstadt's share estimates to be overstated.

25. Moreover, regardless of how the property was sold, the fact that the property was listed in Realcomp shows the value of the Realcomp MLS to home sellers and listing brokers. The fact that home sellers and their listings brokers may list on more than one MLS (*i.e.*, dual list) or advertise the home in newspapers shows that these other channels are not effective substitutes to the Realcomp MLS. The goal is not to evaluate the effectiveness of the listing as a means of marketing homes. Instead the goal is to evaluate the importance, indeed the necessity of MLS listings as a means of marketing homes.

¹⁹ Williams Report, pp. 27-29.

²⁰ Eisenstadt Report, p. 12.

C. Dr. Eisenstadt's opinions regarding the substitutability between Realcomp and other MLSs

1. Dr. Eisenstadt's opinions

26. Dr. Eisenstadt claims that the substitutability between Realcomp and other MLSs is demonstrated by the fact that some brokers belong to MiRealSource but not Realcomp. In particular, he claims that “[a]pproximately 33 percent of MiRealSource agents do not belong to Realcomp ... [which] indicates that they view [the MiRealSource] MLS database as a good substitute for the Realcomp MLS database.”²¹

2. The existence of brokers that belong to MiRealSource but not Realcomp does not suggest substitutability between these MLSs in all of the relevant geographic areas.

27. Dr. Eisenstadt makes an attempt to argue that the fact that 33% of MiRealSource members are not members of Realcomp suggests that MiRealSource is a “good substitute” to Realcomp. In fact, his offered statistic suggests the opposite – it shows that 67% of MiRealSource members are also members of Realcomp. The fact that some brokers are members of both Realcomp and MiRealSource simply does not inform the question of whether or not brokers and home sellers perceive them as substitutes for the purpose of listing a property located in a given geographic market. In reality, it suggests that for these brokers that are dual members, MiRealSource is *not* an effective substitute to Realcomp in certain geographic areas. If MiRealSource and Realcomp were effective substitutes in all areas where these brokers operate, then such dual membership would not be necessary.

28. According to Dr. Eisenstadt, listing brokers for properties located in the western region of Oakland county, for example, will consider listing services supplied by MiRealSource to be a substitute for listing services for Realcomp when Realcomp has a market share of greater than [REDACTED] of new listings. (See Exhibits 9 and 16 in my initial report.) But this inference is inconsistent with Dr. Eisenstadt's conclusion about the two-sided nature of the MLS and the presence of network effects. Dr. Eisenstadt states that “all else equal, listing agents will have a

²¹ Eisenstadt Report, p. 11.

higher demand for an MLS platform that also attracts more selling agents.”²² Likewise, he states that “selling agents’ usage and demand for an MLS will increase with the number of listing agents on the opposite side of the platform.”²³

29. A simple explanation for the phenomenon of dual membership that is consistent with the economic evidence in this case is that certain brokers provide brokerage services within relevant geographic markets located within the Realcomp service area and they also provide brokerages services within relevant geographic markets located within the MiRealSource service area and hence the need for membership in both MLSs. Consistent with this, Exhibit 9 of my initial report is a map that shows Realcomp’s share of all new monthly listings. Exhibit 16 of my initial report is a map that shows Realcomp’s share of “unique” new monthly listings. The difference between these two exhibits reflects dual listing.

30. The lack of absolute dual membership – *i.e.* that some members of MiRealSource are not members of Realcomp – also does not suggest substitutability between MiRealSource and Realcomp. MiRealSource is a significant MLS in certain geographic areas, such as the northeastern part of Macomb and, therefore, the existence of some brokers that only belong to MiRealSource is not surprising. But this does not reveal anything about the competitive significance of MiRealSource, and the substitutability with Realcomp, in other geographic areas, including Wayne, Oakland, and Livingston counties. [REDACTED]

[REDACTED]

More importantly, it is evident from the exhibit that Realcomp has a large number of listings in many areas where MiRealSource has no listings or a trivial number of listings.

²² Eisenstadt Report, p. 36.

²³ Eisenstadt Report, p. 36.

III. Dr. Eisenstadt's Opinion that there Are Effective Alternatives to Realcomp for Disseminating Real Estate Listing Information Directly to Home Buyers

A. Other sources of real estate listing information

1. Dr. Eisenstadt's opinions

31. Dr. Eisenstadt disputes that the Realcomp access restrictions disadvantage brokers using non-ERTS listings in the Realcomp area. In particular, he argues that there are several effective substitutes to Realcomp for disseminating real estate listing information directly to home buyers. First, Dr. Eisenstadt argues that home buyers use sources other than the Internet to search for listings, including real estate agents, yard signs, print newspaper, books and magazines for information regarding real estate listings.²⁴ Second, Dr. Eisenstadt claims that there are various other websites which are widely used by home buyers to search for homes, including Google, AOL Real Estate, and Craigslist.org.²⁵ In addition, Dr. Eisenstadt theorizes that websites that are less widely used by home buyers may in fact be more valuable from the perspective of home sellers because listings displayed on these sites do not have to compete with as many other properties that are also listed on the same site.²⁶

32. As I explain below, these arguments are factually inaccurate, conceptually flawed, and obscure the fact that the websites foreclosed to brokers using non-ERTS listings in the Realcomp area are very significant both from the perspective of home buyers searching for homes and from the perspective of home sellers and listing brokers in disseminating listing information directly to home buyers.

²⁴ Eisenstadt Report, p. 16.

²⁵ Eisenstadt Report, pp. 17-18.

²⁶ Eisenstadt Report, pp. 20-21.

2. *Other public sources of information are not effective substitutes to the Internet for displaying real estate listings.*

33. Dr. Eisenstadt argues that a large share of buyers use sources other than the Internet to search for listings, including real estate agents, yard signs, print newspaper, books and magazines for information regarding real estate listings.²⁷ In particular, he cites the Survey by the National Association of Realtors (NAR), showing that a significant percentage of home buyers used real estate agents (85%), yard signs (63%), print newspaper (55%), and books or magazines (34%) to search for information on real estate listings.²⁸ I reported this same statistic in my initial report.²⁹

34. This statistic does not suggest that other public sources of information are effective alternatives to the Internet in terms of disseminating real estate listing information directly to potential home buyers. In fact, these statistics suggest the exact opposite, that the Internet is a very important tool for home buyers. The reason is that buyers do not use these other information sources as substitutes for the Internet, but rather, use them in addition to using the Internet. This is evident from the fact that the same survey showed that 80% of home buyers used the Internet.³⁰ Thus, for example, although 63% of home buyers obtained information from yard signs, the vast majority of these home buyers also used the Internet (at least 68% of these buyers).³¹

35. The reason is that for this majority of home buyers, the Internet provides better search capabilities, a more comprehensive set of listings, or some other features that other sources of information do not. Dr. Eisenstadt essentially assumes that any source of real estate listing information used by buyers is an effective substitute to the Internet. The flaw in Dr.

²⁷ Eisenstadt Report, p. 16.

²⁸ Eisenstadt Report, p. 16 (“in 2006, 85% of all buyers used real estate agents for information; 80% used the Internet; 63% used yard signs; 55% used print newspaper; and 34% used books or magazines”), citing The 2006 National Association of Realtors, Profile of Home Buyers and Sellers (“2006 NAR Survey”), p. 34. He also cites a NAR Survey statistic showing that “36% of buyers found the home they purchased through an agent versus 24% through the Internet and 15% through a yard sign.” Eisenstadt Report, p. 16, fn. 39; 2006 NAR Survey, p. 38.

²⁹ Williams Report, Exhibit 17 and pp. 33-34.

³⁰ 2006 NAR Survey, p. 37.

Eisenstadt's analysis is most obvious with respect to yard signs, which Dr. Eisenstadt suggests is an alternative to the Internet.³² Although a majority of home buyers look at yard signs, yard signs are not an effective substitute from the perspective of either home buyers, home sellers, or listing brokers. Through public websites, home buyers have direct access to thousands of listings and the ability to search among them based on a variety of criteria, such as price, location, type of dwelling, and characteristics of the property. The cost of driving through the desired neighborhoods looking for yard signs on a frequent basis would far outweigh the costs of searching Internet sites for listings.

36. Similarly, real estate Internet websites provide features that make it a more efficient source of listing information for potential home buyers than are printed publications such as newspapers or magazines.³³ For instance, websites generally have a more comprehensive, accurate, and up-to-date set of listings of homes for sale in a particular area than do printed publications. Real estate websites often also include information on homes for sale that typically is unavailable through most printed publications, including a portfolio of photos, virtual tours, interactive maps, detailed property information, and neighborhood information. Moreover, as mentioned above, websites offer the ability to search among real estate listings based on the desired criteria.

37. The record also suggests that most home buyers do not use real estate brokers as a substitute to searching on the Internet. Buyers who use the Internet are more likely to be assisted by brokers in their home search than buyers who do not use the Internet. Some 87 percent of home buyers who used the Internet to search for homes were assisted by a broker, compared to 74 percent of buyers who did not use the Internet.³⁴ This suggests that using a real estate broker is not a substitute to searching for real estate listing on the Internet for the majority of home buyers.

³¹ According to the survey, 20% of buyers do not use the Internet. If all of these buyers are buyers who use yard signs, then 68% of buyers who use yard signs also use the Internet (43%/63%). 2006 NAR Survey, p. 34.

³² Eisenstadt Report, p. 16.

³³ See e.g., Simos Deposition, pp. 63-65.

³⁴ 2006 NAR Survey, p. 41.

38. This evidence indicates that the Internet is a very important source of information for home buyers. As a result, it is also a very important channel for home sellers and listing brokers to reach home buyers directly. This is corroborated by the fact that MLSs and brokers have made significant investments in developing websites. The value of the Internet as a marketing tool for listing brokers is also confirmed by the fact that the vast majority of listing brokers and home sellers choose to display their listings on public websites.³⁵

3. *Other websites are not effective substitutes to websites affiliated with Realcomp and its members.*

39. In addition to these other sources of real estate listing information, Dr. Eisenstadt argues that there are various other websites which are widely used by home buyers to search for homes.³⁶ According to Dr. Eisenstadt, these other public websites, which include AOL Real Estate, Craigslist.org, ForSalebyOwner.com, Google, Homes.com, Propsmart.com, RealtyTrac, Sell.com, Trulia.com, Yahoo Real Estate, and Zillow.com, are used by a “substantial share of home buyers.”³⁷ In particular, he cites the NAR survey, which shows that “14% of all buyers used a newspaper web site; 6% used a real estate magazine website; and 10% used some ‘other’ web site.”³⁸ I discussed this same statistic in my initial report.³⁹

40. However, rather than showing that these other websites are effective substitutes to the websites restricted by Realcomp’s Website Policy, these statistics show that other websites are much less used by potential home buyers. In fact, the same statistic cited by Dr. Eisenstadt shows that Realcomp restricts non-ERTS listings from the top four types of websites identified by home buyers as being most widely used to search for homes. According to the NAR Survey, the percentage of home buyers using public websites by type and in order of popularity is 53 percent of home buyers used MLS websites (such as Moveinmichigan.com), 52 percent used

³⁵ According to the 2006 NAR Survey, 85% of homes that were sold using a real estate agent were listed on the Internet. 2006 NAR Survey, pp. 76, 67.

³⁶ Eisenstadt Report, p. 16 (“Realtor.com is just one of numerous sites to which the general public obtains information about real estate listings. Specifically, the public also turns to many non-approved websites as well as other public sources for information about residential real estate for sale in Realcomp’s service area.”).

³⁷ Eisenstadt Report, p. 18; p. 16.

³⁸ Eisenstadt Report, p. 16, fn. 40.

³⁹ Williams Report, pp. 34-35.

Realtor.com, 41 percent used real estate company websites and 40 percent used real estate agent websites.⁴⁰ Realcomp denies non-ERTS listings access to all of these websites. The websites that Dr. Eisenstadt discusses trail these websites in popularity by a significant amount.⁴¹ I illustrate this comparison in Exhibit 18 of my initial report.⁴²

41. In support of his opinion that other websites are effective substitutes to the websites foreclosed by Realcomp's Website Policy, Dr. Eisenstadt offers two other statistics. First, he states that "over 56 percent of all Internet searches on 'real estate' and related items are conducted on Google and our search partner sites."⁴³ Second, he states that "[f]our other websites alone (AOL, RealtyTrac, Zillow.com and Yahoo) are estimated to have had a combined total of 11 million visitors in March 2006, which exceed the number of visitors to Realtor.com."⁴⁴

42. These comparisons are flawed and misleading. The key question is whether other websites are effective substitutes to the websites affiliated with Realcomp and Realcomp members from the perspective of home buyers searching for property listings. The statistics provided by Dr. Eisenstadt include such use by home buyers, but they also include many other uses of these websites related to real estate. These uses are not limited to home buyers or to searches for real estate property listings. For instance, Internet searches for "real estate" and "related items" on Google.com may include any type of search related to real estate, including searches for information regarding home rentals, vacation rentals, mortgages, home renovations, brokers and gardening.⁴⁵ But this does not reveal anything about the extent to which home buyers in a particular area search Google for real estate property listings. Dr. Eisenstadt's statistic on "visitors" to AOL, RealtyTrac, Zillow.com, and Yahoo is similarly flawed because such statistics also include any use related to real estate.

⁴⁰ 2006 NAR Survey, p. 44.

⁴¹ 2006 NAR Survey, p. 44.

⁴² Williams Report, Exhibit 18.

⁴³ Eisenstadt Report, p. 18.

⁴⁴ Eisenstadt Report, p. 18.

⁴⁵ An April 2006 RealEstateJournal.com article attached to Dr. Eisenstadt's report states that Google and Craigslist are still relatively small and that Realtor.com "still has a formidable advantage, with about 3 million listings."

43. It is also noteworthy that AOL Real Estate, one of the websites discussed by Dr. Eisenstadt as a substitute to Realtor.com, has an exclusive co-branding agreement with Realtor.com.⁴⁶ In fact, virtually all of AOL's listings are from Realtor.com.⁴⁷ Home buyers searching AOL Real Estate are essentially searching Realtor.com. According to the visitor statistics that Dr. Eisenstadt provides, AOL Real Estate received more visitors (4.0 million) than the other three sites that he discusses (2.9 million for RealtyTrac, 2.3 million for Zillow.com, and 1.8 million for Yahoo Real Estate).⁴⁸ Realtor.com has other co-branding arrangements, with companies such as MSN.com, Dow Jones/WSJ.com, and Internet Broadcasting Systems.⁴⁹ Because Realcomp restricts non-ERTS listings access to Realtor.com, it also restricts listings access to websites such as AOL Real Estate and MSN.com that obtain their listing information from Realtor.com.

4. *Dr. Eisenstadt's claim that websites with few visitors may be more valuable than those used by a large share of home buyers makes no economic sense.*

44. Lastly, in an attempt to argue that any website may be an effective substitute to the websites foreclosed by Realcomp, Dr. Eisenstadt claims that websites that are less widely used by home buyers may in fact be more valuable from the perspective of home sellers.⁵⁰ According to Dr. Eisenstadt, this is because such websites may also have fewer listings and therefore a property listing on such a site need not compete with as many listings for views by potential home buyers.⁵¹ Essentially, Dr. Eisenstadt argues that a website (or even an MLS) with

James R. Hagerty, "Google and Craigslist May Weaken Realtors' Hold on Home Listings," *RealEstateJournal.com*, April 10, 2006; Eisenstadt Report, Attachment 4.

⁴⁶ Simos Deposition, pp. 14-16.

⁴⁷ Simos Deposition, pp. 15-16.

⁴⁸ Noelle Knox, "Its always 'OPEN HOUSE' as real estate goes online," *USA Today*, May 16, 2006; Eisenstadt Report, Attachment 3.

⁴⁹ Simos Deposition, pp. 19-29.

⁵⁰ Eisenstadt Report, pp. 18-19: "In addition, websites with a much smaller volume of traffic ("hits") may actually be more valuable to buyers conducting an internet search for properties located within a local area, and should also be considered competitors to national sites such as Realtor.com."

⁵¹ Eisenstadt Report, pp. 20-21: "...although the value of a real estate website to a seller is directly related to the number of potential buyers who use the website, it is also inversely related to the number of competing properties for sale on that website. Specifically, as the number of competing properties for sale on that website increases, the likelihood that a visitor to the website will click on any individual seller's property declines. Thus, a website which realizes fewer total 'hits' than Realtor.com may generate just as many 'views' for an individual seller's property."

100 listings and 100 potential buyers may be more valuable than a website with 100,000 listings and 100,000 potential buyers because a listing in the former may get more views than a listing in the latter.

45. This framework incorrectly assumes that property listings are all homogeneous, when in fact, they are highly differentiated. Houses vary along numerous dimensions important to buyers in addition to price, such as location, size, exterior features, interior features, age and condition. If properties were all homogeneous and/or home buyers did not search for desired characteristics, then viewing property listings would be random and the probability of a buyer viewing a particular listing would be inversely related to the number of listings on a particular website, as Dr. Eisenstadt hypothesizes. The greater the number of listings, the less chance that the listing would be viewed. However, when listings are differentiated, and home buyers search for particular characteristics, including location, size, and other features, the more listings that there are on a website, the more likely that a particular buyer will find the particular property matching his or her individual preferences. Thus the website becomes more valuable for both home buyers and sellers. From the perspective of a home seller, the value of additional potential buyers who may be searching for a home that matches the characteristics of the seller's home, is significantly greater than the "cost" of having to "compete" against other listings on the website.

46. In essence, Dr. Eisenstadt argues that a small network is more valuable than a large network. But this is inconsistent with the entire structure of the real estate industry. According to Dr. Eisenstadt's theory, an MLS with few listings would be more valuable than an MLS with a majority of listings in a particular geographic area. But in most geographic areas, there is only one dominant MLS rather than many small MLSs, which reflects the efficiencies in aggregating all listings under one network. The efficiencies of an MLS are precisely the network effects that result from such aggregation. Home sellers find it valuable to list their properties in a large MLS despite the fact that their listings may "compete" against some other listings on the MLS.

47. In sum, Dr. Eisenstadt's claim that websites not affiliated with Realcomp or Realcomp-members are effective substitutes to the websites foreclosed by the Realcomp Website Policy is wholly inconsistent with the facts.

B. Ability to circumvent Realcomp's discriminatory access restrictions to "Approved Websites" by listing in other MLSs

1. Dr. Eisenstadt's opinions

48. In addition to the availability of websites that are not affiliated with Realcomp or its members, Dr. Eisenstadt argues that brokers in the Realcomp area using non-ERTS listings can circumvent Realcomp's Website Policy by listing a property in an MLS that does not have discriminatory restrictions similar to Realcomp's.⁵² In particular, Dr. Eisenstadt claims that, since April 2007, MiRealSource has begun sending all listings to Realtor.com, and therefore listing in MiRealSource represents "a ready, inexpensive means of forwarding information to at least some of the so-called Approved web-sites for most Realcomp members."⁵³ Other MLSs, including Ann Arbor, Flint, Downriver, Lapeer, and Shiawassee, also distribute all listings, regardless of the type, to "certain approved websites in Southeastern Michigan" and therefore also allow brokers to circumvent Realcomp's Website Policy according to Dr. Eisenstadt.⁵⁴

2. Brokers using non-ERTS contracts in the Realcomp area cannot circumvent Realcomp's access restrictions to certain key websites, including Moveinmichigan.com and most member IDX websites, by listing in other MLSs.

49. Dr. Eisenstadt's analysis of how brokers in the Realcomp area can circumvent Realcomp's Website Policy focuses on Realtor.com. Brokers in the Realcomp area can disseminate their non-ERTS listings to Realtor.com by dual-listing in a different MLS that does not have similar access restrictions as Realcomp. However, non-ERTS listings in the Realcomp area are foreclosed from other key websites to which Realcomp sends ERTS listings. In addition to Realtor.com, Realcomp sends all ERTS listings to Moveinmichigan.com and to hundreds of Realcomp-member IDX websites. However, pursuant to Realcomp's Website Policy, Realcomp does not send non-ERTS listings, including EA, LS, and MEO listings, to these websites. Moveinmichigan.com, the official website of the Realcomp MLS, receives its listings from the

⁵² Eisenstadt Report, p. 14.

⁵³ Eisenstadt Report, pp. 14-15: Dr. Eisenstadt claims that because many non-traditional brokers "operate statewide" and are members of various MLSs, they would not incur any significant additional cost of dual listing.

⁵⁴ Eisenstadt Report, p. 14.

Realcomp MLS and no other source. Consequently, brokers cannot circumvent Realcomp's discriminatory access restrictions to Moveinmichigan.com by listing in another MLS.

50. Neither can brokers circumvent Realcomp's exclusion of non-ERTS listings from its IDX feed to hundreds of Realcomp-member IDX websites. As I explain in my initial report, Realcomp sends information on all listings to its members via IDX, which is a protocol that enables Realcomp-members to receive Realcomp listings so that they may be displayed on their websites.⁵⁵ MiRealSource uses a similar technology, called "Broker Data Sharing" or BDS, to send its listing information to its members. However, the set of brokers to which MiRealSource sends its listing information is not the same set to which Realcomp sends its listings. Accordingly, MiRealSource's BDS feed is an inadequate substitute to Realcomp's IDX feed for home sellers and listing brokers attempting to reach home buyers in the Realcomp area.

51. In sum, brokers using non-ERTS listings in the Realcomp area cannot circumvent Realcomp's Website Policy by dual-listing in another MLS. Dual-listing in other MLSs, including MiRealSource, does not allow brokers to display non-ERTS listing in Moveinmichigan.com and the majority of member IDX websites. These websites are key websites for listing brokers and home sellers intending to reach home buyers directly. In fact, Dr. Eisenstadt himself claims that broker-owned websites are more important than Realtor.com: "local-broker and individual agent operated websites which are increasing in popularity and constitute a real competitive threat to Realtor.com. In fact, broker-owned, agent-owned, and franchise-owned web sites were, in that order of importance, more important sources of internet exposure to members of NAR than Realtor.com."⁵⁶

⁵⁵ There are two types of IDX technologies, IDX feed and IDX framing. An IDX feed consists of data being transmitted using an ftp protocol from Realcomp to brokers. IDX framing consists of Realcomp providing the IDX data to brokers via a website created by Realcomp. The individual broker can then add their name to the website. When a home buyer searches on the broker's website they are actually searching the website created by Realcomp. Kage Deposition, pp. 121-124.

⁵⁶ Eisenstadt Report, p. 19.

C. Broker-owned websites

1. Dr. Eisenstadt's opinions

52. Dr. Eisenstadt also argues that Realcomp's exclusion of non-ERTS listings from its IDX feed does not prevent non-ERTS listings from being displayed on broker-owned websites because brokers can circumvent Realcomp's restriction by independently sending such listings via e-mail or fax.⁵⁷ According to Dr. Eisenstadt, listing brokers can send information about non-ERTS listings to cooperating brokers and cooperating brokers can post those listings on their websites at "modest cost."⁵⁸

53. Dr. Eisenstadt further claims that Realcomp's policy is not an "actual impediment" to brokers using non-ERTS listings because most brokers would independently choose not to display non-ERTS listings on their websites if such listings were included in Realcomp's IDX feed.⁵⁹ According to Dr. Eisenstadt, "... some member brokers would choose to delete those listings from their websites if it was easy to do so" because displaying such listings would "generate little expected incremental revenue..."⁶⁰

2. Sending listings to cooperating brokers via e-mail or fax is not an adequate substitute for inclusion in Realcomp's IDX feed.

54. Dr. Eisenstadt asserts that listing brokers can send listing information to cooperating brokers through e-mail, fax, or non-IDX software, and cooperating brokers can display such listing information, at "modest cost." There are over [REDACTED] broker offices that receive

⁵⁷ Eisenstadt Report, p. 22: "Any Realcomp broker can obtain a feed in non-IDX format of the listing data it supplies to Realcomp ... [and] transmit data for these listings to cooperating brokers electronically using non-IDX software, e-mail, or fax."

⁵⁸ Eisenstadt Report, p. 22: "Realcomp's policies do not prevent listing brokers from feeding information about limited service contract properties to cooperating agents at modest cost... It is my understanding that brokers who obtain electronic information about EA listings by some means other than IDX and who want to post those listings on their websites can do so at very modest cost."

⁵⁹ Eisenstadt Report, p. 22: "Realcomp's IDX policy would not, in fact, be the actual impediment to having information about these properties displayed on other brokers' websites if traditional Realcomp brokers would not display the information, even if it were made available through an IDX feed."

⁶⁰ Eisenstadt Report, pp. 23-24.

Realcomp's IDX feed or have an IDX framing arrangement with Realcomp.⁶¹ The time and effort required to manually transmit each listing would clearly be substantial. This is before including the costs associated with receiving the manual transmissions and integrating them one-by-one onto websites. Added to the costs of transmitting, receiving, and posting individual listings to the websites is the cost of updating the listings each time asking prices change and eventually when the listed property sales or the offer to sale is withdrawn.

3. *Dr. Eisenstadt provides no evidence for his conclusion that brokers would not display non-ERTS listings on their websites absent the Realcomp restrictions.*

55. Dr. Eisenstadt also asserts that Realcomp's Website Policy is not an impediment to brokers using non-ERTS listings in the Realcomp area because "at least some" brokers would "delete" such listings from their websites even if Realcomp included them in its IDX feed. The issue in this case is the dissemination of listing information, not how it is used after it is received. Without any factual support that a substantial number of recipients would ignore the listings, Dr. Eisenstadt's opinion is unsupported and without economic basis.

4. *Collective exclusion of non-ERTS listings from the IDX feed is not equivalent to each broker deciding whether to display non-ERTS listings on their websites.*

56. The fact that Realcomp members collectively decided to exclude non-ERTS listings does not mean that each member would decide to remove non-ERTS listings from the IDX feed, even if doing so were costless. This is because brokers are more likely to discriminate against such listings when other brokers also discriminate. The cost to brokers of not including all listings on their websites, in terms of attracting potential home buyers, is much lower if all other competing brokers also do not include all listings. If a broker does not include all listings on its website, but other brokers do, such a broker would be at a competitive disadvantage in terms of providing a valuable site for potential home buyers and therefore in attracting business from potential home buyers. In essence, offering a lower-quality website is less costly from a competitive perspective if other brokers also offer lower-quality websites.

IV. Dr. Eisenstadt's Opinion that the Search Function Policy Does Not Have Any Effect on Searches by Cooperating Brokers

1. Dr. Eisenstadt's opinions

57. Dr. Eisenstadt also disputes that Realcomp's Search Function Policy has had any impact on the competitiveness of brokers using non-ERTS listings in the Realcomp area. In particular, he argues that Realcomp's Search Function Policy is not an "impediment to brokers' acquiring information on Realcomp *Online*[®] about limited service contracts."⁶² According to Dr. Eisenstadt, cooperating brokers can search all listings, including non-ERTS listings, by changing the default setting, which requires "virtually no additional effort and cost."⁶³

58. Moreover, Dr. Eisenstadt argues that Realcomp's Search Function Policy is not an impediment to brokers using non-ERTS listings if "most Realcomp members independently would choose the same default setting."⁶⁴ Dr. Eisenstadt suggests that many Realcomp members would, in fact, prefer to only show their clients ERTS listings.⁶⁵

2. Dr. Eisenstadt incorrectly assumes that Realcomp's Search Function Policy has no effect on brokers using non-ERTS listings from the fact that default search terms can be changed by cooperating brokers at little cost.

59. The fact that it may not be costly for cooperating brokers to view all listings by changing the default setting does not imply that the Search Function Policy does not affect the behavior of cooperating brokers in searching listings and, therefore, the competitiveness of listing brokers using non-ERTS contracts. Several studies consistently show that default settings do matter to choices made by consumers, even when such default settings are costless to change and consumers are aware of the choices. For instance:

- In an online experiment, respondents were asked in three different ways whether they would be organ donors. The first was an "opt-in" condition, where

⁶² Eisenstadt Report, pp. 7, 24.

⁶³ Eisenstadt Report, p. 24.

⁶⁴ Eisenstadt Report, pp. 24-25.

⁶⁵ Eisenstadt Report, pp. 25-26.

participants were told that the default was not to be an organ donor and they were given a choice to confirm or change that status. The second was the “opt-out” condition, in which the default was to be a donor. The third had no prior default. About 42% of the participants consented to be donors when they had to “opt-in”, compared to 82% of donors that had to “opt-out,” and 79% of participants for which there was no default.⁶⁶

- Respondents in an online survey were asked about whether they wanted to be contacted about health surveys. When “Do NOT notify me about more health surveys” was unchecked, 96.3% of the participants agreed to be contacted about more health surveys compared to 69.2% when the box for the above question was checked.⁶⁷
- A study of 401(k) savings decisions of employees of a Fortune 500 company in the health care and insurance industry found that 71% of newly hired employees that participated in the 401(k) plan did not change the 3% default contribution rate or the allocation of their savings into a money market fund.⁶⁸

V. Dr. Eisenstadt’s Estimates of the Competitive Effects of Realcomp Policies

A. Effect on the percentage of non-ERTS listings in the Realcomp MLS

1. Dr. Eisenstadt’s opinions

60. Dr. Eisenstadt argues that, consistent with his opinion that neither the Website Policy nor the Search Function Policy effectively disadvantage non-ERTS listings, the evidence shows that the Realcomp policies have not significantly reduced the percentage of non-ERTS listings on the Realcomp MLS. In particular, he argues that compared to the Ann Arbor MLS,

⁶⁶ Johnson, Eric J. and Goldstein, Daniel. “Do Defaults Save Lives?” *Science*, November 2003, 302, pp. 1338-39.

⁶⁷ Bellman, Steven, Johnson, Eric J. and Lohse, Gerald L., “Defaults, Framing and Privacy: Why Opting In-Opting Out,” *Marketing Letters*, 2002, 13(1), pp. 5-15.

⁶⁸ Madrian, Brigitte C. and Shea, Dennis F., “The Power of Suggestion: Inertia in 401(k) Participation and Savings Behavior,” *Quarterly Journal of Economics*, November 2001, 116 (4), pp. 1149-87.

“the estimated share of sellers who use discount or flat-fee contracts in the area served by Realcomp is less than one percentage point lower than the share of sellers using discount contracts in the adjacent area that is served by the Ann Arbor MLS, which has no allegedly restrictive policies.”⁶⁹ He claims that, in fact, the effect of Realcomp’s policies on the use of *flat-fee* listing contracts has been even smaller, because many non-traditional brokers in the Realcomp area have circumvented Realcomp’s restrictions by offering flat-fee ERTS contracts rather than non-ERTS contracts.⁷⁰

2. *Dr. Eisenstadt’s methodology is flawed*

61. Dr. Eisenstadt bases his entire empirical analysis of the effects of Realcomp’s policies on a comparison with the Ann Arbor MLS. His reliance on a single MLS for his comparison is reason enough to question the results. The reason is that factors other than Realcomp’s restrictions may affect the percentage of non-ERTS listings. For example, the prevalence of non-ERTS contracts in a given area may be related to the amount of advertising by limited service brokers, the characteristics of home buyers and sellers, and other features of the real estate market in a given area. One way to control for such extraneous factors is to use more than a single MLS as a benchmark. By using more than a single MLS, the influence of extraneous factors is reduced because variation in the percentage of non-ERTS listings due to extraneous factors is more likely to be offsetting and thus averaged out. Thus, the analyst reduces the risk that extraneous factors will unduly influence the results of the comparison. Another way to control for extraneous factors is to select MLSs based on some objective criteria related to the expected propensity of non-ERTS listings. Instead, Dr. Eisenstadt seems to have arbitrarily picked Ann Arbor for purposes of comparison.

62. In my initial report, I presented the results of a more comprehensive empirical analysis of the effect of Realcomp’s policies on the prevalence of non-ERTS contracts.⁷¹ This analysis makes use of data from 10 different MLSs (including Realcomp). Moreover, rather than arbitrarily choosing an MLS, I used objective criteria to select the MLSs included in the sample.

⁶⁹ Eisenstadt Report, p. 6.

⁷⁰ Eisenstadt Report, pp. 29-30.

⁷¹ Williams Report, pp. 41-42.

These criteria are related to factors likely to affect the level of non-ERTS listings in different geographic areas.⁷² The analysis used data from these 10 MLSs to compare the percentage of non-ERTS listings for MLSs with no discriminatory access restrictions, with the percentage of non-ERTS listings for MLSs with discriminatory access restrictions similar to the restrictions implemented by Realcomp. The result of this statistical analysis is that discriminatory access rules are associated with a statistically significant decrease in the percentage of non-ERTS listings equal to 5.5 percent. This estimate is significant at a 99.99% level of confidence. Rather than addressing the results of this comprehensive empirical study, Dr. Eisenstadt offers a comparison with one arbitrarily chosen MLS.

3. *The conclusions that Dr. Eisenstadt derives from his own results are flawed*

63. The result of Dr. Eisenstadt's comparison is that the percentage of non-ERTS listings on the Ann Arbor MLS, where there are no restrictions on non-ERTS listings, is six times higher than the percentage of non-ERTS listings on the Realcomp MLS.⁷³ This result is fully consistent with the results of my own analysis of the effect of Realcomp's restrictions and with the conclusion that Realcomp's restrictions are associated with significant decreases in the percentage of non-ERTS listings.

64. Dr. Eisenstadt dismisses this result by defining the question in a way that gives him the desired answer. Dr. Eisenstadt defines the question as the percentage of non-ERTS listings used to list properties *located in the service area of the MLS*.⁷⁴ He then proceeds to eliminate any non-ERTS listing for a property located outside of the primary service area of the Ann Arbor MLS (Washtenaw).⁷⁵ After eliminating from consideration any listing for a property

⁷² Williams Report, Appendix C.

⁷³ Eisenstadt Report, p. 27: "...just 0.74 percent of the contracts listed in Realcomp *Online*® in 2005-6 carried [non-ERTS] designations, while the combined share of EA, limited service and MLS-only contracts listed on the Ann Arbor MLS over the same period was 4.21 percent."

⁷⁴ Eisenstadt Report, pp.27-28.

⁷⁵ Eisenstadt Report, p. 28.

located outside of Washtenaw County, he finds that percentage of non-ERTS contracts, according to his definition, is 1.6 percent.⁷⁶

65. But the question for antitrust purposes is not “the percentage of non-ERTS listings used to list properties located in the service area of the MLS.” Instead, the question is “the percentage of non-ERTS listings but-for the Realcomp restrictions.” If brokers dual list for business reasons, such as a desire to reach a wider audience of potential home buyers, then it is simply incorrect to exclude them from the analysis because those non-ERTS listings would be present in the but-for world of no restrictions. There is deposition testimony in this case confirming that brokers dual list for business reasons.⁷⁷ [REDACTED]

[REDACTED] Indeed, Dr. Eisenstadt himself not only acknowledges that dual listings are used for business reasons in his report, he also argues that the cost of doing so is not prohibitive.⁷⁸ It is therefore extremely difficult to reconcile the fact that he advocates dual listing on the one hand and then argues that this business practice should be ignored when the results of his analysis are consistent with the existence of an anticompetitive effect associated with Realcomp’s restrictions.

66. Moreover, even if one accepts Dr. Eisenstadt’s methodology by which he arrives at the conclusion that the percentage of non-ERTS listings in Washtenaw county is 1.6 percent, this does not call into question the results from my empirical analysis.⁷⁹ Dr. Eisenstadt’s estimated percentage of non-ERTS listings in Washtenaw is more than twice the percentage of non-ERTS listings in the Realcomp MLS (0.74% according to Dr. Eisenstadt).⁸⁰ Thus, even this flawed comparison supports the conclusion that Realcomp’s policies have had a statistically significant effect on the prevalence of non-ERTS listings.

⁷⁶ Eisenstadt Report, p. 28: “As a result, only an estimated 1.6 percent ... of owners with properties in Washtenaw County chose non-ERTS contracts.”

⁷⁷ See, e.g., Gleason Deposition, p. 87; Aronson Deposition, p. 32.

⁷⁸ Eisenstadt Report, pp. 14-15.

⁷⁹ Eisenstadt Report, p. 28.

⁸⁰ Eisenstadt Report, p. 27.

4. *Dr. Eisenstadt's analysis shows that Realcomp's policies have forced many non-traditional brokers to offer full-service ERTS listings instead of limited-service non-ERTS listings.*

67. Dr. Eisenstadt also argues that his analysis comparing the prevalence of non-ERTS listings in the Realcomp MLS with the Washtenaw county listings of the Ann Arbor MLS actually overstates the effect of the Realcomp policies because brokers in the Realcomp MLS have circumvented the Realcomp policies by offering flat-fee ERTS contracts rather than non-ERTS contracts.⁸¹ He claims that flat-fee ERTS contracts used by discount brokers appear to be more prevalent in Realcomp's service area than they are in the Ann Arbor MLS.⁸² Dr. Eisenstadt concludes from this that flat-fee listing contracts have not been disadvantaged by the Realcomp restrictions.

68. It is unclear why Dr. Eisenstadt focuses his analysis of the competitive effects of Realcomp's restriction on *flat-fee* contracts, including ERTS flat-fee contracts, rather than *non-ERTS* contracts. The only explanation he offers is that "most limited service brokerages market their services using flat-fee contracts."⁸³ But the flat-fee aspect of many non-ERTS contracts is not the only, or even primary, characteristic that makes non-ERTS contracts a significant competitive threat to traditional brokers.

69. Flat-fee ERTS contracts in the Realcomp MLS are necessarily full service. This is because Realcomp's minimum services requirement for ERTS listings ensures ERTS listings are full service.⁸⁴ In particular, Realcomp requires that brokers listing properties as ERTS provide a full array of services, which it defines as showing the property to potential home buyers, accepting and presenting offers to the home seller, advising sellers as to the merits of purchase offers, assisting the seller in developing and communicating counteroffers, and helping the seller negotiate with home buyers.⁸⁵ Realcomp's minimum service requirement for ERTS

⁸¹ Eisenstadt Report, pp. 29-30. He claims that "flat-fee brokers who list properties in the Realcomp service area sometimes encourage prospective customers to choose discount or flat-fee ERTS contracts in place of flat-fee EA contracts." *Id.*, p. 29.

⁸² Eisenstadt Report, p. 29.

⁸³ Eisenstadt Report, p. 27.

⁸⁴ *See, e.g.*, Williams Report, p. 37.

⁸⁵ Realcomp II Ltd. Rules and Regulations, October 2006 (RC1337-1363 at 1341). Realcomp describes an LS listing as one in which "the listing broker will NOT provide one, or more, of the following services: (a) Arrange

listings ensures that unbundled brokerage services can only be supplied using non-ERTS listings. Dr. Eisenstadt claims that “Realcomp’s policies do not proscribe the use of flat-fee contracts, including flat-fee ERTS contracts...”⁸⁶ But he ignores the fact that Realcomp’s minimum service requirement ensures that ERTS listings correspond to full service brokerage contracts. By unbundling the full set of services supplied by listing brokers, non-ERTS contracts allow brokers to offer home sellers a subset of brokerage services, if they desire, rather than an ‘all-or-nothing’ choice.

70. In fact, Dr. Eisenstadt’s analysis reveals that the Realcomp restrictions have had a significant effect. In particular, his analysis shows that some non-traditional brokers have switched their customers from non-ERTS to ERTS listings as a result of the Realcomp restrictions. Dr. Eisenstadt shows that for discount brokerages that “appear to offer only flat-fee contracts...the ratio of flat-fee ERTS contracts to EA contracts is about four times higher in Realcomp’s area than in Washtenaw county.”⁸⁷ He also provides evidence that “brokers who list properties in the Realcomp service area sometimes encourage prospective customers to choose discount or flat-fee ERTS contracts in place of flat-fee EA contracts.”⁸⁸ But this precisely shows the effect of Realcomp’s discriminatory access restrictions. This evidence confirms that non-traditional brokers have been forced to switch to ERTS contracts from EA, MEO, and LS listings contracts.

71. Dr. Eisenstadt argues that the ERTS flat-fee contracts offered by these non-traditional brokers are equivalent to non-ERTS contracts from the perspective of home sellers because “... while flat-fee ERTS contracts are nominally more expensive, they offer potentially

appointments for cooperating brokers to show listed property to potential purchases but instead gives cooperating brokers authority to make such appointments directly with the seller(s); (b) Accept and present to the seller(s) offers to purchase procured by cooperating brokers but instead gives cooperating brokers authority to present offers to purchase directly to the seller(s); (c) Advise the seller(s) as to the merits of offers to purchase; (d) Assist the seller(s) in developing, communicating, or presenting counteroffers; or (e) Participate on the seller(s) behalf in negotiations leading to the sale of listed property.”

⁸⁶ Eisenstadt Report, p. 27.

⁸⁷ Eisenstadt Report, p. 30.

⁸⁸ Eisenstadt Report, pp. 29-30.

greater value to the seller by including more services.”⁸⁹ But this precisely shows the competitive impact – brokers are forced to offer a bundle of product at a higher price.

B. Effect on selling price of non-ERTS listed homes

1. Dr. Eisenstadt's opinions

72. Dr. Eisenstadt claims that another way to assess the competitive impact of Realcomp's policies is to analyze the effect that the policies have had on the sales prices of homes listed under non-ERTS contracts in the Realcomp MLS.⁹⁰ He argues that if the policies have harmed competition, then home sellers using non-ERTS contracts in the Realcomp MLS should realize lower sales prices than they would but-for the Realcomp restrictions.

73. Dr. Eisenstadt tests this hypothesis by conducting an empirical analysis that compares the sales prices of properties in the Realcomp MLS with the prices of properties in the Ann Arbor MLS. Specifically, he estimates the relationship between home sales prices and listing type (*i.e.* ERTS or non-ERTS), and how this relationship differs between the Realcomp MLS and the Ann Arbor MLS, controlling for various characteristics of the homes and the areas in which they are located.⁹¹ The results of his analysis are that sales prices of ERTS listed homes in the Realcomp MLS are 17% lower than sales prices of ERTS listed homes in the Ann Arbor MLS.⁹² In the Ann Arbor MLS, the selling price of homes listed using non-ERTS contracts is 5% lower than homes listed using ERTS contracts.⁹³ In the Realcomp MLS, however, non-ERTS listed homes sell for 8% *more* than ERTS listed homes.⁹⁴ Dr. Eisenstadt attributes this disparity between the Ann Arbor and the Realcomp MLS to the Realcomp restrictions and concludes that “Realcomp's policies have not harmed (and, indeed, appear to have helped)

⁸⁹ Eisenstadt Report, p. 29.

⁹⁰ Eisenstadt Report, p. 44.

⁹¹ Eisenstadt Report, pp. 45-46, Appendix C.

⁹² Eisenstadt Report, p. 46, fn. 116.

⁹³ *Id.* The difference between the sales prices of ERTS and non-ERTS listed homes in the Ann Arbor MLS is statistically insignificant according to Dr. Eisenstadt's regression. Eisenstadt Report, p. 46, fn. 116.

⁹⁴ Eisenstadt Report, Exhibit 7. This result is derived from the coefficients on LTDSERVICE and REALCOMP*LTDSERVICE. It is calculated as $(e^{(0.13-0.05)} - 1)$.

sellers.”⁹⁵ In particular, he concludes from these numbers that the effect of the Realcomp restrictions is a 14% increase in the sale price of homes listed as non-ERTS.⁹⁶

2. *Dr. Eisenstadt’s empirical results are contrary to common sense and contradicted by his own analysis.*

74. According to Dr. Eisenstadt’s interpretation, the results of his empirical analysis indicate that home sellers are better off as a result of Realcomp’s restrictions. His results show that, relative to ERTS-listed homes, homes sold using non-ERTS listings on Realcomp had sale prices that were 14% higher on average than homes sold using non-ERTS listings on the Ann Arbor MLS, causing him to claim that “sellers of limited service properties listed on Realcomp realize significantly higher sale prices than sellers of limited service properties listed on the Ann Arbor MLS.”⁹⁷ Dr. Eisenstadt infers from this statistical result that Realcomp’s restrictions actually help the home sellers who still use them. He fails to mention the home sellers who no longer have the ability and/or incentive to use non-ERTS listings because of the Realcomp restrictions.

75. The only explanation that he offers for the counterintuitive result that Realcomp’s restrictions result in higher sale prices for home sellers using non-ERTS listings is that “Realcomp’s policies increase selling agents’ incentives to promote and show their limited service properties to their clients...” But this explanation is insufficient to explain another result of his statistical analysis, namely that home sellers using non-ERTS contracts on Realcomp receive 8% higher sales price than home sellers using ERTS contracts on Realcomp. Even if Realcomp’s policies increase cooperating brokers’ incentives to promote and show non-ERTS properties to their clients, why should this incentive be greater for non-ERTS contracts than ERTS contracts?

76. Equally important, Dr. Eisenstadt’s ‘incentive’ explanation contradicts the general thrust of his report, the essence of which is that the restrictions are procompetitive because they favor ERTS listings over non-ERTS listings which he alleges ensures parity in bidding. It also

⁹⁵ Eisenstadt Report, p. 7.

⁹⁶ Eisenstadt Report, pp. 46-47.

⁹⁷ Eisenstadt Report, p. 46.

contradicts his arguments for why non-ERTS listings are detrimental and thus require restricting. Realcomp's restrictions do nothing to change the incentives of home buyers and home sellers using non-ERTS listings. The restrictions only discourage their use. Therefore, whatever alleged economic problems associated with non-ERTS listings that justify Realcomp's restrictions continue to be present even after the restrictions are imposed. For example, Dr. Eisenstadt and Respondents have argued that cooperating brokers have little incentive to show properties using non-ERTS listings or otherwise supply brokerage services because of an alleged bidding disadvantage, an alleged risk of free-riding, and an alleged risk of investing time and effort but not ultimately making the sale. Realcomp's access restrictions alter none of these alleged risks, if they existed at all. Now, according to Dr. Eisenstadt, not only are cooperating brokers who are members of Realcomp willing to provide services for non-ERTS listings that both he and Respondent argue they have no individual incentive to provide, but they do so with such vigor that home sellers receive a 14% higher sale price. This result defies common sense.

3. *Dr. Eisenstadt's statistical analysis is flawed in several important aspects*

77. It is noteworthy that even though his dataset contains 36,596 observations, Dr. Eisenstadt's empirical results regarding the relationship between the sale price of homes and non-ERTS listing status focuses on the difference in sales prices between 27 properties listed using non-ERTS contracts in Ann Arbor, and 101 properties listed using non-ERTS contracts in Realcomp.⁹⁸

78. More importantly, Dr. Eisenstadt's statistical model, and the conclusions that he draws from it, are flawed in several crucial respects. Essentially, Dr. Eisenstadt finds that relative to ERTS listings, non-ERTS listed in the Realcomp MLS sell at a higher price than non-ERTS listed homes in the Ann Arbor MLS. That is, he finds a *correlation* between listing type and sales price, and this correlation differs between the Realcomp MLS and the Ann Arbor MLS. Based on this correlation, he infers a causal relationship whereby the Realcomp restrictions cause the sales prices for homes listed using non-ERTS listings on the Realcomp MLS to be relatively higher than non-ERTS listed homes on the Ann Arbor MLS. In short, he interprets the result as evidence that the Realcomp restrictions had a positive *effect* on sales prices when a non-ERTS

⁹⁸ Source: Data received from Dr. Eisenstadt.

contract is used. But Dr. Eisenstadt has offered very little in way of a theory that would explain why or how Realcomp's restrictions could actually be helpful when non-ERTS listings are used (a topic I discuss in more detail below). To the contrary, the general thrust of his analysis is that the Realcomp restrictions are a means of limiting the bundle of services provided to non-ERTS listed homes and thus effectively raising the price of non-ERTS listings. In the absence of an economic basis for interpreting a correlation as causation, the inference that the result merely reflects correlation cannot be rejected. In fact, a detailed examination of the data suggests evidence in support of the inference that Dr. Eisenstadt has merely detected a correlation between sales price and type of listing on Realcomp.

79. A detailed look at the data show that the characteristics of non-ERTS listed homes in Realcomp differ systematically from the characteristics of non-ERTS listed homes on the Ann Arbor MLS. Moreover, these differences in characteristics are likely to be correlated with housing prices. For example, in the Realcomp MLS, non-ERTS listed homes are, on average, 10 years newer than ERTS listed homes, whereas in Ann Arbor, they are roughly the same age. Also, in the Realcomp MLS, non-ERTS listed homes are on average over 200 square feet bigger than ERTS-listed homes, whereas in the Ann Arbor MLS, they are 125 square feet *smaller*. These relative differences in the age of the homes sold (non-ERTS listings in Realcomp are relatively younger) and the relative differences in the size of the homes sold (non-ERTS listings in Realcomp are relatively bigger) shows that there are systematic differences in the pool of houses that were sold on Realcomp and Ann Arbor. It also suggests why the statistical results show that the sale prices are greater for non-ERTS-listed homes on Realcomp, relative to ERTS-listed homes, than on the Ann Arbor MLS. Newer homes and bigger homes typically have higher sales prices and they may differ in terms of other characteristics for which Dr. Eisenstadt does not control, such as being newly renovated or possessing curb appeal. If there are housing characteristics that systematically differ between Realcomp and Ann Arbor that are not controlled for in Dr. Eisenstadt's statistical model, the effect of these characteristics will show up in the regression analysis as an effect of the Realcomp restrictions, but it would be incorrect to interpret the results in this way.

80. There is an alternative interpretation of Dr. Eisenstadt's statistical results that better fit his statistical results than his explanation. If the Realcomp restrictions do in fact

“restrict” non-ERTS listings in ways that make them less effective as a marketing tool, then it would make economic sense to use non-ERTS listings on the Realcomp MLS only if the expected savings in brokerage costs are sufficiently large to compensate for the competitive disadvantage created by the Realcomp restrictions. Because the brokerage cost savings are proportional to the price of the home,⁹⁹ this implies that it is more likely to make economic sense to use non-ERTS listings for higher priced homes on the Realcomp MLS. In contrast, in the absence of restrictions that reduce the marketability of non-ERTS listings on the Ann Arbor MLS, I would not necessarily expect the propensity to use non-ERTS listings to favor primarily higher-priced homes.

81. This explanation explains why Dr. Eisenstadt’s statistical results show that houses using non-ERTS listings have sale prices that are 14% higher, relative to ERTS-listed homes, on the Realcomp MLS compared to the Ann Arbor MLS. This explanation is also consistent with Dr. Eisenstadt’s findings that non-ERTS listed homes in the Realcomp MLS on average sell for 8% higher prices than ERTS listed homes, a result that cannot be reconciled with Dr. Eisenstadt’s explanation. Since there is no restriction on ERTS listings on Realcomp there is no bias toward listing only higher-priced houses using them. In addition, the presence of restrictions for non-ERTS listings on Realcomp makes these listings economically less viable as a marketing method for lower-priced homes and induces home sellers of lower-priced homes who would have used non-ERTS listings but-for the restrictions to use ERTS listings. Both consequences of the Realcomp restrictions—the absence of a bias toward higher-priced homes for ERTS listings and substitution of ERTS listings for non-ERTS listings by sellers of lower-priced homes—implies that the sale prices for homes using non-ERTS listings on Realcomp will be greater on average than the sale prices for ERTS listings on Realcomp.

82. In sum, the data suggests that Dr. Eisenstadt’s regression is not capturing the effect of listing type on sales price, but rather, the effect of sales price on the propensity to use a non-ERTS listing. The result that, in the Realcomp MLS, non-ERTS listed homes tend to be

⁹⁹ For instance, at the typical 6 percent commission paid by the home seller, the commission on the sale of a \$150,000 house would be \$9,000. The cost savings of using a non-ERTS unbundled services broker (for expositional purposes, assume \$499 for unbundled services from AmeriSellRealty) is \$8501 (assuming that the home buyer does not use a cooperating broker). However, if a house sells for \$300,000, the commissions using a traditional broker and an ERTS contract would be \$18,000, and the savings of using a flat-fee EA contract would be \$17,501.

more expensive homes than ERTS listed homes, whereas in the Ann Arbor MLS they tend to be similar to the average ERTS listed home, supports the conclusion that the Realcomp restrictions have anticompetitively restricted the use of non-ERTS listings. In particular, the result suggests that Realcomp's Website Policy and Search Function Policy have restricted the use of non-ERTS listing by sellers of lower-priced homes.

VI. Dr. Eisenstadt's New Theories of Procompetitive Justifications

A. Dr. Eisenstadt offers procompetitive justifications for Realcomp's restrictions that are completely different from the justifications offered by Realcomp.

83. Before addressing Dr. Eisenstadt's new theories of procompetitive justifications for Realcomp's discriminatory access restrictions, it is important to note that the theories he offers are entirely different than the justifications offered by Realcomp. In particular, Realcomp offered two justifications for its Website Policy. First, Realcomp argued that its Website Policy was intended to prevent home buyers from using the services of cooperating brokers but then independently identifying and purchasing a property after a cooperating broker had committed time and effort in unsuccessful attempts to identify a house that the home buyer wanted to purchase. Second, Realcomp attempted to justify its Website Policy based on the argument that a home seller using a non-ERTS listing unjustly benefits from using the MLS if a cooperating broker is not the procuring cause of the sale.

84. Realcomp also offered two different justifications for its Search Function Policy. First Realcomp attempted to justify its Search Function Policy based on a need to provide advance notification to cooperating brokers that the listing broker was offering limited services. Second, Realcomp attempted to justify its Search Function Policy based on the risk that home buyers would free-ride on the efforts of cooperating brokers. I refuted each of Realcomp's procompetitive justifications in my initial report. In his report, Dr. Eisenstadt does not dispute any of my conclusions.

85. Instead, Dr. Eisenstadt offers theories of procompetitive justifications that are entirely different. In particular, he claims that the Realcomp restrictions have three

procompetitive benefits. First, they prevent home buyers from being “artificially disadvantaged” as a result of using a cooperating broker and preserve cooperating agents’ incentives to supply services. Second, he theorizes that the Realcomp restrictions create an optimal pricing structure that “balance” the benefits that different brokers bring to the Realcomp MLS. Third, he claims that the restrictions prevent the “subsidization” by cooperating brokers of home sellers that use non-ERTS listings.

B. Dr. Eisenstadt’s claim that the Realcomp restrictions prevent home buyers from being “artificially disadvantaged” as a result of using a cooperating broker and preserve cooperating agents’ incentives to supply services

1. Dr. Eisenstadt’s opinions

86. Dr. Eisenstadt argues that home buyers who are assisted by cooperating brokers are disadvantaged when bidding for a non-ERTS listed property vis-à-vis home buyers who are unassisted by a cooperating broker. According to Dr. Eisenstadt, the reason for this alleged bidding disadvantage is that “a seller must pay a commission when a buyer uses a cooperating agent.”¹⁰⁰ Dr. Eisenstadt argues that the direct consequences of the alleged bidding disadvantage are that (a) home buyers who choose to use brokers are at a bidding disadvantage and therefore harmed and (b) cooperating brokers have a reduced incentive to supply their services in transactions where the property is listed using a non-ERTS listing.¹⁰¹ He further argues that, because “a [home] seller with an ERTS contract pays a selling agent’s commission whether or not the buyer is represented by a selling agent,”¹⁰² the Realcomp restrictions eliminate the alleged bidding disadvantage faced by broker-assisted home buyers and restore the incentives of cooperating brokers to render services for properties listed under non-ERTS contracts.¹⁰³

¹⁰⁰ Eisenstadt Report, pp. 32-33.

¹⁰¹ “In essence, the proposed relief would not only reduce selling agents’ incentives to render their services in conjunction with purchasing EA or MLS-only properties, but also would harm home buyers who prefer to use a realtor when they purchase those properties.” Eisenstadt Report, p. 34.

¹⁰² Eisenstadt Report, p. 33.

¹⁰³ “This raises a selling agent’s expected commission from showing ERTS properties relative to EA properties, and increases the incentive of a selling agent to show and promote an ERTS property. And, because they are not at a bidding disadvantage vis-à-vis buyers who do not use selling agents, buyers have more incentive to use selling agents’ services when they acquire ERTS properties than when they acquire EA properties.” Eisenstadt Report, pp. 33-34.

2. *Home buyers are not “artificially disadvantaged” by using a cooperating broker, but rather, bear the true cost of the brokerage services that they use.*

87. In a competitive market for real estate, broker-assisted home buyers who assign the same value to a property as unassisted home buyers are not at a bidding disadvantage. A simple example illustrates the point. Suppose that a broker-assisted home buyer and an unassisted home buyer value a property for sale equally and they both believe that it is worth \$100,000. An unassisted home buyer would simply bid his or her highest valuation, which in this example is \$100,000. A broker-assisted home buyer is also willing to bid \$100,000 for the house, but if the broker-assisted home buyer bids only that amount the home seller receives only \$97,000 because the commission of the cooperating broker used by the broker-assisted home buyer is subtracted from the home seller's sale proceeds. Thus, in order to make the bid comparable to that of an unassisted home buyer, the broker-assisted home buyer must pay for the brokerage services used by incorporating the price of those services into their bid. For example, a bid by a broker-assisted home buyer of roughly \$103,000¹⁰⁴ fully incorporates the commission to the cooperating broker and ensures that the home seller receives \$100,000 net of the cooperating broker's commission. A rational home seller would be indifferent between a bid of roughly \$103,000 by a broker-assisted home buyer and a bid of \$100,000 by an unassisted home buyer because both bids result in the same net price to the home seller.

88. The broker-assisted home buyer is not disadvantaged because he or she must pay the commission of the cooperating broker that they hire. In any situation where a bidder hires professional services, the bidder bears the cost of those services. However, in many situations, such as when a bidder for commercial real estate hires lawyers or accountants to assist in the purchase, the bidder pays for these services separately. Thus, the bid itself is independent of the cost of these services but the economic effect is the same in that the bidder bears the cost of services used. The difference here is that under an ERTS contract, the home buyer does not have the option of paying for the services of a cooperating broker separately. The physical payment of the cooperating broker's commission is made by the home seller because it is subtracted from the home seller's sales proceeds. However, regardless of which party makes the physical

¹⁰⁴ The bid that ensures the home seller a net price of \$100,000 is equal to \$103,093. If the cooperating broker's commission is 3 percent of the sale price, then the Net Bid = Bid*(1 - 0.03) = Bid*(0.97). This implies that the gross bid must equal (\$100,000/0.97) or \$103,093.

payment, the determination of which party—the home buyer or home seller—will ultimately bear the economic cost depends on market conditions. In a situation involving multiple bidders, some of which are broker-assisted and some unassisted by brokers, broker-assisted bidders will have little bargaining power. As a result, it is unlikely that the home buyer will be able to get the home seller to bear all or part of the cooperating broker's commissions. In a highly contested bidding environment, a broker-assisted home buyer will likely need to pay for brokerage services that they hire, and the ERTS contract necessitates that they do this by incorporating the cost of the brokerage services that they use into their bid. However, they are not disadvantaged by this reality, any more than a bidder for commercial property is disadvantaged because they bear the cost of legal and accounting services that the bidder hires.

89. Dr. Eisenstadt assumes that a broker-assisted home seller could never bid an amount that ensures the home seller a net price that is competitive with the net price a home seller would receive from an unassisted home buyer. For example, in his footnote 55, he provides an example of two bidders who are “willing to pay *at most* \$100,000.” (emphasis added) He then goes on to explain that if the broker-assisted home buyer bids \$100,000, the home seller will choose the bid of the unassisted home buyer as long as it is greater than \$97,000, which is correct given how he constructs the example. But the example only works because of the assumption that the broker-assisted home buyer is unable to increase his or her bid to reflect the cost of the cooperating broker's commission. Otherwise, the bid of the broker-assisted home buyer would increase to an amount whereby the home seller would be indifferent between the bids of the broker-assisted home buyer and the unassisted home buyer.¹⁰⁵

90. The foregoing examples demonstrate that there is no economic basis for the conclusion that broker-assisted home buyers are at a bidding disadvantage. As long as broker-assisted home buyers are able and willing to bid an amount that fully compensates the home seller for the commission of the cooperating broker, they are not at a bidding disadvantage.¹⁰⁶

¹⁰⁵ If the broker-assisted home buyer is *unwilling* to bid more than \$100,000, then this implies that the broker-assisted home buyer places a lower value on the property (only \$97,000 net of the cooperating broker's commission) than the unassisted broker (\$100,000). In this case, it makes no economic sense to say that the broker-assisted home buyer is disadvantaged. Given that the broker-assisted buyer has a lower valuation and is therefore willing to bid less, we would expect the unassisted broker to win the bidding contest in a competitive market.

¹⁰⁶ By bidding an amount that compensates the home seller for the commission of the cooperating broker, the home buyer bears the full cost of the brokerage services that they employ. This result is likely to lead to a more efficient

The examples also demonstrate that the bidding disadvantage that Dr. Eisenstadt alludes to is not a consequence of the provisions of non-ERTS contracts. Instead, if it exists at all, the bidding disadvantage described by Dr. Eisenstadt is the result of factors completely unrelated to the listing contract which constrain the ability of broker-assisted home buyers to bid their highest valuation net of the cooperating broker's commission, such as a financial market constraint. But Dr. Eisenstadt offers no economic evidence that such a constraint exists, let alone that it affects broker-assisted home buyers differently from unassisted home buyers.¹⁰⁷

3. *Because broker-assisted home buyers are not at a bidding disadvantage, there is no economic basis for the conclusions that broker-assisted home buyers are harmed or that cooperating brokers have a reduced incentive to supply services based on listing type*

91. It follows directly from the foregoing discussion that home buyers who prefer and choose to use brokerage services are not disadvantaged or harmed by this choice, as Dr. Eisenstadt concludes. It is true that broker-assisted home buyers may bear the full cost of the brokerage services that they use. But requiring home buyers to pay for the brokerage services that they use does not disadvantage or harm them.

92. It also follows from the foregoing discussion that since broker-assisted home buyers are not at a bidding disadvantage, there is no disincentive for cooperating brokers to supply their services for properties using non-ERTS listings, as Dr. Eisenstadt has concluded. Given that there is no bidding disadvantage, the bids of broker-assisted home buyers are just as

allocation of brokerage services because home buyers explicitly take into account the cost of the brokerage services that they use.

¹⁰⁷ Nor is it likely that he could show that financial constraints exist and affect broker-assisted home buyers differentially. The prevailing consensus has been that the lending standards in the home mortgage market have been too lax. *See, e.g.*, Simon, Ruth, "Mortgage Lenders Loosen Standards," *RealEstateJournal.com*, July 27, 2005: "But lenders are making it still easier for borrowers to qualify for a loan. They are lowering the credit scores needed to qualify for certain loans, increasing the debt loads borrowers can carry and easing the way for borrowers to get loans while providing little documentation. In some cases, lenders are easing standards not only for homeowners, but also for the growing number of people buying residential real estate as an investment." *See, also*, "For mortgage market, its prime time," (http://money.cnn.com/2007/03/29/real_estate/dont_forget_prime/index.htm).

likely to succeed as unassisted home buyers and thus a cooperating broker is just as likely to earn a commission for non-ERTS listings as for ERTS listings.¹⁰⁸

4. *Even if cooperating brokers had a disincentive to show non-ERTS listings, such a cost would not lead to inefficiencies because home sellers would internalize such costs in deciding whether to enter into ERTS or non-ERTS contracts.*

93. Dr. Eisenstadt argues that a consequence of the alleged bidding disadvantage is that cooperating brokers have less incentive to show non-ERTS listings because the expected commission is lower than the expected commission for ERTS listings. According to Dr. Eisenstadt, the alleged bidding disadvantage, which I have demonstrated does not exist, decreases the probability that the bid of a broker-assisted home buyer will be successful and thus reduces the likelihood that a cooperating broker will receive a commission which correspondingly reduces the expected value of a brokerage commission for non-ERTS listings relative to ERTS listings.

94. But even momentarily accepting Dr. Eisenstadt's conclusion that the expected commission for non-ERTS listings is lower for the purpose of analysis, this does not provide an economic basis for Realcomp's restrictions because the costs associated with the decision to choose a non-ERTS listing instead of an ERTS listing are fully reflected in the sales price of the house and the brokerage fees paid and thus are fully borne by home sellers making the decision as to whether to enter into an ERTS or non-ERTS contract.

95. Given that home sellers bear the full cost of their listing decision, each home seller individually and independently has the proper incentives to choose or not choose non-ERTS listings. Moreover, there is no reason to assume that home sellers will be uninformed ex ante about their listing decisions because in a competitive market for brokerage services listing brokers have an incentive to supply information to home sellers about the relative benefits of their services, including the relative benefits and costs of listing types, a fact verified every day by the number of solicitations from brokers in our mailboxes. Thus, Realcomp's restrictions are not required to achieve a socially optimal outcome with regard to home sellers' decisions

¹⁰⁸ Cooperating brokers may independently prefer not to deal with non-ERTS listings for reasons unrelated to the alleged bidding disadvantage, an issue that I address in my initial report. For example, cooperating brokers may perceive the risk of free-riding by home buyers to be higher. See generally Section VII of my initial report.

regarding listing type, even if it is “analytically indeterminate”¹⁰⁹ whether the increase in the number of offers from unassisted buyers will offset the reduction in the number of offers from broker-assisted buyers.

5. *Even if home buyers assisted by cooperating brokers were disadvantaged, and they are not, forcing home buyers to pay for the services of a cooperating broker is not procompetitive.*

96. In the above section, I demonstrated (a) that broker-assisted home buyers are not at a bidding disadvantage in a competitive bidding market where their bids reflect the cost of the cooperating broker’s commission and (b) that even if broker-assisted home buyers were disadvantaged, the disadvantage is unrelated to non-ERTS contracts per se. Therefore, the conclusion that Realcomp’s access restrictions are needed to resolve these issues has no economic basis. Nonetheless, it is useful to consider the economic logic supporting Dr. Eisenstadt’s contention that Realcomp’s restrictions are a procompetitive solution to this perceived economic problem.

97. Dr. Eisenstadt admits that Realcomp’s policies make it more likely that home buyers pay for the services of a cooperating broker regardless of whether or not one is employed,¹¹⁰ a point with which I agree.¹¹¹ In fact, he argues that it is procompetitive to require that home buyers pay for services of a cooperating broker regardless of whether or not the home buyer chooses to use such services. As discussed, his rationale is that forcing all home buyers to pay for the services of a cooperating broker eliminates the alleged bidding disadvantage.¹¹²

¹⁰⁹ According to Dr. Eisenstadt, in the absence of Realcomp’s restrictions, if a home seller chooses a non-ERTS listing, the home seller can expect an increase in offers from unassisted home buyers but fewer offers from broker-assisted buyers because for cooperating brokers the expected value of a commission is lower. He goes on to say that “the net price (*i.e.*, the gross sale price less commissions) that the owners of those properties receive is analytically indeterminate.” Eisenstadt Report, pp. 31-32.

¹¹⁰ Eisenstadt Report, p. 33. This is fully consistent with the anticompetitive effects of Realcomp’s restrictions explained in my original report.

¹¹¹ See generally my discussion of anticompetitive effects in Section VI of my initial report.

¹¹² According to Dr. Eisenstadt, ERTS listings eliminate the alleged bidding disadvantage because “a seller with an ERTS contract pays a seller agent’s commission whether or not the buyer is represented by a selling agent.” Therefore, “buyers who use selling agents are not as disadvantaged when bidding for ERTS properties against buyers without agents.” Eisenstadt Report, p. 33.

Here, I disagree. Even if a bidding disadvantage existed, and it does not, there is simply no economic evidence to support the conclusion that the effect of Realcomp's restrictions is procompetitive.

98. Again, momentarily accepting for the sake of analysis Dr. Eisenstadt's bidding disadvantage hypothesis, the supposed effect of the alleged bidding disadvantage is that home sellers may get fewer offers from broker-assisted home buyers and more offers from unassisted home buyers. But as discussed above, the economic consequences of these effects are fully borne by the home seller. Moreover, even if cooperating brokers have less incentive to supply services in the case of non-ERTS listings, they are not harmed from an antitrust perspective because they have the ability to independently avoid non-ERTS listings, if they choose to do so. Since Realcomp's restrictions do not solve economic problems that cannot be solved individually, Realcomp's restrictions are not efficiency enhancing even if a bidding disadvantage existed, and it does not.

99. But Dr. Eisenstadt's reasoning stands the competitive process on its head. He argues for disadvantaging certain low cost bidders—namely, unassisted home buyers—in order to ensure bidding parity with higher cost bidders. As a general proposition this reasoning makes no economic sense, nor does it make economic sense in the context of this case. But this is exactly the procompetitive justification proffered by Dr. Eisenstadt in this case. Using Dr. Eisenstadt's logic, any tying claim involving an intermediate good could be justified on economic grounds because, by forcing all buyers to purchase the tied good, the tie ensures that buyers have equal costs so that none faces a cost disadvantage vis-à-vis another who would choose not to purchase the tied good if free to do so. Raising costs to eliminate a cost advantage is simply not procompetitive.

C. Dr. Eisenstadt's claim that the Realcomp restrictions create an efficient pricing structure

1. Dr. Eisenstadt's opinions

100. Dr. Eisenstadt asserts that ERTS listings are more valuable to an MLS than are non-ERTS listings because cooperating brokers value ERTS listings more.¹¹³ He offers two reasons. "First, EA and other limited service listing contracts can impose higher transaction costs (*e.g.*, scheduling on-site visits and completing paper work at closings) on selling agents who must deal directly with owners rather than with listing agents."¹¹⁴ "Second, ...I would expect potential buyers who view a property on a public website to be less likely to use a selling agent when that property is offered under an EA contract."¹¹⁵ As a result, according to his argument, an independent MLS would charge a higher listing fee for non-ERTS listings than ERTS listings, which he implies is sufficient economic evidence that such differential pricing is efficient.¹¹⁶ He then posits a certain equivalence between charging a higher price to non-ERTS listings and imposing access restrictions such as those at issue in this case.¹¹⁷

2. Dr. Eisenstadt's theories regarding efficient pricing is predicated on the false assumption that home buyers who are assisted by a cooperating broker are disadvantaged when bidding for properties

101. The basis for Dr. Eisenstadt's entire discussion of efficient pricing is that "limited service brokers" allegedly create less positive "indirect network effects" on the MLS platform. The alleged negative indirect network effects are the result of home buyers who are assisted by cooperating brokers being competitively disadvantaged when bidding for properties because they are unable to bid higher than home buyers who are unassisted by cooperating brokers by an

¹¹³ According to Dr. Eisenstadt, "selling agents would be expected to place less value on the number of brokers with non-traditional business models who belong to an MLS platform than on the number of traditional, full-service brokers..." Eisenstadt Report, pp. 37-38.

¹¹⁴ Eisenstadt Report, p. 38.

¹¹⁵ Eisenstadt Report, p. 38.

¹¹⁶ "Therefore, all else equal, I would expect an independent platform (*i.e.* MLS neither owned nor operated by real estate brokers) ... to charge a higher price for listing EA versus ERTS contracts because properties marketed using the latter type of contract will attract more selling agents." Eisenstadt Report, p. 38.

¹¹⁷ "Rather than charging different prices, an independent platform might offer fewer services to listing brokers with EA or other limited service contracts." Eisenstadt Report, p. 38.

amount that compensates the home seller for the cooperating broker's commission. Because the conclusion that broker-assisted home buyers are disadvantaged is false, there is no basis for the indirect network effects that give rise to Dr. Eisenstadt's efficient pricing analysis. In the absence of the claimed indirect network effects, there is no economic justification for charging "limited service brokers" a higher fee for listing services and thus no economic justification for achieving the alleged efficient pricing structure using Realcomp's access restrictions, even if access restrictions were an efficient means of accomplishing a price increase.

3. *Dr. Eisenstadt's efficient pricing justification implies unrealistic assumptions about demand conditions*

102. Beyond its dependence upon the false assumption of a bidding disadvantage, Dr. Eisenstadt's efficient pricing justification suffers from another flaw. The essence of his analysis is that brokers using non-ERTS contracts should bear a larger share of the fixed costs because they generate fewer positive network effects and possibly negative network effects relative to full service brokers. This implies that brokers using non-ERTS contracts should pay a higher membership fee. The MLS would "balance" by using the additional revenues obtained from these brokers to lower the membership fees paid by traditional brokers using ERTS contracts.¹¹⁸ The reduction in the membership fee paid by brokers using ERTS contracts would increase the demand for MLS listing services by these brokers and increase the positive network effects and the value of the MLS.

103. But this implies that the demand for MLS listing services by traditional listing brokers is responsive to a reduction in the membership fee—that is, the demand is elastic at lower membership fees. But the membership fees are a very small part of offering brokerage services. Therefore, it is highly unlikely that lower membership fees to traditional listing brokers would substantially increase the demand for MLS listing services. There is little reason to believe that their demand for MLS listing services is highly elastic at lower membership fees, as

¹¹⁸ Dr. Eisenstadt's theories regarding optimal MLS membership fees misapplies the economic concept of "balancing" as it applies to a "two-sided" market. The economic term "balancing" refers to charging different relative prices on opposite sides of a two-sided market taking into account the relative contributions of participants on either side to the network effects of the platform. Dr. Eisenstadt applies theories intended to explain why it is efficient to charge different relative pricing on opposite sides of a two-sided market (*i.e.* "balancing") to justify charging different relative prices on the same side of a two-sided market. Yet he never explains why this extension is appropriate. Eisenstadt, pp. 36-37.

it must be in order for Dr. Eisenstadt's so-called efficient pricing analysis to make economic sense.

104. The reason why lowering membership fees to traditional listing brokers is unlikely to have any significant effect on their demand for MLS listing services is that lower membership fees do not allow listing brokers to lower their commissions to home sellers significantly. The demand from home sellers for brokerage services is unlikely to be responsive to a reduction in commissions resulting from lower membership fees because listing broker membership fees are a trivial portion of home seller's commission costs.¹¹⁹ Thus, it is highly unlikely that lowering membership fees to traditional listing brokers will lead to more home sellers selecting ERTS listings for their properties in the Realcomp MLS.

105. Consequently, even if there existed an economic basis for the claim that limited service brokers generate fewer positive or even negative network effects, there is no economic basis for the argument that reducing membership fees would significantly affect the demand for MLS listing services by brokers or by home sellers. In fact, the economic evidence shows that most brokers are MLS members at prevailing rates.

4. *The Realcomp discriminatory access restrictions are not equivalent to charging a higher price to non-ERTS listings because such restrictions do not lower the costs of operating the Realcomp MLS.*

106. The basic point of the economic literature on "balancing" cited by Dr. Eisenstadt is that given some optimal uniform price, a network has an incentive to alter the prices paid by network participants such that the relative prices paid by each reflect their relative costs and contributions to the network. Thus, the notion of "balancing" implies raising the price for certain network participants in order to offer correspondingly lower prices to more-valued network participants. In other words, the notion of "balancing" involves disfavoring certain network participants in order to favor more-valued participants.

¹¹⁹ For instance, if a listing broker has 10 listings per quarter, Realcomp's membership fee of \$99 per quarter amounts to \$9.90 per listing. The home sellers' commission for a \$200,000 house, at 6% commission, is \$12,000. Thus, the membership fee is .08% of the cost.

107. Dr. Eisenstadt asserts an economic equivalence between the imposition of Realcomp's access restrictions and raising the membership price to limited service brokers. He states that "rather than charging different prices, an independent platform might offer fewer services to listing brokers with EA or other limited service contracts."¹²⁰ Under certain conditions, if the reduction in services lowered the incremental costs of operating or setting up the MLS, then the service reduction would effectively increase the quality-adjusted price and provide cost savings that could be passed on traditional brokers in the form of lower fees. Such a rebalancing of cost allocation might be consistent with "balancing" in economics.

108. The problem is that the access restrictions do not result in cost savings that can be passed on to traditional brokers. On the contrary, Realcomp incurred additional costs to implement the restrictions to the extent that it had to upgrade or change software to achieve the restrictions and then incur the cost of notifying joint venture members. Thus, Dr. Eisenstadt's attempt to justify the access restriction based on the economics of "balancing" is flawed.

109. Even if one accepted the conclusion that differential pricing is justified on economic grounds, Dr. Eisenstadt provides no economic rationale for why Realcomp's discriminatory access restrictions are the economic equivalent of increasing the membership fees to limited service brokers relative to traditional brokers.

5. *Even if it were optimal to charge members with many listings a higher membership fee, such pricing structure could be achieved by Realcomp implementing a per-listing fee.*

110. Dr. Eisenstadt's arguments regarding efficient pricing and subsidization beg the question – why not charge for listing services on a per listing basis rather than a per member basis? Realcomp has the ability to do so. And, according to Dr. Eisenstadt, it has the incentive to do so. Dr. Eisenstadt bases part of his analysis on "average or incremental cost *per listing*."¹²¹ (original emphasis) And, his entire discussion of "efficient pricing" is based on identifying the socially optimal *pricing* structure. In fact, Dr. Eisenstadt argues that Realcomp's access restrictions can be viewed as a means of accomplishing differences in relative prices. But what

¹²⁰ Eisenstadt Report, p. 38.

¹²¹ Eisenstadt Report, p. 39.

is hidden behind all the extensive theoretical discourse is the simple reality that if, in fact, Realcomp's goal for imposing its access restrictions was to achieve an optimal structure of prices, then the simplest (and likely socially optimal) means of accomplishing the goal would be to actually change the pricing structure.

D. Dr. Eisenstadt's claim that cooperating brokers subsidize home sellers that use non-ERTS listing contracts

1. Dr. Eisenstadt's opinions

111. Another procompetitive rationale offered by Dr. Eisenstadt is based on the claim that cooperating brokers effectively "subsidize" home sellers that use non-ERTS contracts. According to Dr. Eisenstadt, the effective subsidy occurs because cooperating brokers pay the "same quarterly MLS membership fee per office and per agent" but are disadvantaged in procuring buyers for non-ERTS listed homes.¹²² The basis for this theory is that buyers who are assisted by cooperating brokers are disadvantaged in bidding for a non-ERTS listed properties vis-à-vis home buyers who are unassisted by a cooperating broker. Therefore, cooperating brokers as a group are contributing to the costs of the MLS that enables the transaction without an opportunity to profit from the transaction, and therefore they are subsidizing home sellers using non-ERTS contracts.

2. Dr. Eisenstadt's description of cooperating brokers "subsidizing" home sellers makes no economic sense because such so-called "subsidies" would occur any time a cooperating broker is not used by a home buyer, regardless of the listing type

112. Dr. Eisenstadt's theory of cooperating brokers "subsidizing" home sellers that use non-ERTS contracts is predicated on his claim that home buyers employing a cooperating broker are disadvantaged in bidding for non-ERTS listed properties relative to buyers that do not use a broker. In the above section, I demonstrated that broker-assisted home buyers are not at a

¹²² Eisenstadt Report, p. 34: "The relief the FTC seeks would force selling agents to subsidize the marketing expense which sellers who use limited service contracts would otherwise incur to procure buyers themselves. Listing and selling brokers each pay Realcomp the same quarterly MLS membership fee per office and per agent. Given this fee structure, under the proposed relief selling agents would pay part of the cost of distributing information to buyers who do not intend to use their services."

bidding disadvantage. Therefore, cooperating brokers are not artificially foreclosed from procuring buyers who bid on non-ERTS listed properties.

113. Another problem with Dr. Eisenstadt's subsidy argument is that it applies to other circumstances where a cooperating broker is not used by a home buyer. In fact, his theory implies that every time that a cooperating broker is not compensated in connection with the sale of a home listed in the MLS, cooperating brokers are "subsidizing" home sellers and listing brokers who use the MLS system. In all such cases, cooperating brokers are not compensated even though they are contributing membership fees to the Realcomp MLS. Dr. Eisenstadt's theory of cooperating brokers "subsidizing" home sellers also is not limited to non-ERTS contracts. Under an ERTS listing, if the home buyer does not use a broker, then the listing broker becomes the procuring broker and keeps the offer of compensation. But cooperating brokers are still not compensated. The only difference is that on a transaction involving an ERTS listing, the listing broker keeps the offer of compensation.

114. But Realcomp does not have rules aimed at restricting such so-called "subsidies" under these general circumstances. For instance, it does not require that a cooperating broker be used on every transaction related to a property listed in the Realcomp MLS. Moreover, member brokers, and the Realcomp MLS itself, frequently engage in permitted practices, such as sending ERTS listings to websites, designed to provide potential home buyers with listing information. These practices aid home buyers in searching and purchasing properties without the use of a cooperating broker. Thus, accepting Dr. Eisenstadt's theory, these practices, which the Realcomp MLS allows and facilitates, increase the extent of such so-called "subsidization."

E. Dr. Eisenstadt's procompetitive justifications necessarily imply that the Realcomp access restrictions discourage or otherwise impede the use of non-ERTS listings

115. An irrefutable implication of Dr. Eisenstadt's opinion that Realcomp's access restrictions could have the "procompetitive effect" that he alleges is that the restrictions discourage or impede the use of non-ERTS listings. Dr. Eisenstadt argues for ERTS listings as a solution to his alleged bidding disadvantage because they require home buyers to pay for the services of cooperating brokers whether or not they use them. Realcomp's restrictions do not

directly affect the demand for ERTS listings by, for example, reducing the price of those listings to home sellers who might demand them. Thus, Realcomp's restrictions can only achieve the result of encouraging the use of ERTS listings by discouraging the use of non-ERTS listings. If Realcomp's restrictions are to have any effect at all, including Dr. Eisenstadt's alleged procompetitive effects, they do so by discouraging or impeding the use of non-ERTS listings and the nontraditional brokerage services associated with them. This conclusion – that Realcomp's access restrictions discourage or impede the use of non-ERTS listings—is also a key conclusion in my initial report (*See* Section V).

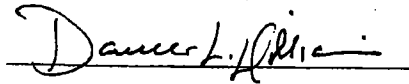
116. Analysis presented by Dr. Eisenstadt and my own analysis is consistent with the conclusion that Realcomp's restrictions have discouraged or impeded the use of non-ERTS listings. For example, Dr. Eisenstadt finds that the percentage of non-ERTS listings on the Ann Arbor MLS is six times higher the percentage of non-ERTS listings on the Realcomp MLS before he makes adjustments. After he makes adjustments, the percentage is still two times higher. Using a larger sample of 10 different MLSs, I also found that the percentage of non-ERTS listings was substantially greater where there were no restrictions of the type used by Realcomp. Also consistent with the conclusion that Realcomp's access restrictions have deterred the use of non-ERTS listings, Dr. Eisenstadt also finds that the ratio of ERTS contracts to non-ERTS contracts is four times higher for a sample of non-traditional brokers on the Realcomp MLS than on the Ann Arbor MLS. And, he states that there is evidence that brokers who list properties in the Realcomp service area have substituted flat-fee ERTS contracts for flat-fee non-ERTS contracts. All of which is consistent with and supports the conclusion that Realcomp's access restrictions discourage or impede the use of non-ERTS contracts and the nontraditional brokerage services associated with them on the Realcomp MLS.¹²³

117. The key difference between the opinions of Dr. Eisenstadt and myself is not the effect of Realcomp's restrictions. The analysis and evidence in both reports indicate that Realcomp's restrictions deter the use of non-ERTS listings by home sellers and listing agents who want to use them. Nor do we disagree that by deterring the use of non-ERTS listings, Realcomp's restrictions aid in forcing home buyers to pay for brokerage services that they do not

¹²³ As I explain in my initial report, Realcomp's minimum service requirement ensures a close correspondence between the percentage of non-ERTS listings and the percentage of nontraditional brokerage contracts.

want or do not use. Dr. Eisenstadt himself explains that “a seller with an ERTS contract pays a selling agent’s commission whether or not the buyer is represented by a selling agent.”¹²⁴

118. The key difference is: I have argued and demonstrated that it is harmful to competition and to consumers of brokerage services to exclude nontraditional brokers because nontraditional brokers change the dynamics of competition and that it is harmful to consumers of brokerage services to force them to pay for brokerage services that they do not want or use. Dr. Eisenstadt believes that these actions are procompetitive. In fact, Dr. Eisenstadt’s analysis implies that such exclusion is necessary.



Darrell L. Williams

5-1-07

Date

¹²⁴ Eisenstadt Report, p. 33.

Documents Considered

Expert Report of Dr. David M. Eisenstadt, April 17, 2007
Expert Report of Darrell L. Williams, Ph.D., April 3, 2007
Complaint Counsel's Objections and Responses to Respondent's First Set of Interrogatories
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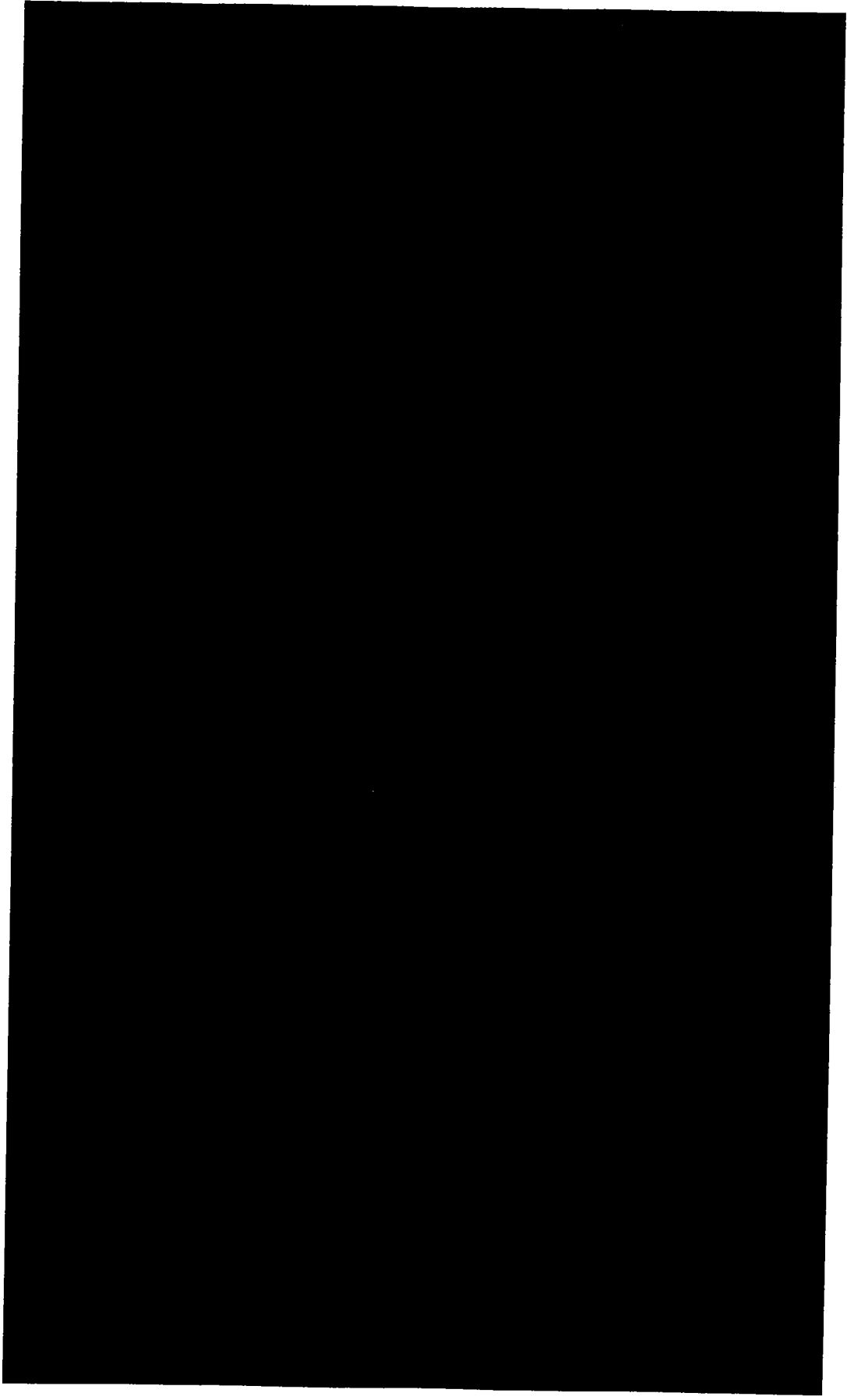
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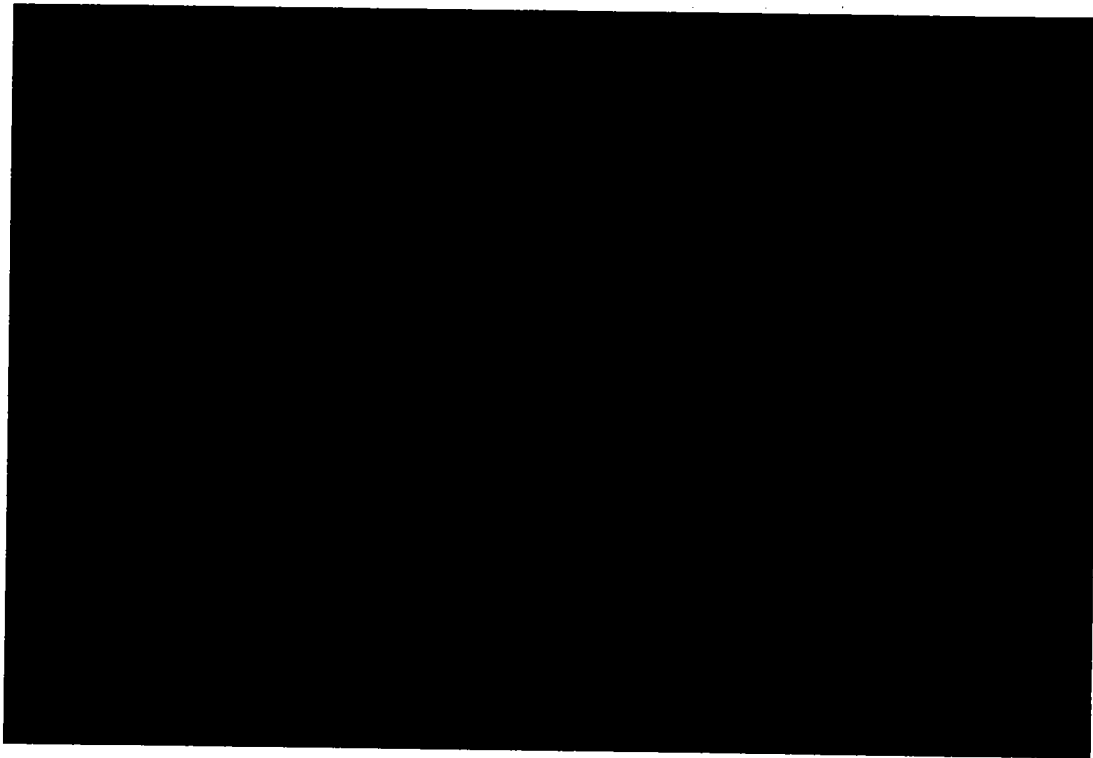
Exhibit 1

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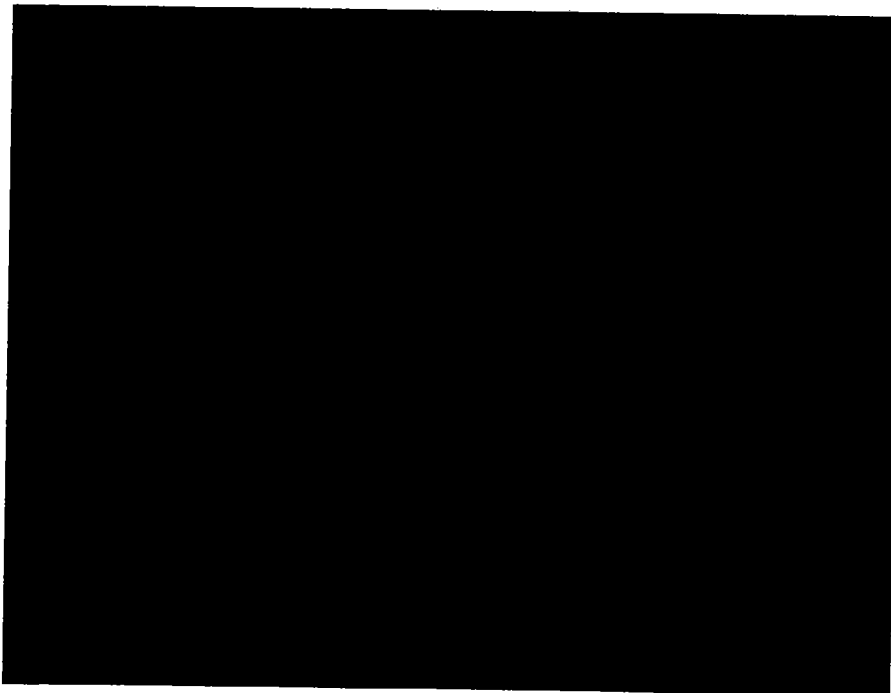
Revision of Dr. Eisenstadt's Market Share Estimates



Frequency of Listings by Zip Code: Realcomp vs. MiRealSource



MiRealSource



Sources: [REDACTED]

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32300 NORTHWESTERN HIGHWAY, SUITE 2300
FARMINGTON HILLS, MICHIGAN

DATE FEBRUARY 22, 2007

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TESTIMONY OF DOUGLAS WHITEHOUSE

**FOR THE RECORD, INC.
10760 DEMARR ROAD
WHITE PLAINS, MD 20695
(301)870-8025**

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11 Exhibit Page

12 (Exhibits attached to transcript.)

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15 DEPOSITION EXHIBIT NUMBER CX 302 19

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1 UNITED STATES FEDERAL TRADE COMMISSION
2 NONPUBLIC INVESTIGATIONAL HEARING
3

4 IN THE MATTER OF:) File No. 9320
5 REALCOMP II, LTD.,)
6 _____
7
8

9 CONTAINS RESTRICTED AND CONFIDENTIAL PORTIONS
10

11 The Investigational Hearing of DOUGLAS WHITEHOUSE,
12 Taken at 32300 Northwestern Highway, Suite 230,
13 Farmington Hills, Michigan,
14 Commencing at 9:45 a.m.,
15 Thursday, February 22, 2007,
16 Before Kathy Calo, CSR-4697, RMR, RPR, B.A.
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22
23
24
25

1 APPEARANCES:

2

3 SEAN P. GATES

4 United States Federal Trade Commission

5 601 New Jersey Avenue, Northwest

6 Washington, D.C. 20001

7 (202) 326-3086

8 Appearing on behalf of the United States

9 Federal Trade Commission.

10

11 STEVEN H. LASHER

12 SCOTT L. MANDEL

13 Foster, Swift, Collins & Smith, P.C.

14 313 South Washington Square

15 Lansing, Michigan 48933

16 (517) 371-8157

17 Appearing on behalf of Realcomp, II, Ltd.

18

19

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21

22

23

24

25

1 Farmington Hills, Michigan

2 Thursday, February 22, 2007

3 9:45 a.m.

4

5

DOUGLAS WHITEHOUSE,

6

was thereupon called as a witness herein, and after

7

having first been duly sworn to testify to the truth,

8

the whole truth and nothing but the truth, was

9

examined and testified as follows:

10

EXAMINATION

11

BY MR. GATES:

12

Q. Good morning, Mr. Whitehouse.

13

A. Good morning.

14

Q. I'm Sean Gates and I'm with the Federal Trade

15

Commission and I'll be asking you a few questions here

16

this morning. Can we just start out and can you tell

17

me what positions you have had with Realcomp, if any.

18

A. I've served on their board of directors and in fact I

19

chaired their board of directors. That's really been

20

about it.

21

Q. When was that?

22

A. Back in the mid-'80s. I don't have a date for you

23

specifically.

24

Q. And which boards are you a member of?

25

A. Presently? I'm a member of Metropolitan Consolidated

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CX421-06

1 Association of Realtors.

2 Q. And that's MCAR?

3 A. Correct.

4 Q. What positions do you have at MCAR?

5 A. None. I'm sorry, I serve as the director of the
6 National Association of Realtors on their behalf.

7 Q. Is that like a liaison between MCAR and NAR?

8 A. Because of MCAR's membership count they are entitled
9 to appoint directors to the National Association of
10 Realtors and I fill one of those positions.

11 Q. As a director for the NAR, is that the board of
12 directors for NAR?

13 A. Correct.

14 Q. And how many members of the board of directors are
15 there for NAR?

16 A. Oh boy, several hundred. Good sized group.

17 Q. So every I guess local board is able to appoint --

18 A. Depends on the size of the board and states have
19 directors, institutes, societies and councils have
20 directors.

21 Q. And going back to say 2000, have you had any other
22 positions at MCAR?

23 A. At MCAR? No.

24 Q. Have you been involved --

25 A. Excuse me, I've served on committees.

- 1 Q. Okay. Which committees have you served on at MCAR?
- 2 A. Professional standards, arbitration.
- 3 Q. So the professional standards and arbitration
- 4 committees, when did you serve on those committees?
- 5 A. I presently serve on them.
- 6 Q. And when did you start?
- 7 A. Oh geez, I've served on committees off and on there
- 8 for many, many years, since the board -- since MCAR
- 9 became a board.
- 10 Q. Since 2000 have you been on --
- 11 A. Professional standards and arbitration.
- 12 Q. And as a member of the committee for the professional
- 13 standards for the arbitration panels, have you dealt
- 14 with procuring cause disputes?
- 15 A. Yes.
- 16 Q. In those procuring cause disputes, do you know what
- 17 the underlying agreement is between the listing agent
- 18 and the seller?
- 19 A. You mean what type of listing they take them?
- 20 Q. Yes.
- 21 A. Generally that's not -- in the cases I've served on,
- 22 that hasn't been an issue, but I would say that maybe
- 23 on one or two of them I knew what it was.
- 24 Q. Generally it's not an issue in a procuring cause
- 25 dispute?

- 1 A. No. It's an issue between two brokers, who is
2 entitled to the selling commission.
- 3 Q. As part of the procuring cause arbitration process
4 then, you don't go and find out what the agreement is
5 between the seller and the listing agent?
- 6 A. Not necessarily, not unless it's a question of
7 somebody stepping on somebody else's listing or
8 something like that.
- 9 Q. Have you dealt with procuring cause disputes where the
10 buyer has represented to the seller that they were
11 unrepresented?
- 12 A. No.
- 13 Q. Procuring cause disputes that you've been involved in
14 are between two brokers who claim to be entitled to
15 the offer of compensation?
- 16 A. Correct.
- 17 Q. Are you a member -- have you been a member since 2000
18 of any other board?
- 19 A. I've served as a director of the Michigan Association
20 of Realtors and president of the Michigan Association
21 of Realtors, and all of the executive chairs in
22 between.
- 23 Q. Can you tell me what is the relationship between a
24 board such as MCAR and the Michigan Association of
25 Realtors, which I'll refer to as MAR?

1 A. Okay. The relationship of the board. One is a state
2 association of Realtors and the other is a local, and
3 they cooperate, they work together. I don't know
4 what -- I don't really understand the question.

5 Q. Well, does MAR, for example, have any authority or
6 control over MCAR?

7 A. No.

8 Q. When were you the director of MAR?

9 A. I am currently a director of the Michigan Association
10 of Realtors. I've been a director of the Michigan
11 Association of Realtors for at least a half a dozen
12 years with the exclusion of last year, the year 2006.

13 Q. And 2005 you were president of MAR?

14 A. Correct.

15 Q. And at the same time you were a member of the board of
16 directors?

17 A. Correct.

18 Q. You said also that there was some executive positions
19 that you were involved in at MAR, what were those?

20 A. That would have been the president, president elect,
21 treasurer and the director.

22 Q. What's the goal or purpose of MAR?

23 A. To further the interests of homeowners and membership.

24 Q. And the membership is who for MAR?

25 A. Realtors.

- 1 Q. And Realtors in the state of Michigan?
- 2 A. Correct.
- 3 Q. And how many Realtors are there in the state of
4 Michigan presently?
- 5 A. How many Realtors? I would say there are probably
6 somewhere in the vicinity between 30 and 34,000.
- 7 Q. And you own a real estate brokerage?
- 8 A. Yes, I do. I'm a partner in a real estate brokerage.
- 9 Q. You're a partner, and which brokerage is that?
- 10 A. H-A-N-N-E-T, Wilson & Whitehouse, L.L.C. Realtors.
- 11 Q. Who are the other partners of that brokerage?
- 12 A. Kathy Wilson, John and Gail Hannet, and as of a few
13 days ago, Jerry Burke.
- 14 Q. Who is the broker of record for that brokerage?
- 15 A. I am.
- 16 Q. And when did you get your broker's license?
- 17 A. Probably 1981.
- 18 Q. And how long have you been a partner at Hannet, Wilson
19 & Whitehouse?
- 20 A. 1993.
- 21 Q. Prior to that what was your involvement in the real
22 estate industry?
- 23 A. I was for eight, nine years the chief executive
24 officer of Chamberlain Realtors.
- 25 Q. What was Chamberlain Realtors?

- 1 A. It was a regional real estate company in the southeast
2 Michigan area.
- 3 Q. Does Chamberlain Realtors still exist?
- 4 A. Actually, they've been sold and it was originally
5 Chamberlain and then it was Chamberlain, Prudential --
6 Prudential, Chamberlain, Steel and now it is
7 Prudential Cranbrook Realtors.
- 8 Q. And Hannet, Wilson & Whitehouse, how many agents do
9 you have?
- 10 A. Probably about 45.
- 11 Q. And how many offices?
- 12 A. One.
- 13 Q. And where's the office?
- 14 A. In Birmingham, Michigan.
- 15 Q. What MLSs is Hannet, Wilson & Whitehouse a member of?
- 16 A. Realcomp and MI Real Source.
- 17 Q. What's the geographic region in which Hannet, Wilson &
18 Whitehouse does its business, how would you describe
19 that?
- 20 A. The best way to describe it is southeast Michigan.
- 21 Q. What counties do you cover?
- 22 A. Primarily I would say the majority of our business is
23 in Oakland, Macomb and Wayne. We go into other areas,
24 I mean, but not hugely significant.
- 25 Q. When did you join MI Real Source?

- 1 A. Oh, I would guess three, four years.
- 2 Q. When did you join Realcomp?
- 3 A. Me personally?
- 4 Q. Your brokerage.
- 5 A. It was a member of Realcomp when the company was
6 formed in '93, when the partnership was formed in '93.
- 7 Q. When you said three, four years ago you joined MI Real
8 Source, was that you personally or was it the company?
- 9 A. The company.
- 10 Q. The office.
- 11 A. Yeah.
- 12 Q. Why did you join MI Real Source?
- 13 A. More information.
- 14 Q. What do you mean by more information?
- 15 A. Be able to get more information, be able to get in
16 touch with more Realtors.
- 17 Q. You list homes both on -- on both MLSs?
- 18 A. Um-hum. Every one of our listings show up on both
19 MLSs.
- 20 Q. And when you say you get more information, is that --
21 what do you use the information for?
- 22 A. Selling homes.
- 23 Q. How is the information that you get from MI Real
24 Source useful to you in selling homes?
- 25 A. Knowing that the home's available and being able to

- 1 see what the information is on the home.
- 2 Q. You said know the home is available, you mean when you
3 put it on to MI Real Source more agents will be --
4 will know that the home is available for sale?
- 5 A. Are you talking about for me selling?
- 6 Q. I'm trying to understand what you meant by more
7 information is helpful to you in selling homes.
- 8 A. If I'm trying to sell a home, I'm putting it on both
9 boards of Realtors to expose it to as many Realtors as
10 possible.
- 11 Q. Okay. If you're trying to -- you're representing a
12 buyer then, do you search both on MI Real Source and
13 on Realcomp?
- 14 A. Majority of times, no.
- 15 Q. Why not?
- 16 A. Time, too much time.
- 17 Q. To search on both?
- 18 A. Yeah.
- 19 Q. It would be too much time? So what do you search on
20 then?
- 21 A. I generally use Realcomp.
- 22 Q. And is there a particular reason why you use Realcomp
23 instead of MI Real Source to search on?
- 24 A. Easier, used to it.
- 25 Q. Are there more listings on Realcomp than MI Real

- 1 Source?
- 2 A. I find pretty much the majority of the properties are
3 on both boards.
- 4 Q. And when you represent buyers, is it also in Oakland,
5 Macomb and Wayne Counties the majority of time?
- 6 A. Majority of time, yes.
- 7 Q. When you say on the selling side, when you're
8 representing sellers, what percentage of your listings
9 fall into those three counties?
- 10 A. I would say probably 95, 98 percent. Majority of
11 them. That's a guess without going back and
12 recapping.
- 13 Q. Would you characterize your brokerage as a full
14 service brokerage?
- 15 A. I would.
- 16 Q. And what do you mean by full service so we're all on
17 the same page?
- 18 A. Simply that we provide all services necessary to list
19 and sell a property from marketing through closing and
20 follow-up.
- 21 Q. When you represent sellers of homes and list their
22 homes, what type of contract do you use?
- 23 A. Exclusive right-to-sell.
- 24 Q. In your -- when you're listing homes or when you're
25 seeking to obtain clients who want to sell homes, who

1 are your competitors?

2 A. Who is competing against me for the buyer client?

3 Q. For the selling client.

4 A. Oh, for the seller?

5 Q. Yeah. Somebody wants to sell a home, they're looking
6 at agents and they give you a call, with whom are you
7 competing for that listing?

8 A. Pretty much any and every broker out there. Just
9 depends on, you know, who that buyer is looking to
10 talk with.

11 Q. Who the seller is looking to talk with?

12 A. Pardon?

13 Q. I think you said buyer.

14 A. I'm sorry, seller.

15 MR. GATES: And why don't we go into the
16 restricted confidential.

17 MARKED BY THE REPORTER:

18 DEPOSITION EXHIBIT NUMBER CX 301

19 9:59 a.m.

20 THE FOLLOWING EXHIBIT CX 301 AND TESTIMONY CONCERNING SAME
21 IS RESTRICTED AND CONFIDENTIAL.

22 BY MR. GATES:

23 Q. Mr. Whitehouse, can you tell me what CX 301 is?

24 A. It's a policy and procedures manual for Hannet, Wilson
25 & Whitehouse Realtors.

1 Q. And as I understand it, these are excerpts from that
2 policies and procedures manual, correct?

3 A. Correct.

4 Q. And this is -- this governs your agents at Hannet,
5 Wilson & Whitehouse?

6 A. Correct.

7 Q. So if we look at page, well, the page that has a Bate
8 stamp DW 00098 and the top of the page it says
9 schedule-company.

10 A. Um-hum.

11 Q. So if I understand this correctly, it says that the
12 commission that Hannet, Wilson & Whitehouse will
13 accept on residential and commercial sales is 6
14 percent?

15 A. That's the commission they will ask for, yes.

16 Q. And a company salesperson can have an exception if
17 they're working with a builder?

18 A. Um-hum. Yes, that's correct.

19 Q. If a company salesperson is working with a residential
20 homeowner, can they deviate from the 6 percent?

21 A. With permission, yes.

22 Q. From whom?

23 A. From the management of the company.

24 Q. And who is the management of the company?

25 A. Any one of the partners.

1 Q. So any one of the partners that we listed before?

2 A. I'm sorry. Any one of the partners or the office
3 manager.

4 Q. And who is the office manager?

5 A. It was Carol Frick and is now Jerry Burke.

6 Q. Then under schedule-other brokers it says, multiple
7 listing residential sales will be divided with the
8 cooperating brokers on a minimum of 3 percent to
9 outside brokers unless otherwise changed by a
10 management?

11 A. Correct.

12 Q. Does that mean that the offer of compensation that
13 Hannet, Wilson & Whitehouse will make on the Realcomp
14 and the MI Real Source MLSs is a minimum of 3 percent
15 unless approval is given by management?

16 A. Correct.

17 Q. So for example if a company salesperson is
18 representing a home seller and gets permission from
19 the, one of the partners to have a 5.5 percent
20 commission, they also need to get permission from
21 company management to offer less than the 3 percent to
22 cooperating brokers?

23 A. If we're going to do that, correct.

24 Q. Do you have a standard commission schedule for
25 builders?

- 1 A. No.
- 2 Q. That's a case-by-case basis?
- 3 A. Absolutely.
- 4 Q. If you'd turn over to the last page of the document,
5 DW 00100, and it lists out the responsibilities of
6 listing salespersons, do you see that?
- 7 A. Yes.
- 8 Q. And C says, to see that listings are properly set up
9 for tour caravan, what's a tour caravan?
- 10 A. That is where we are -- where our office will actually
11 tour the new listing so that our salespeople are
12 familiar with the property.
- 13 Q. So all 45 salespeople would tour a property?
- 14 A. On Wednesdays after our office meeting we go out and
15 tour our new inventory.
- 16 Q. So every Wednesday you go tour your new inventory?
- 17 A. Correct.
- 18 Q. How many listings do you currently have?
- 19 A. Well, we don't tour every listing, we tour the new
20 ones.
- 21 Q. I understand that, but how many listings do you
22 currently have?
- 23 A. Oh boy, several hundred.
- 24 Q. How many listings do you have in a typical year?
- 25 A. I don't know.

1 Q. Do you know how many listings you had in 2006?

2 A. I do not.

3 Q. When you say several hundred, what, more than 200?

4 A. Probably somewhere around 200 at a time.

5 Q. Put that document aside.

6 MR. GATES: We can go out of restricted
7 confidential.

8 THIS MARKS THE END OF THE RESTRICTED AND CONFIDENTIAL
9 DESIGNATION FOR EXHIBIT 301 AND TESTIMONY CONCERNING SAME.
10 BY MR. GATES:

11 Q. Mr. Whitehouse, referrals from former clients are an
12 important part of your business?

13 A. Absolutely.

14 Q. And between 60 and 70 percent of your business is
15 referrals from former clients?

16 A. I would say it's probably, yeah, 50 percent plus.

17 Q. Let me give to you what's been marked as CX -- we'll
18 mark as CX 302.

19 MARKED BY THE REPORTER:

20 DEPOSITION EXHIBIT NUMBER CX 302

21 10:06 a.m.

22 BY MR. GATES:

23 Q. CX 302 is a screen shot from the realviewnl.com which
24 at the top you sees it's Real Estate News Real View,
25 are you familiar with that publication?

- 1 A. Yes, I am.
- 2 Q. And if you look down on the front page there's --
3 about halfway down there's something that says lateral
4 relational capital, do you see that?
- 5 A. Okay.
- 6 Q. And about the middle of that paragraph it says Doug
7 Whitehouse of Hannet, Wilson & Whitehouse, L.L.C.
8 Realtors says 60 to 70 percent of his business is
9 referrals from past clients, is that accurate?
- 10 A. I would say that it's probably closer to 50 percent,
11 but yeah.
- 12 Q. And then where did this publication get this
13 information?
- 14 A. Probably in an interview with me.
- 15 Q. And this was in 2005, December 2005?
- 16 A. I don't know when the interview was.
- 17 Q. It was published in December 2005.
- 18 A. Yes, it was.
- 19 Q. So given that at least more than 50 percent of your
20 business comes from referrals from past clients, is it
21 the case that your reputation as a real estate broker
22 is important to you?
- 23 A. Absolutely.
- 24 Q. And is it the case that making sure that your clients
25 are satisfied with your services is important to you?

1 A. Absolutely.

2 Q. Sometimes clients aren't satisfied with -- they blame
3 you for things that weren't your fault, has that
4 happened before?

5 A. Absolutely.

6 Q. And regardless of the fact that it wasn't your fault,
7 that still is not good for your business, is that
8 right?

9 A. That's correct.

10 Q. Mr. Whitehouse, you said earlier that you were
11 competing for listings with just about every real
12 estate broker out there, that would include discount
13 brokers, right?

14 A. I would assume so. I don't always know who I'm
15 competing with. In fact, most cases don't know who
16 I'm competing with.

17 Q. But you would include discount brokers within the
18 competition that's out there?

19 A. Absolutely.

20 Q. And in fact isn't it the case that full service
21 brokers have been -- expressed concern about
22 competition from discount brokers?

23 A. No more than competition from any other broker.

24 Q. But they have expressed concerns about competition
25 from discount brokers, correct?

- 1 A. I would not say separately, no.
- 2 Q. Not separately?
- 3 A. No.
- 4 Q. You don't know of any publication --
- 5 A. I've read articles that say that the discount brokers
6 are a concern to Realtors, and that they're a bigger
7 concern, and I think that's been blown out of
8 proportion.
- 9 Q. When we're talking about discount brokers, that
10 includes what's been known as flat fee brokers, right?
- 11 A. I would say you would probably classify them as --
12 under the same terminology.
- 13 Q. Discount brokers?
- 14 A. Yeah.
- 15 Q. And just so we're clear on the record, when we talk
16 about discount brokers, how would you define that?
- 17 A. I would define, you know, probably both of those as
18 limited service brokers, brokers who are offering
19 something other than a full service. They're
20 unbundling the service and offering individual
21 services.
- 22 Q. And you said you have read articles about concerns
23 expressed by full service brokers about competition
24 from limited service brokers, right?
- 25 A. I've read articles expressing that. Who they've been

1 by I don't --

2 MR. GATES: Let me mark this as CX 303.

3 MARKED BY THE REPORTER:

4 DEPOSITION EXHIBIT NUMBER CX 303

5 10:10 a.m.

6 BY MR. GATES:

7 Q. Mr. Whitehouse, CX 303 is an article entitled, "Online
8 Marketing Agents Sound Off About How to Combat
9 Discounters," do you see that?

10 A. Yes, I do.

11 Q. And this is something that you produced to us, right?

12 A. Yes.

13 Q. And so you see down at the bottom of the document it
14 looks like it came from your computer because there's
15 your name is there, is that right?

16 A. Yes. Well, wait a minute. Down at the bottom, yes.
17 Yes, that is correct.

18 Q. And so in response to our subpoena you produced a
19 number of E-mails and articles, did you archive those?
20 Have you saved these articles?

21 A. Yeah.

22 MR. MANDEL: Sean, just so you're clear,
23 looking at that line, I think that came from us
24 because we marked it. I don't think --

25 A. I was going to say, I don't recognize --

1 MR. LASHER: That looks like us.

2 MR. MANDEL: I think it's from us.

3 A. That doesn't look like --

4 MR. MANDEL: Where it says Whitehouse, just
5 so you're clear on that.

6 BY MR. GATES:

7 Q. Let's back up then. Mr. Whitehouse, in the ordinary
8 course of business do you save E-mails and online
9 articles?

10 A. I save articles that I feel might be worth reading at
11 a later time, because I don't always have the
12 opportunity to read them on an ongoing basis.

13 Q. And this is one of the articles that you saved, is
14 that right?

15 A. I would say so. If I provided it to you and, yeah, it
16 was one I saved.

17 Q. So this is then an article that you thought might be
18 worth reading at least at some later date?

19 A. That's correct.

20 Q. Have you read this?

21 A. I don't remember it off hand.

22 Q. If you look at the first page you see, well, first off
23 let me ask you, Michael E. Parker is the author of
24 this article, do you know anything about him?

25 A. Nothing.

- 1 Q. And do you know what publication this article came
2 from?
- 3 A. I do not.
- 4 Q. If you look at the first page and the second paragraph
5 at the bottom it says, here then with some editing and
6 rephrasing done by us are points to ponder when
7 resisting discounters, do you see that, first page,
8 second paragraph?
- 9 A. Okay.
- 10 Q. First page, second paragraph, last sentence, do you
11 see that sentence?
- 12 A. Here then, okay.
- 13 Q. Resisting discounters, do you see that?
- 14 A. Okay, yep, I see that.
- 15 Q. So you would agree that full service brokers are in
16 competition with discount brokers, right?
- 17 A. Absolutely. We're in competition with every
18 brokerage.
- 19 Q. And they have to find ways to resist the pressure from
20 discount brokers, right?
- 21 A. I would say so, yes.
- 22 Q. One of the things discount brokers are putting
23 pressure on is the commission rates, right?
- 24 A. Um-hum. Yes.
- 25 Q. And in fact you've participated in some blogs where

1 you have given advice to full service brokers on how
2 to deal with discount brokers, right?

3 A. I don't know specifically what you're referring to.

4 Q. Okay.

5 MARKED BY THE REPORTER:

6 DEPOSITION EXHIBIT NUMBER CX 304

7 10:14 a.m.

8 BY MR. GATES:

9 Q. Mr. Whitehouse, this is a printout from a blog
10 entitled, "Active Rain Real Estate Network," that's a
11 blog that you have participated in, correct?

12 A. It is.

13 Q. From time to time you put comments on this blog,
14 right?

15 A. I have commented on different things on that blog,
16 yes.

17 Q. You see here that the first entry then talks about
18 different levels of service?

19 A. Yes.

20 Q. And the first sentence talks about, says, as the wave
21 of the future continues to ripple, so will the flat
22 fee services?

23 A. Yes.

24 Q. And in general this entry is complaining about
25 pressure on commissions from flat fee service

1 providers, right?

2 A. I think it's stating some circumstances. I'm not sure
3 it's, quote, a complaint. I would have to take the
4 time to reread it and digest it.

5 Q. You would agree first that it's talking about flat fee
6 service providers, correct?

7 A. Yes.

8 Q. And the second paragraph says, sit in the client's
9 mind and imagine this, hmm, I have to pay a real
10 estate agent \$36,000 to sell my house. The agent
11 fills out a form, submits a listing on the MLS,
12 advertising in a few local real estate books and goes
13 on about the different services, correct? I'm reading
14 that correctly, right?

15 A. Yep.

16 Q. And what this writer is saying is that from a client's
17 point of view, they don't understand exactly all the
18 services they get and what the value of the services
19 they get for the 6 percent commission that they pay,
20 is that right?

21 A. Correct.

22 Q. And flat fee brokers come in and say, well, here, I'll
23 give you some services for a fairly minimal amount of
24 money -- right? -- is that what they do?

25 A. Whatever they charge, yes.

1 Q. And so the flat fee service providers then are putting
2 pressure on full service brokers' commissions and
3 causing full service brokers to have to explain the
4 value of their services to their clients, is that
5 right?

6 A. Absolutely.

7 Q. And that's what you advised this person to do is to
8 talk to them, talk to the clients about the value of
9 the service that they're providing, right?

10 A. Correct.

11 MR. GATES: I'll give you what we'll mark
12 as CX 305.

13 MARKED BY THE REPORTER:

14 DEPOSITION EXHIBIT NUMBER CX 305

15 10:18 a.m.

16 BY MR. GATES:

17 Q. CX 305 is another article by Mr. Parker that you had
18 saved on the computer and provided to us, is that
19 correct?

20 A. Yes.

21 Q. So this is another one of those articles that you
22 thought might be worth reading at some point, right?

23 A. Correct.

24 Q. And it's entitled, "Online Marketing, Full Service
25 Discounters Strike Back," right?

- 1 A. Can't quite read the last word, but yes.
- 2 Q. If you look down near the bottom of the first page
3 there's something that's attributed to Terry Crowley,
4 do you see where I'm looking?
- 5 A. I do.
- 6 Q. And it says, "Terry Crowley wrote to remind me that
7 the broker who intimated that he might not spend as
8 much effort marketing co-listings at reduced
9 commissions was an example of a dangerous situation.
10 It may be a very short time before the testers make an
11 example out of a few brokers."
- 12 You've heard that term before, the testers?
- 13 A. No. Well, I mean, a fair housing testing, yes, I've
14 heard the word testers.
- 15 Q. Do you understand what it means in the context of this
16 statement?
- 17 A. No.
- 18 Q. You see the last part of that sentence says, "that's
19 why blanket discounting is in my opinion not correct
20 either."
- 21 A. I see that sentence.
- 22 Q. Do you understand what that's referring to?
- 23 A. Not -- no.
- 24 Q. Is there a phenomena of blanket discounting in the
25 real estate industry?

1 A. I don't understand the term. I've never heard the
2 term blanket discounting.

3 Q. I was trying to figure out what it meant myself.

4 A. I don't know.

5 Q. Okay. Let me give to you what will be marked as CX
6 306.

7 MARKED BY THE REPORTER:

8 DEPOSITION EXHIBIT NUMBER CX 306

9 10:21 a.m.

10 BY MR. GATES:

11 Q. CX 306 is another article by Michael Parker. This is
12 an article this you saved and produced to us, is that
13 right?

14 A. Correct.

15 Q. And it's entitled, "Online Marketing, Last Stand of
16 the 6 Percenter," and something about hype question
17 mark, right?

18 A. Correct.

19 Q. And this is, I'm sorry, also another one by Michael
20 Parker, right?

21 A. Correct.

22 Q. If you look down at the bottom of the page it says, "A
23 discount that loses sales, reduces marketability or
24 results in a lower selling price is a very expensive
25 discount. Houses aren't oriental rugs and real estate

1 professionals shouldn't act like rug salesmen. When
2 they do, the market becomes cannibalized and no one
3 makes a decent living."

4 Do you agree that real estate professionals
5 shouldn't act like rug salesmen?

6 A. No argument.

7 Q. And then when real estate professionals, I guess rug
8 salesmen, what he's referring to is that there's some
9 businesses that always advertise 80 percent off their
10 rugs, is that --

11 A. I don't necessarily interpret it the same way.

12 Q. Okay. If you look at the document then, you see above
13 where I was reading it says, Newport Beach, California
14 where we call home has a high number of oriental rug
15 merchants, and the next sentence, every one of them is
16 seemingly always to have a huge sale, 80 percent off
17 any rug?

18 A. Okay.

19 Q. He's referring to the concept that oriental rug
20 salesmen tend to always try to discount their product,
21 right?

22 A. Yeah. Or could be that because they're selling a
23 commodity.

24 Q. And then if you would apply the concept of discounting
25 and selling a commodity to real estate professionals,

1 and the market becomes cannibalized, you agree with
2 that, right?

3 A. Yeah, I don't think what we're selling is a commodity,
4 therefore, I don't think that it falls under a
5 commodity sale that everybody has the same thing to
6 sell.

7 Q. Some brokers try to sell it that way as just a
8 commodity?

9 A. Yes.

10 Q. And that creates a problem for -- in the industry
11 because consumers start to perceive real estate
12 professionals as selling commodities, right?

13 A. Creates a problem for the home buyer and seller
14 because they lose out on the opportunity to get good
15 service when they feel that they're -- that their sale
16 of real estate is a commodity sale.

17 Q. And it also is not good for real estate professionals
18 to have their services viewed as commodities, right?

19 A. I don't believe they are commodities, so yeah,
20 absolutely.

21 Q. Mr. Whitehouse, when your brokerage represents buyers,
22 do you enter into contracts with the client?

23 A. Sometimes.

24 Q. What percentage of the time do you do that?

25 A. I would say that, it's a guesstimate because I don't

1 know of all the times that we do and do not enter into
2 a contract, but I would say it's probably at least 50
3 percent of the time.

4 Q. Why would you enter into a buyer's agency contract?

5 A. There's numerous reasons to go with a buyer agency
6 contract. One is to provide a higher level of service
7 for the buyer. Unless you are an agent for him and an
8 advocate, well, unless you are under contract as a
9 buyer broker, you cannot be an agent for and an
10 advocate for that buyer.

11 Q. When you enter into a buyer's agency contract, does
12 that spell out the commission that will be paid by the
13 buyer to the agent if there's a -- if a sale is
14 consummated?

15 A. It does.

16 Q. And is that entitlement to a commission contingent on
17 the agent being a procuring cause or not?

18 A. I don't think it addresses the issue of procuring
19 cause in the agency contract.

20 Q. So for example if a buyer is -- enters into a buyer's
21 agency contract with one of your agents and then
22 goes -- during the time of that contract, during the
23 period of that contract goes to an open house on their
24 own and finds a home on their own and negotiates for
25 the purchase of that home on their own, would the

1 agent still be entitled to a commission because of the
2 buyer's agency agreement?

3 A. Depends on the buyer's agency agreement that was
4 signed, whether it's an exclusive buyer's agency, a
5 nonexclusive buyer's agency.

6 Q. And what type do you use at your office?

7 A. Both.

8 Q. And how often do you use exclusive buyer agency
9 contracts?

10 A. Personally?

11 Q. No, your brokerage.

12 A. I don't know.

13 Q. You said about 50 percent of the time roughly you
14 enter into buyer's agency contracts, you know the
15 split between exclusive and nonexclusive?

16 A. No, I do not.

17 Q. When you say an exclusive contract, just so we have
18 this right, if it is an exclusive contract, then an
19 agent would be entitled to the commission agreed to
20 under the contract regardless of how the buyer found
21 the home?

22 A. If it's an exclusive right-to-sell, yes, correct. I'm
23 sorry, not exclusive -- exclusive right to buy.

24 Q. Exclusive right to buy.

25 A. Yeah.

1 Q. Okay. And if it's nonexclusive then, if the buyer
2 finds a home by some other means other than the agent,
3 the agent is not entitled to the commission?

4 A. Correct.

5 Q. So that would kind of be the mirror image of an
6 exclusive agency contract?

7 A. Correct.

8 Q. When you enter into a buyer's agency contract with a
9 buyer, you now have a fiduciary duty to the buyer, is
10 that right?

11 A. Correct.

12 Q. And absent that contract you don't, is that right?

13 A. I'm sorry?

14 Q. Absent that -- absent a buyer's agency contract you do
15 not have a fiduciary duty to the buyer?

16 A. Depending on what property you're showing, your
17 relationship can change.

18 Q. Okay. How? Explain to me how that works.

19 A. If I'm showing a house that offers a subagency
20 relationship to the listing broker, then if I am not
21 an agent of the seller, I am a subagent of the listing
22 broker.

23 Q. When you say if there's an offer of subagency, that
24 would be spelled out in the listing that's put on the
25 multiple listing service?

1 A. Correct.

2 Q. And so if I look under the compensation arrangement
3 section of a listing, there will be a subagency entry,
4 and if that says yes and gives an offer of
5 compensation, then you could enter into a subagency in
6 that circumstance?

7 A. That is correct.

8 Q. Now, if there is not an offer of compensation for a
9 subagency, then how does it work?

10 A. Then I would either be a buyer's agent or I would by
11 default become a transaction coordinator.

12 Q. So if you don't have a contract with the buyer, then
13 you would by default become a transaction coordinator?

14 A. If I'm not offered subagency by the seller?

15 Q. Yes.

16 A. Then I would default to a transaction coordinator.

17 Q. As a transaction coordinator, you can't give any
18 advice to either side, you just handle basically all
19 the paperwork?

20 A. I'm not supposed to be an advocate or advice giver in
21 that particular circumstance, correct.

22 Q. Do you have any sense of what percentage of listings
23 offer a subagency?

24 A. I don't. I really don't have a percentage.

25 Q. Is it often the case that there's not an offer of

- 1 compensation for a subagency?
- 2 A. I've seen it fairly common that there's not.
- 3 Q. Do you know why that is?
- 4 A. I think that it's trying to avoid the liability of
5 what a subagent says on behalf of the seller.
- 6 Q. Explain to me, who is trying to avoid the liability?
- 7 A. The seller is and the listing agent are, seller and
8 listing agent.
- 9 Q. And so if somebody bringing a buyer enters into a
10 subagency agreement with the listing agent and the
11 seller, then if that subagent breaches a fiduciary
12 duty, the listing agent and the seller could be
13 liable?
- 14 A. That's potentially a possibility, yes.
- 15 Q. As a definitional -- for definitional purposes, can
16 you tell me, a for sale by owner, would you agree that
17 that is a seller who is not represented by a listing
18 agent?
- 19 A. That's the definition that I would give it.
- 20 Q. When a sale is consummated, a deed is filed with the
21 county, is that right? A warranty deed.
- 22 A. Yeah, well, yes, normally a deed is filed.
- 23 Q. Some type of deed is filed?
- 24 A. Um-hum.
- 25 Q. And that's to evidence a transfer of ownership, right?

- 1 A. Could be a deed, could be a memorandum of land
2 contract, depending on the type of sale.
- 3 Q. For residential real estate, what would be filed with
4 the county to show, to evidence the transfer of title?
- 5 A. As I said, it could be a deed, land contract,
6 memorandum of land contract, depending on how the sale
7 took place.
- 8 Q. Okay. So when would you use a memorandum of land
9 contract?
- 10 A. When you sell on a land contract and don't wish to
11 record the entire terms of the land contract.
- 12 Q. When you say a land contract, is that vacant land?
- 13 A. No. A land contract is an installment sale on the
14 sale of real estate, not a cash sale, or not, yeah,
15 it's an installment sale.
- 16 Q. That would be the case, for example, when a seller
17 finances the purchase of the home?
- 18 A. Correct.
- 19 Q. So that would be evidenced by this memorandum of land
20 contract until the loan is paid off?
- 21 A. Correct.
- 22 Q. And then they would enter -- they would file a
23 warranty deed?
- 24 A. They would file a deed of some kind.
- 25 Q. So that transfer then would be evidenced by two

1 different things filed by the county, right?

2 A. Correct.

3 Q. And you said there was another type other than a deed,
4 what was that again?

5 A. There was land contract, memorandum of land contract,
6 deed.

7 Q. What's the difference between a land contract and a
8 memorandum of land contract?

9 A. Land contract you actually record the land contract
10 document; a memorandum of land contract you record a
11 document referencing that the land contract exists and
12 there's an interest of someone else in that property.
13 The buyer has interest in that property by a land
14 contract.

15 Q. And the third type of document that could be filed is
16 a deed, different types of deeds?

17 A. Correct, there are.

18 Q. What are the different types?

19 A. I don't know all of them that I could recite, but
20 there's a warranty deed, a limited warranty deed,
21 there's a corporate warranty deed, there's a quitclaim
22 deed.

23 Q. So if I wanted to go to the county recorder's office
24 and figure out how many sales took place in say a
25 given month in Oakland County, what would I look for?

- 1 A. Probably look for the recording of evidence of
2 transfer on all the properties in Oakland County.
- 3 Q. When you say evidence of transfer, are you talking
4 about the different types of deeds that we just
5 discussed?
- 6 A. Deeds, land contracts.
- 7 Q. If there is a transfer of ownership, like an inter
8 family transfer of ownership, would that be recorded
9 by a deed?
- 10 A. Could be recorded by any one of those vehicles.
- 11 Q. Okay. So for example if a parent decides to give
12 their home to their children for one reason or
13 another, that would be recorded by one of those
14 instruments, right?
- 15 A. Correct.
- 16 Q. That would show up as a sale?
- 17 A. Correct. I would think so.
- 18 Q. Is there a way to separate those from the others?
- 19 A. I'm not sure I understand.
- 20 Q. Separate those types of inter family transfers where
21 there's -- say there's no consideration given or
22 nominal consideration given.
- 23 A. You could certainly separate them by compensation, but
24 I think you would probably have to look at the
25 transfer document to separate them any other way.

- 1 Q. So when you say separate them by compensation, what do
2 you mean by that?
- 3 A. How much they paid for the property.
- 4 Q. For example, you could look for every property
5 transfer that -- where there's a payment over, you
6 know, \$25,000, for example?
- 7 A. Yeah, you could probably, I would say you could
8 probably look at every property where a payment over
9 some number that was substantially lower than that.
10 Properties sell for \$25,000.
- 11 Q. In order to get out these inter family transfers, you
12 want some number that -- above nominal?
- 13 A. That's not going to work either, because you also have
14 the recording of the dollar sales, so that's not going
15 to be a good methodology to do it.
- 16 Q. Okay. Explain to me what is a dollar sale.
- 17 A. It's simply where the seller or the buyer has asked
18 that the actual transfer or the actual sale price not
19 be recorded on the documentation.
- 20 Q. So it's in the documentation then, it's just recorded
21 as a one dollar sale price?
- 22 A. Correct.
- 23 Q. And that's recorded -- at the county they can record
24 it that way?
- 25 A. Um-hum, correct.

- 1 Q. How is it then that the county would figure out how
2 much taxes to impose on that transfer?
- 3 A. There's a separate document that is produced, which is
4 an affidavit of valuation, which is submitted to the
5 treasurer and the treasurer then uses that to consider
6 value of the property, but it doesn't -- it's not for
7 public -- or it's not recorded with the transfer.
- 8 Q. Is it not then a public document?
- 9 A. It is a public document.
- 10 Q. But it's with the treasurer's office?
- 11 A. Correct.
- 12 Q. Why would a person not want to have their sale price
13 listed?
- 14 A. Concern for privacy.
- 15 Q. Mr. Whitehouse, when you're representing a seller, can
16 you tell me the ways in which your company markets the
17 home?
- 18 A. Just about every way out there. It goes from hard
19 copy advertising, it goes from open houses, it goes
20 from extensive word of mouth marketing, it goes to
21 Internet marketing, it goes to multimedia
22 presentations. To answer that question I probably
23 could have brought, you know, 150 ways to market a
24 home.
- 25 Q. Let's talk about some of the ways then. One of the

1 most important ways is to put the home on the multiple
2 listing service, correct?

3 A. That's a significant way but I wouldn't necessarily
4 say it's one of -- I wouldn't say it is the most
5 important way.

6 Q. Do you have any homes that you have not listed on the
7 multiple listing service?

8 A. I've sold homes that I haven't -- well, I have listed
9 them on the multiple listing service once I sold them.

10 Q. Okay. So let me understand. You have homes that you
11 have sold but that were never listed on the multiple
12 listing service?

13 A. Correct.

14 Q. And what were the -- how many of those, what
15 percentage of your listed homes or homes that you've
16 sold would those be?

17 A. I would say that I probably sell at least a couple a
18 year that way, and so do a lot of my sales associates.

19 Q. Is there any particular part of the market that your
20 firm specializes?

21 A. Any specific market segment?

22 Q. Yes.

23 A. We do all -- the whole entire spectrum of the market.

24 Q. So you sell a couple of houses a year that are not
25 listed on the multiple listing service, how did you --

1 how did those sales come about?

2 A. All kinds of different ways. We learn about a
3 property that may be available, we know a seller, or a
4 buyer who is interested in a type of property, we go
5 out and create a transaction. I've gone to the point
6 of having a specific buyer needs and going out and
7 shopping for it and finding somebody to sell a
8 property that meets those needs.

9 Q. So you would go and contact people who own homes and
10 for some reason you think that they might be
11 interested in selling?

12 A. Correct.

13 Q. And how would you know that they would be interested
14 in selling?

15 A. By asking.

16 Q. And how do you ask them?

17 A. All kinds of ways. Used to do it by phone until the
18 FTC came along and said do not call, and now we -- so
19 we've hurt a lot of sellers that way because we can no
20 longer contact them, so we're not able to help them
21 that way, so we will send mail, we will knock on a
22 door.

23 Q. So putting aside these instances where you find a
24 seller, you find a seller who has not listed a home,
25 has not expressed any interest and you find them

1 through some kind of direct mailing method, putting
2 aside those, would you agree that listing on the
3 multiple listing service is kind of the baseline
4 marketing service that your firm provides?

5 A. If you're saying baseline because, you know, we put
6 every listing in the MLS, yes, we put every listing in
7 the MLS.

8 Q. But you don't agree that's one of the most important
9 ways to market your home?

10 A. I don't necessarily agree that is the most important
11 way to market a home, no. There's a lot that -- I
12 don't think there is a, quote, the most important way.
13 I think that you have to do a lot of services, do your
14 marketing in a lot of directions to market effectively
15 if you're going to market, and I wouldn't give any one
16 of them a preponderance of the way to market.

17 Q. Would you say that to be -- for a seller when they're
18 looking for a Realtor to represent them, an absolute
19 must should be that that Realtor is a member of a
20 local MLS?

21 A. I would say that the seller needs to be looking at a
22 huge set of criteria in the Realtor that represents
23 them and that's one of the things that I put forth in
24 my marketing efforts. It's not just the MLS. It's
25 the -- all of the things that the agent brings to the

1 table, because candidly, just marketing is a portion
2 of the sale process, but it is certainly not the sale
3 process, because there are too many other things that,
4 you know, are important in it.

5 Q. Your brokerage, Hannet, Wilson & Whitehouse has an
6 Internet website, right?

7 A. Correct.

8 Q. And the information on that Internet website that's
9 put out by your brokerage is truthful and accurate?

10 A. Yes.

11 Q. And that's what you intend it to be, right?

12 A. Yes.

13 MARKED BY THE REPORTER:

14 DEPOSITION EXHIBIT NUMBER CX 307

15 10:44 a.m.

16 BY MR. GATES:

17 Q. Mr. Whitehouse, CX 307, you recognize that as a screen
18 shot of part of your website?

19 A. Yes, I do.

20 Q. And some of the graphics didn't come up through but if
21 you look on the second page you see that your name,
22 your wife's name and your firm's name is there, right?

23 A. Correct.

24 Q. And the copyright is to you and Kathie Whitehouse,
25 right?

- 1 A. Correct.
- 2 Q. Why is a copyright to you and your wife rather than to
3 the firm?
- 4 A. Because that's my personal website.
- 5 Q. So this is your personal website.
- 6 A. That's correct.
- 7 Q. Okay. And then your personal website you intend to
8 put truthful and accurate information, right?
- 9 A. Yes.
- 10 Q. And you use this to market your services to potential
11 clients?
- 12 A. Yes.
- 13 Q. So if you look at the first page, you talk about what
14 to look for in a Realtor, right?
- 15 A. Yes.
- 16 Q. And the second paragraph says, many agents are also
17 members of the state and local association of
18 Realtors, do you see that?
- 19 A. Yes.
- 20 Q. And in your web page that you use to market your
21 services to consumers you say, an absolute must is
22 that the Realtor subscribes to the local computerized
23 multiple listing service, MLS, so that your property's
24 exposed to the maximum number of potential buyers,
25 that's truthful, isn't it?

1 A. Absolutely, but you'll notice also that it states
2 above that that there are other things that are coming
3 before that and more important than just the MLS.

4 Q. Mr. Whitehouse, did you state that as an absolute must
5 that a seller find a Realtor who is a member of a
6 local MLS?

7 A. Yes.

8 Q. Okay. That's a truthful statement?

9 A. Yes.

10 Q. Thank you.

11 A. But that doesn't necessarily rank the priority.

12 MARKED BY THE REPORTER:

13 DEPOSITION EXHIBIT NUMBER CX 308

14 10:47 a.m.

15 BY MR. GATES:

16 Q. Mr. Whitehouse, you recognize CX 308 as a screen shot
17 from your personal website?

18 A. I do.

19 Q. And this is entitled, A Real Estate Seller's Guide,
20 right?

21 A. Yes.

22 Q. And in this you put different things that a -- someone
23 who wants to sell their home should consider, right?

24 A. Correct.

25 Q. These are the services that you and your brokerage

- 1 will provide?
- 2 A. Correct.
- 3 Q. And one of the services is a marketing plan, right?
- 4 A. Correct.
- 5 Q. Is it important to expose a listing so that it will
6 get sold?
- 7 A. Yes.
- 8 Q. And to expose a listing you -- that's part of your
9 marketing plan, right?
- 10 A. Correct.
- 11 Q. And the multiple listing service is a stepping stone
12 in that process, right?
- 13 A. It's part of the process, correct.
- 14 Q. And you described it in this document as a stepping
15 stone in that process, right?
- 16 A. Correct.
- 17 Q. And in addition to that you do a whole bunch of other
18 things to market homes, right?
- 19 A. Correct.
- 20 Q. Part of that is marketing it on the Internet?
- 21 A. Correct.
- 22 Q. And you consider marketing on the Internet an
23 important aspect of your marketing plan?
- 24 A. I do. By the way, most of this information was
25 created by the company that created the website.

- 1 Q. Did you review it?
- 2 A. Pardon?
- 3 Q. Did you review it?
- 4 A. As much as possible, yes.
- 5 Q. Did you approve it?
- 6 A. Pardon?
- 7 Q. Did you approve it?
- 8 A. I told them to put the website up, yes.
- 9 Q. And so you reviewed it and approved it and you didn't
- 10 intend for any of that to be inaccurate or untruthful,
- 11 right?
- 12 A. I don't think that it's untruthful, no.
- 13 Q. And in the end it's going out under your name,
- 14 correct?
- 15 A. That is correct.
- 16 Q. So when somebody reads something here, they would
- 17 attribute it to you, not to the company that put it
- 18 together for you, right?
- 19 A. Most likely.
- 20 Q. So if I were a consumer and I read these things, I
- 21 would assume that these are coming from you, not from
- 22 Sizzling Studios, right?
- 23 A. I would say it depends on how educated you are as a
- 24 consumer. You could attribute --
- 25 Q. Do you intend that the statements be perceived by

1 consumers as coming from Sizzling Studios and not from
2 you?

3 A. No, I would intend it to be perceived as good advice
4 on marketing.

5 Q. Good advice on marketing from you, correct?

6 A. Correct.

7 Q. Thank you.

8 MARKED BY THE REPORTER:

9 DEPOSITION EXHIBIT NUMBER CX 309

10 10:50 a.m.

11 BY MR. GATES:

12 Q. Mr. Whitehouse, this is -- CX 309 appears to be a
13 couple pages that were copied out of a Birmingham
14 Bloomfield Lifestyle publication, is that right?

15 A. Correct.

16 Q. And you provided these to us in response to the FTC's
17 subpoena, right?

18 A. Correct.

19 Q. And can you tell me what is the Birmingham Bloomfield
20 Lifestyle publication?

21 A. A publication put out by the Birmingham Bloomfield, I
22 believe this is a chamber -- I'm not sure whether it's
23 a Chamber of Commerce or just a -- I honestly can't
24 tell you whether it's a chamber published or just a
25 local community reference guide, and I don't know who

- 1 it's published by off hand.
- 2 Q. But it's a local publication, right?
- 3 A. Correct.
- 4 Q. If you look at the second page it has some -- a
- 5 description of your brokerage, correct?
- 6 A. Correct.
- 7 Q. And did you provide the information for this write-up?
- 8 A. Our Marketing Department probably did.
- 9 Q. So your Marketing Department probably provided the
- 10 information for this write-up, right?
- 11 A. I would say that's most likely the case, or the
- 12 periodical might have provided it for our review. I
- 13 don't know.
- 14 Q. So at least somebody at your firm reviewed this?
- 15 A. Most likely, yes.
- 16 Q. And if you reviewed it, you wanted to make sure it was
- 17 accurate and truthful, right?
- 18 A. I would assume that's what they were looking for.
- 19 Q. And in it it gives different aspects of your firm and
- 20 the intent there was to basically advertise the
- 21 services of your firm, right?
- 22 A. Correct.
- 23 Q. And so in that you were trying to give kind of the
- 24 benefits your firm can give to real estate clients?
- 25 A. Correct.

- 1 Q. One of the benefits that you highlight there is that
2 Hannel, Wilson & Whitehouse is a member of the
3 multiple listing service Realcomp Online, correct?
- 4 A. Correct.
- 5 Q. You don't list MI Real Source there, do you?
- 6 A. No, because this was -- this has probably been around
7 for a long time.
- 8 Q. So if you turn to the first page you see it's the 2006
9 annual issue, right?
- 10 A. Correct.
- 11 Q. And you joined MI Real Source you said three or four
12 years ago?
- 13 A. Correct.
- 14 Q. Thank you.
- 15 A. This was probably created before that.
- 16 Q. You said earlier that marketing a home through the
17 Internet was an important part of your marketing plan,
18 right?
- 19 A. Marketing through the Internet is an important part of
20 my marketing, yes.
- 21 Q. Tell me why that is.
- 22 A. Because it's a good way to get in contact with buyers
23 and sellers.
- 24 Q. Why is it a good way to get in contact with buyers and
25 sellers?

1 A. Every way is good way to get in contact with buyers
2 and sellers. We used to use the phone to do that, we
3 can't do that anymore, so we have to find other ways
4 to get in touch with them.

5 Q. You would agree that 80 percent of home buyers search
6 for homes on the Internet?

7 A. I believe that's the statistic put out by the National
8 Association of Realtors, something along that level.

9 Q. And your brokerage has in fact used that statistic in
10 your marketing materials, correct?

11 A. We've used similar statistics, yes.

12 Q. And that 80 percent number, that's consistent with
13 your experience in dealing with buyers and sellers?

14 A. I find that most of my buyers and sellers have gone to
15 the Internet.

16 Q. And buyers go to the Internet to look for homes, look
17 at listings, is that right?

18 A. They go to the Internet for many things, and one of
19 them is to look at homes and one to find a Realtor.
20 In fact, I will tell you that most of my, a good deal
21 of my clientele come from Internet marketing, but
22 surprisingly they don't come from the homes on the
23 Internet.

24 Q. When you say they come from Internet marketing,
25 meaning they visited your website?

1 A. Correct.

2 Q. And by visiting your website they got familiar with
3 your firm and contacted you to hire you?

4 A. Correct. I'm speaking more of my personal website,
5 and most of the time, yes, what happens when somebody
6 visits my website, I try and establish a relationship
7 with them, establishing that relationship then leads
8 forward to additional rapport and eventually a
9 business relationship.

10 Q. Is it important to you in marketing a home to get that
11 home on to kind of the most popular real estate
12 websites?

13 A. In marketing -- one of the things that my direction on
14 marketing on the Internet is mainly to establish
15 relationships with prospective clients. It is not to
16 give them the eventual home that they buy. In the
17 instances where I have sold homes directly off the
18 Internet, most of the sales that I've sold off the
19 Internet sight unseen have been sold via my multimedia
20 presentation off of my website.

21 Q. I think we're missing each other a little bit.

22 A. Okay.

23 Q. When you're representing a seller, it's important for
24 you in representing a seller to market the home on the
25 Internet, right?

- 1 A. Yes.
- 2 Q. And in marketing that home for sale on the Internet,
3 is it important for you to insure that that listing
4 gets on the most popular real estate websites?
- 5 A. Yeah, I put it out there every way I can.
- 6 Q. When you say that, that includes Realtor.com?
- 7 A. Yes, it does.
- 8 Q. And in fact you pay for enhancements at Realtor.com?
- 9 A. I do.
- 10 Q. And that costs some substantial amount of money?
- 11 A. Correct.
- 12 Q. And why is it important for you to be on Realtor.com?
13 Start with that.
- 14 A. It's important because the seller perceives that as
15 the way that the home sells, and so in a competitive
16 marketplace it's important that the seller perceive
17 that I'm doing something for their benefit. It
18 doesn't necessarily sell the home, and generally
19 doesn't, but it's a competitive situation. Very
20 candidly, if it was not for competing for a listing, I
21 find very little benefit to being on Realtor.com.
- 22 Q. Okay. So it's important for you to get listings on to
23 Realtor.com because sellers want and expect that?
- 24 A. Because sellers think that's what sells real estate
25 and it doesn't.

- 1 Q. And is it also important for you to get those listings
2 out on to other websites other than Realtor.com?
- 3 A. Yes. I put them out on my own websites and put them
4 on websites that I create.
- 5 Q. And from --
- 6 A. And for the same reasons.
- 7 Q. Is it important for your clients then, for sellers to
8 have their listings appear on some of the national
9 brokerage sites like KellerWilliams.com and Remax.com
10 and Century21.com?
- 11 A. I've never had that question arise.
- 12 Q. Do you have your listings go to those sites?
- 13 A. If they do, not that I know of.
- 14 Q. Do you participate in the IDX system for Realcomp?
- 15 A. Yes.
- 16 Q. And you know when you participate in the IDX at
17 Realcomp and your listings go out to --
- 18 A. My fellow local brokers.
- 19 Q. And your fellow local brokers include franchises from
20 Century21.com?
- 21 A. Yes.
- 22 Q. Or Century 21, I'm sorry.
- 23 A. Yes.
- 24 Q. And from Keller Williams, yes?
- 25 A. Yes.

- 1 Q. And from Remax?
- 2 A. Yes.
- 3 Q. Realty One?
- 4 A. Yeah.
- 5 Q. So your listings go out to the websites of those
6 franchisees, correct?
- 7 A. Yes.
- 8 Q. Now, you could choose not to participate in the IDX
9 feed, correct?
- 10 A. Then I would be keeping my fellow brokers locally from
11 having access to my properties.
- 12 Q. And --
- 13 A. And I would not have access to theirs.
- 14 Q. So tell me why it is you participate in the IDX then.
- 15 A. Why do I participate in the IDX?
- 16 Q. Yes.
- 17 A. So that I can have other brokers' listings on my
18 website and so they can have my listings on their
19 website.
- 20 Q. So you want to have your listings on other brokers'
21 websites?
- 22 A. Sure. I want them to cooperate with me.
- 23 Q. And you want them to have -- show your listings on
24 their websites so that they get more exposure?
- 25 A. Sure.

1 (Discussion off the record at 11:00 a.m.)

2 (Back on the record at 11:13 a.m.)

3 MR. GATES: Let's mark this portion of the
4 transcript as restricted confidential.

5 THE FOLLOWING EXHIBITS 310-311 AND TESTIMONY CONCERNING SAME
6 IS RESTRICTED AND CONFIDENTIAL.

7 BY MR. GATES:

8 Q. Mr. Whitehouse, I'm going to give you a document that
9 we're going to mark as CX 310.

10 MARKED BY THE REPORTER:

11 DEPOSITION EXHIBIT NUMBER CX 310

12 11:13 a.m.

13 BY MR. GATES:

14 Q. Mr. Whitehouse, can you just tell us what CX 310 is?

15 A. It's a printout of a PowerPoint presentation.

16 Q. And is it a PowerPoint presentation that you created?

17 A. Yes.

18 Q. What do you use this PowerPoint presentation for?

19 A. To share some ideas with potential sellers.

20 Q. So --

21 A. Regarding marketing.

22 Q. And is this part of your listing presentation?

23 A. Yes.

24 Q. If you look on -- about I think it's the sixth page,
25 DW 30038, do you see that? It says something about

1 Cyber Stars?

2 A. Yes.

3 Q. Can you tell me what that is? What's a Cyber Star?

4 A. A Cyber Star is a group of approximately 200
5 salespeople that belong to an organization called the
6 Cyber Stars.

7 Q. And what is that organization?

8 A. Brain trust, group of agents, top agents sharing ideas
9 with other agents, sharing agents with each other,
10 sharing ideas with each other, sorry.

11 Q. Ideas about what?

12 A. Marketing, real estate, selling, investment,
13 everything.

14 Q. I understand, well, the name of it says Cyber Stars,
15 does it have anything to do with the Internet?

16 A. Oh, part of it is, sure, it's on Internet marketing.

17 Q. And this presentation at least it says, one of the
18 things that you're telling your potential clients is
19 that you're one of the best at using technology to get
20 your homes sold?

21 A. Correct.

22 Q. And so being a member of the Cyber Stars would
23 designate you as one of the best at using technology
24 to get homes sold?

25 A. That's what it's implying, yes.

- 1 Q. There's only 200 members of this organization?
- 2 A. Approximately, yes.
- 3 Q. How are they invited?
- 4 A. The originator of the organization, Allen Hanes,
5 invites them to join the organization.
- 6 Q. Based on what criteria if you know?
- 7 A. A productivity volume, a technology orientation, a
8 willingness to share their ideas with other people,
9 with other Cyber Stars, a good website on the
10 Internet.
- 11 Q. When did you become a member of the organization?
- 12 A. Six, eight years ago.
- 13 Q. When you say best at using technology to get your home
14 sold, what technology are you referring to?
- 15 A. It's literally everything you can think of, from cell
16 phones to voice mails to the Internet to magazine
17 advertising to producing your own homes magazine,
18 to -- Oh God, writing books to doing everything,
19 literally just about anything you can think of in
20 marketing, it comes up there.
- 21 Q. How is writing books and putting things in homes
22 magazines a use of technology?
- 23 A. That's a way of marketing today and that's one of the
24 technologies that you use today.
- 25 Q. So when you're referring -- talking about technology

1 here, you're talking about different means for
2 marketing?

3 A. Yeah. Literally almost everything you can think of.
4 It's whatever works. One agent in Ohio went out and
5 created his own homes magazine as an individual agent
6 and just increased his business unbelievably by doing
7 that.

8 Q. If you look at the page that's been marked DW 00049,
9 you see that's right after the page that has the
10 picture of you and your wife, right?

11 A. Correct.

12 Q. And entitled, The Best of the Best in Networking?

13 A. Correct.

14 Q. And then the page DW 0049 is entitled, How Did Buyers
15 Find the Home That They Decided to Buy, right?

16 A. Yes.

17 Q. And underneath there it says, founded by an -- I think
18 it's supposed to say founded by surfing the Internet,
19 right?

20 A. I need to correct that one. Thank you.

21 Q. So the intent here is to convey to potential clients
22 that one of the ways at least that buyers find homes
23 is through the Internet?

24 A. Yeah, they find homes and Realtors by the Internet.

25 Q. If you go to the next page, DW 0050, you have looks to

1 me like a piece of another publication printed here,
2 right?

3 A. Yes.

4 Q. What publication is this?

5 A. That was an article in, I forget the exact source that
6 I got that from, but I believe it was a builders
7 association that simply said that they did some
8 research and said that they're spending too much money
9 on the hard copy advertising and they needed to be
10 spending more money on Internet advertising, because
11 the public is going to the Internet to find their new
12 home construction.

13 Q. So you look down, one of the bullet points here, the
14 first one is consumers value online resources most in
15 search for new homes?

16 A. Correct.

17 Q. So that's what you were referring to?

18 A. Yeah. That there's different ways that the consumers
19 are finding property and on the Internet and different
20 sites and different methodologies and they're valuing
21 the find, they're finding builders' websites and
22 builders' offerings on the Internet.

23 Q. Consumers avowing the fact that they can find real
24 estate information on the Internet and that's become
25 more and more prevalent, right?

1 A. Um-hum. Definitely.

2 Q. The next page, DW 0051, you have a pie chart and says
3 how many agents responded to this trend, and then
4 underneath that only 6.1 percent of homes in Oakland
5 County have a tour. Explain to me what you're trying
6 to convey with that page.

7 A. That a multimedia presentation is a valuable tool in
8 marketing a home.

9 Q. When you say a multimedia presentation, you mean a
10 multimedia presentation on the Internet?

11 A. Yeah. That's how you can -- well, I shouldn't say
12 just that, because we convey the multimedia
13 implementation via small CDs, via, you know, little
14 individual CDs that we hand out on the property. We
15 also put it up on the Internet. I also put it on my
16 website. It's put on places like visual tour website.

17 Q. What do you mean by a multimedia presentation?

18 A. Multiple photographs of the property; those
19 photographs can be anywhere from still photos to
20 360-degree photos, word description of the property.

21 Q. And what you're trying to convey here is that other
22 agents in Oakland County haven't caught on to the need
23 to have multimedia presentations, is that right?

24 A. Correct.

25 Q. Then the next page, DW 0052, is entitled, Many Still

1 Use Old, Ineffective Technology, and so down there you
2 have three bullet points, right?

3 A. Right.

4 Q. And you would consider those things to be old,
5 ineffective technology?

6 A. I consider the fact that the Realtors create a
7 brochure, put it in a house for a potential buyer and
8 expect that to draw people to the property, well, the
9 brochure in the house, if they come into the house to
10 pick up a brochure, they've already seen the house,
11 you know? So it doesn't work very effectively putting
12 a brochure in the house.

13 Q. Let's back up, because the first bullet point is
14 supply in brochure box on sign. If I understand that
15 right, a for sale sign is put out in front of a home
16 and attached to that you'll have a box that has
17 brochures, is that what you're referring to there?

18 A. That is correct.

19 Q. That's an old and ineffective technology?

20 A. I don't think it's effective.

21 Q. And the handout to local offices, can you tell me what
22 you mean by that?

23 A. Taking brochures around to local real estate offices.

24 Q. And that's not effective either?

25 A. I don't think so.

- 1 Q. And then the third bullet point, direct mail or
2 deliver to local agents, what do you mean by that?
- 3 A. Same thing, direct mailing them and delivering them to
4 the local agents I don't think is an effective use.
- 5 Q. Turn to the next page, DW 0053, it's entitled, Most
6 Used Average Technology. What are you trying to
7 convey on this?
- 8 A. There's different types of multimedia presentations
9 and I'm saying that most agents use four 360-degree
10 photographs, the quantity of four, and that I don't
11 feel that is the best and most useful technology out
12 there.
- 13 Q. Okay.
- 14 A. In multimedia presentations.
- 15 Q. If you turn to the next page you talk about what your
16 brokerage uses?
- 17 A. What I use.
- 18 Q. What you use.
- 19 A. Correct.
- 20 Q. As a broker. Okay. And it's up to 50 photos, not
21 just four, that's what you were just explaining?
- 22 A. Correct.
- 23 Q. And then other points here, so in other words, you're
24 conveying to potential sellers that you use better
25 technology than your competitors?

- 1 A. Correct.
- 2 Q. You said you personally, so your agents don't use this
3 technology?
- 4 A. Some of my agents do, some don't.
- 5 Q. Why is that?
- 6 A. Because that's their choice. They're independent
7 contractors.
- 8 Q. So some of your agents have chosen not to because it's
9 too expensive?
- 10 A. As I said, it's their choice. They're independent
11 contractors and they make those decisions on their
12 own.
- 13 Q. You're the broker, so you want to insure that your
14 salespersons, you know, produce as much as possible,
15 right?
- 16 A. Right.
- 17 Q. And so you don't mandate that they use this
18 technology?
- 19 A. As independent contractors, we can't mandate what they
20 use as technology.
- 21 Q. Do you suggest?
- 22 A. We share with them everything that we can.
- 23 Q. Go to the next page, DW 0055, what does it mean --
24 this all mean to you? First point says, with most
25 buyers looking to the Internet first, what do you mean

1 by that?

2 A. With most buyers going out to the Internet, you need
3 to be there, your Realtor needs to be there, and needs
4 to be there in some very positive ways that your
5 Realtor gets found so that he can be the source of
6 selling your property.

7 Q. When you say you need to be there, do you mean the
8 listing needs to be there on the Internet?

9 A. No, I mean that I need to be out there, that they need
10 to be able to find me. They need to be able to find
11 the information that I'm offering out there, and it
12 could be my listing, it could be my listing on
13 Realtor.com, it could be my listing on the websites
14 that I create, it could be my listing on my own
15 website.

16 Q. So this is -- this presentation is intended for
17 potential seller clients, right?

18 A. Correct.

19 Q. So in this slide here, DW 00055, you're telling them
20 that most buyers go to the Internet first and so
21 therefore you want your listing out there on the
22 Internet in the best possible format?

23 A. You want your listing out there and you want me out
24 there.

25 Q. And you out there and you want it all to look good?

1 A. Absolutely.

2 Q. Second bullet point says with buyers finding a home
3 before they find a Realtor, what did you mean there?

4 A. Some buyers find the home. I've sold homes sight
5 unseen where the buyer hasn't even actually seen the
6 home from the Internet.

7 Q. So they looked at the home on the Internet and in a
8 virtual tour and decided to buy the house sight
9 unseen?

10 A. And literally said, let's go buy the house.

11 Q. You say here, buyers finding a home before they find a
12 Realtor, I'm not sure what you mean there.

13 A. Simply put, that some buyers go out and find the home
14 that they want to buy.

15 Q. Before they --

16 A. Before they acquire, before they're working with an
17 agent.

18 Q. So for that reason again it's important for your
19 listings and you as a broker to be on the Internet so
20 people can find you?

21 A. Correct.

22 Q. So you've had buyers, for example, find homes on the
23 Internet and then come to you unrepresented?

24 A. Asking to be represented, yeah, asking to buy a home.

25 Q. So they don't have another -- a buyer's agent?

- 1 A. Correct.
- 2 Q. What do you do in those circumstances? Do you tell
3 them you need to go find another agent or do you
4 insure -- how do you insure they're not represented?
5 What do you do in those cases?
- 6 A. I ask them.
- 7 Q. You ask whether they have another agent?
- 8 A. Absolutely, that's part of the code of ethics, a
9 Realtor needs to disclose their agency relationship
10 and ask them if they're represented.
- 11 Q. If they're not represented, how do you deal with
12 someone that wants to buy a home that you have listed
13 and they don't have an agent?
- 14 A. A home that I have listed?
- 15 Q. Yes.
- 16 A. I will try and help them buy that home.
- 17 Q. And how do you do that? Do you have to enter into an
18 agency relationship with them or how do you do it?
- 19 A. I've done it all kinds of ways. I've done it as a
20 disclosed dual agent, I've done it as an agent for the
21 seller.
- 22 Q. Okay. Any other ways?
- 23 A. No, not really. Those are the two ways.
- 24 Q. So tell me, what is a disclosed dual agent then?
- 25 A. That is where I am a buyer -- where I am an agent for

1 a seller and I'm also a buyer broker for a buyer and
2 the buyer becomes interested in a listing that I have,
3 that I personally represent, and at that point I
4 become a disclosed dual agent.

5 Q. So all of your listings have an offer of compensation
6 to a cooperating broker on the MLS, right?

7 A. Correct.

8 Q. So in an instance in which a buyer comes to you and
9 they're not represented, then you don't have to give
10 that offer of compensation away because there is no
11 other agent, right?

12 A. The other agent is me doing the buying side.

13 Q. So you basically keep it yourself, right?

14 A. Correct.

15 Q. Some people call it an in-house transaction?

16 A. Correct.

17 Q. So if you go a few pages later, DW 0058, do you see
18 that?

19 A. Yes.

20 Q. Entitled, Will Direct Internet Search Find Your Home.
21 Explain to me what you mean by this. What are you
22 trying to convey with that slide?

23 A. I am trying to convey the fact that most people go out
24 and do key word searches on the Internet, such as
25 somebody searching for a property in Birmingham,

1 Michigan, they will put on their search terms
2 Birmingham, Michigan real estate, Birmingham, Michigan
3 Realtor, Birmingham, Michigan homes, and it's
4 critically important where the individual shows up
5 that they're having market their home when those
6 search terms are used.

7 Q. So your perception then is that consumers put in
8 search terms, for example, real estate and the city in
9 which they want to look and then go to the sites that
10 come up in that -- after that search?

11 A. Absolutely.

12 Q. Do you have any -- what do you base that understanding
13 on?

14 A. Key word searches, information that I've heard on the
15 Internet, you know, on key word searches and key words
16 have always been a priority, search engine
17 optimization has been a priority on the Internet.

18 Q. I understand that, but do you have any understanding
19 of how often consumers who are searching for real
20 estate do key word searches rather than simply going
21 to a site that they have heard about, such as
22 Realtor.com?

23 A. Huge. Absolutely huge. I think -- you know, I can't
24 give you specific statistics, but in talking to people
25 that optimize Internet sites and everything, and I

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1 think it's out there, it's available to see how many
2 times people search for, you can go on the Internet
3 and somehow or another, I don't know how personally,
4 but I know you can go on the Internet and find out how
5 many times people search for Birmingham, Michigan real
6 estate, how many times they use those type of key
7 words, and I think Google, you know, you can Google
8 that type of information I guess.

9 Q. So we know that Realtor.com is the most popular
10 website in existence right now, you agree with that?

11 A. Yeah, absolutely.

12 Q. As far as, in terms of you need visitors, in terms of
13 number of hits?

14 A. That's my understanding.

15 Q. Is it your understanding then when you do a search as
16 you described that Realtor.com will show up in that
17 search?

18 A. No, I don't think that Realtor.com shows up in those
19 types of searches that much. I think you'll find a
20 whole heck of a lot more of individual results,
21 individual websites, individual brokerages, individual
22 agents.

23 Q. Okay. So for example if you did a search for
24 Birmingham, Michigan real estate, you would expect to
25 find a lot of individual brokerage sites, right?

- 1 A. Yeah. I think you would expect to find me.
- 2 Q. Including your own.
- 3 A. Probably number one.
- 4 Q. Because you've paid to optimize the search engine such
5 that your brokerage shows up high in the search,
6 right?
- 7 A. Actually, it's many different costs. It's having a
8 good website, it's having the proper key words on it,
9 it's not paper click, it's search engine optimization
10 as I understand the term, it's how popular your
11 website is, it's links to your website, it's all kinds
12 of different things that are important to put all that
13 package together.
- 14 Q. So if somebody's looking for a home and they search
15 under Birmingham, Michigan, one of the sites that will
16 pop up, may even be the number one site under that
17 search, will be yours?
- 18 A. Hopefully, yes.
- 19 Q. If they go to your site they can search for homes on
20 your site?
- 21 A. Yes, they can see the multimedia presentations that
22 I've produced on the homes that I've got, they can
23 search for other homes on my website. They can see my
24 listings, absolutely.
- 25 Q. And on your site they can search for homes, other than

- 1 your listings, because you participate in the IDX?
- 2 A. Correct.
- 3 Q. So what you're trying to tell your potential sellers
4 here in this slide is that your brokerage has found
5 ways to insure that your brokerage websites show up in
6 Internet search --
- 7 A. That I have found ways for my website to show up.
- 8 Q. So you have found ways for your website, and you're
9 talking about your personal website?
- 10 A. Yes.
- 11 Q. So your personal website will show up high in Internet
12 searches and so therefore people are more likely to
13 see your listings?
- 14 A. Correct.
- 15 Q. Now, I'm going to jump to page DW 00063 and it's
16 entitled, Not Only First, But Twice.
- 17 A. Um-hum.
- 18 Q. So this indicates that your listings will show up
19 twice on Realtor.com, right?
- 20 A. Correct.
- 21 Q. And the reason why they'll show up twice in
22 Realtor.com is because you've listed them both in MI
23 Real Source and in Realcomp?
- 24 A. Correct.
- 25 Q. And so that's one of the reasons why you double list?

- 1 A. That is correct.
- 2 Q. Is that the main reason why you double list?
- 3 A. No, that is not the main reason. That is not the
4 single reason why I double list.
- 5 Q. That's one of the reasons -- one of the benefits that
6 you get for double listing and that's one of the --
- 7 A. That gives me the privilege of paying Realtor.com more
8 money so I can enhance them all.
- 9 Q. But you do convey that benefit to your --
- 10 A. Absolutely.
- 11 Q. If you jump to the page that's marked DW 00067 you see
12 there's a list of Internet sites.
- 13 A. Yep.
- 14 Q. So it says at the top, here are some of the locations
15 that I will use to feature your home on the Internet,
16 and then lists a number of Internet sites below that,
17 right?
- 18 A. Correct.
- 19 Q. How do you get listings on to these various Internet
20 sites?
- 21 A. Most of it's done through Realtor.com.
- 22 Q. Okay. So by getting it on to Realtor.com it goes out
23 to some of these other sites?
- 24 A. Correct.
- 25 Q. Do you pay to be put on any of these other sites?

- 1 A. Uhm, no, I don't pay to be on any of these sites, but
2 I get put on, you know, a lot of different sites at no
3 cost.
- 4 Q. Okay. No additional cost because it's listed on the
5 MLS which feeds Realtor.com?
- 6 A. I'm on a lot of sites because my multimedia
7 presentation. I end up on sites like Yahoo Preferred
8 Homes, Keller Williams, other sites just because I
9 create a multimedia presentation on the property.
- 10 Q. So explain to me how you get to Keller Williams simply
11 because you create a multimedia presentation.
- 12 A. The multimedia software company has the ability to
13 publish my multimedia presentations to other sites,
14 and that's how I get multimedia presentations up on
15 other --
- 16 Q. What sites then --
- 17 A. Prudential Real Estate.
- 18 Q. You see on the other half of the page it says Internet
19 Broadcasting System, Inc., what are you referring to
20 there?
- 21 A. I can't even tell you. I think these are sites that
22 have feeds or links to Realtor.com.
- 23 Q. So for example NewOrleanschannel.com over there, you
24 understand that's -- has a link to Realtor.com?
- 25 A. That's my guess. I really don't know. As you can

1 see, there's a lot of stuff on here besides Internet
2 marketing.

3 Q. We'll talk about that in a second. We'll remain in
4 restricted confidential and we'll mark the next
5 document as 311.

6 MARKED BY THE REPORTER:

7 DEPOSITION EXHIBIT NUMBER CX 311

8 11:39 a.m.

9 BY MR. GATES:

10 Q. Mr. Whitehouse, can you tell us what CX 311 is?

11 A. It's a hard copy marketing presentation, part of a,
12 what would be included in here would be a normal
13 market analysis for the property that I'm going to out
14 to try to list.

15 Q. So this is a sample Comparative Market Analysis,
16 right?

17 A. Well, there's no market analysis in here, but it would
18 include a market analysis of the property that I'm
19 trying to list.

20 Q. This is the basic form that you use in order to create
21 a competitive market analysis?

22 A. Yes, this is some of the information that I pass on to
23 a potential seller.

24 Q. So this is for a potential seller?

25 A. Right.

- 1 Q. So this is something you would use at a listing
2 presentation?
- 3 A. Correct.
- 4 Q. If you look at the fourth page of the document, it's
5 DW 00008, here if I understand this correctly you're
6 explaining that you will place the listing on the
7 multiple listing service?
- 8 A. Correct.
- 9 Q. And then you're explaining to your potential client
10 how the cooperating broker system works, is that
11 right?
- 12 A. Correct. The idea here was to explain agency.
- 13 Q. So they can understand if --
- 14 A. Who represents who in a transaction.
- 15 Q. So they can understand for example if somebody is
16 acting as a subagent and brings to them a buyer, they
17 can understand who they represent?
- 18 A. Correct.
- 19 Q. And where the fiduciary duties lie?
- 20 A. Correct.
- 21 Q. And also a buyer's broker and a transaction
22 coordinator, you're explaining what their roles would
23 be?
- 24 A. Correct.
- 25 Q. So the next page, it says that Harnet, Wilson &

1 Whitehouse will agree to a fee split with transaction
2 coordinators and buyers' brokers; is it the case that
3 you also agree to fee split with subagents or not?

4 A. Yes.

5 Q. So you agree to fee split with subagents, transaction
6 coordinators and buyers' brokers?

7 A. Correct.

8 Q. So you explained earlier that there's some risk in
9 offering compensation to subagents, right?

10 A. Correct.

11 Q. So you're willing to take on that risk?

12 A. Correct, if my client is willing to. It's up to my
13 client really. It's not my decision. It's my
14 client's decision how they want to operate. I'm
15 telling them that we will and we do normally work with
16 everybody.

17 Q. So for example if you go back to the previous page, DW
18 00008, and you look about three quarters of the way
19 down in the paragraph that starts, in the capacity as
20 subagent, do you see that?

21 A. Okay.

22 Q. And then the very last line says, because of this
23 relationship you could be held liable for his or her
24 actions?

25 A. Correct.

- 1 Q. So that's where you explain to your client, your
2 potential client, they could be liable for a subagent
3 actions and they make a choice?
- 4 A. Correct.
- 5 Q. If you look at the page that's DW 000016, do you see
6 the top of it says over 96.9 percent of all properties
7 sold in the greater Oakland County multiple listing
8 service are cooperative sales, what does that mean?
- 9 A. That means that the broker that listed the property is
10 not necessarily the broker that sold the property.
- 11 Q. So 96.9 percent of the time there are two agents
12 involved?
- 13 A. Correct.
- 14 Q. And for that reason, well, why are you explaining that
15 to your potential sellers?
- 16 A. Because a ton of agents out there will say, oh, I
17 double dip or I sell almost all my own properties and
18 what I'm saying is that's not the general rule.
- 19 Q. Okay. So in other words there are agents out there
20 who say, use me because I'll also represent the buyer,
21 right?
- 22 A. Correct. I list and sell almost all my own
23 properties.
- 24 Q. So you're saying that's not --
- 25 A. That's not the general rule, and if you do that you're

1 probably keeping your listing in your own pocket too
2 long.

3 Q. So we talked earlier about the types of marketing that
4 you do and you said there was things such as hard copy
5 advertising, right?

6 A. I'm sorry, I didn't understand the question.

7 Q. We talked earlier about the types of marketings that
8 you do and one of the things that you said in
9 marketing was that you use hard copy advertising?

10 A. Correct.

11 Q. Open houses, right?

12 A. Correct.

13 Q. And then Internet marketing is another one, right?

14 A. Correct.

15 Q. In your hard copy advertising, you're talking about
16 advertising in real estate magazines and things like
17 that?

18 A. Homes magazines, newspapers.

19 MR. GATES: We can go out of restricted
20 confidential now.

21 THIS MARKS THE END OF THE RESTRICTED AND CONFIDENTIAL
22 DESIGNATION FOR EXHIBITS 310-311 AND TESTIMONY CONCERNING
23 SAME.

24 BY MR. GATES:

25 Q. I'm going to hand you to a magazine that we're going

1 to mark as CX 312.

2 MARKED BY THE REPORTER:

3 DEPOSITION EXHIBIT NUMBER CX 312

4 11:45 a.m.

5 BY MR. GATES:

6 Q. So CX 312 is an Oakland Homes magazine, that's one of
7 the magazines that you mentioned earlier, right?

8 A. Correct.

9 Q. And if you look at the tabbed page, which if you could
10 tell me what page that is?

11 A. Page 32 and 33.

12 Q. On page 32 and 33 there's an advertisement from your
13 brokerage, right?

14 A. Correct.

15 Q. And how many houses are listed there?

16 A. 24.

17 Q. 24 houses and you told me you had at any given time
18 several hundred listings, is that right?

19 A. Probably, yeah.

20 Q. So 24 of those several hundred listings, then you
21 advertise in that magazine, right?

22 A. Correct.

23 Q. And that magazine is distributed, you know, at
24 different stores and things like that, right?

25 A. Right.

1 Q. So I could go to, for example, a bagel store and it
2 might be sitting out in front of the store and I could
3 pick that up and look at that magazine while I'm
4 eating a bagel, right?

5 A. Correct.

6 MR. MANDEL: Likely source.

7 BY MR. GATES:

8 Q. And how often does that magazine come out?

9 A. This one I think is a, it's either every couple weeks
10 or every month and I can't tell you which.

11 Q. Okay. So every company weeks or month you put in
12 approximately 24 listings into the Oakland Homes
13 magazine?

14 A. Correct.

15 Q. And do you rotate your listings through that?

16 A. Yes.

17 MR. GATES: I'll give to you what we'll
18 mark as 313.

19 MARKED BY THE REPORTER:

20 DEPOSITION EXHIBIT NUMBER CX 313

21 11:47 a.m.

22 BY MR. GATES:

23 Q. Mr. Whitehouse, I've given you what's been marked as
24 CX 313. It's a Preferred Oakland Homes magazine,
25 right?

- 1 A. Correct.
- 2 Q. And that's another magazine that you advertise in?
- 3 A. Correct.
- 4 Q. If you turn to the tabbed page, I believe you have --
- 5 your brokerage has an advertisement there?
- 6 A. That's correct.
- 7 Q. Which page is the advertisement?
- 8 A. Let's see, page four, five, six and seven.
- 9 Q. And how many homes then are featured in that
- 10 advertisement?
- 11 A. Oh boy --
- 12 MR. MANDEL: Of his?
- 13 BY MR. GATES:
- 14 Q. Of your brokerage.
- 15 A. Looks like about 38 homes.
- 16 Q. So if you turn back to the first page of that
- 17 advertisement and you see there at the bottom of the
- 18 first page it says, "My sold listings in 2006," and
- 19 there's three homes above that?
- 20 A. Correct.
- 21 Q. Did you count those?
- 22 A. Yes, I did.
- 23 Q. Okay. So those aren't active listings then?
- 24 A. Correct.
- 25 Q. About 35 active listings in that advertisement, right?

- 1 A. Correct.
- 2 Q. And in the second page there you have Cindy Kahn is
3 listed as the agent at the top, right?
- 4 A. Correct.
- 5 Q. So is it only her listings are on that page?
- 6 A. Correct.
- 7 Q. How do you decide which agents you feature in these --
- 8 A. We don't. These are ads put in and paid for by the
9 agents.
- 10 Q. So the agents are the ones who do that marketing?
- 11 A. That is correct.
- 12 Q. We'll just do one more of them. We'll mark this as CX
13 314.
- 14 MARKED BY THE REPORTER:
15 DEPOSITION EXHIBIT NUMBER CX 314
16 11:49 a.m.
- 17 BY MR. GATES:
- 18 Q. CX 314 is entitled The Real Estate Book, right?
- 19 A. Correct.
- 20 Q. And that's another local magazine in which your agents
21 advertise in?
- 22 A. Correct.
- 23 Q. And there is an advertisement from some of your agents
24 in that book?
- 25 A. Correct.

- 1 Q. How many pages?
- 2 A. Page 40, 41, 42 and 43. Looks like four pages.
- 3 Q. So it isn't your brokerage that decides which listings
4 that go into those, it's the agents, is that right?
- 5 A. Some of them are our brokerage and some of them are
6 the agents.
- 7 Q. Can you tell me which or how many of them are the
8 brokerage and how many are the agents?
- 9 A. The first page is the brokerage, the remaining pages
10 are the agents.
- 11 Q. And how many total listings are in that book?
- 12 MR. MANDEL: For his brokerage?
- 13 BY MR. GATES:
- 14 Q. For your brokerage in total, including your agents'
15 listings.
- 16 A. Let's see, 34.
- 17 Q. And how often does The Real Estate Book come out?
- 18 A. I don't know off hand. It's either biweekly or
19 monthly.
- 20 Q. Your brokerage or your agent has to pay to have the
21 listings displayed in The Real Estate Book?
- 22 A. If they're displayed on the company page, no; if
23 they're their own advertising, yes.
- 24 Q. But if it's on the company page, your brokerage is
25 paying for it, right?

- 1 A. Correct.
- 2 Q. And then if we go back to the exhibit before, CX 313,
3 that's the Preferred Oakland Homes?
- 4 A. Correct.
- 5 Q. Can you tell me how often that comes out?
- 6 A. I'm going to guess that's monthly.
- 7 Q. Now, your listings on the Internet, you have all your
8 listings on all the Internet sites that we've
9 discussed earlier, right?
- 10 A. I have all my listings on the Internet, on the sites
11 that we've discussed earlier, yes.
- 12 Q. And those listings are updated periodically?
- 13 A. Yes.
- 14 Q. So for example if a seller decides to change the
15 description of their home you'll update that and that
16 will be also updated in the -- on the Internet?
- 17 A. Correct.
- 18 Q. If they decide to change the price, that will be
19 updated and updated in the Internet?
- 20 A. Um-hum. Correct.
- 21 Q. Now, in these hard copy advertisements you don't have
22 any opportunity to update any of the listings until
23 the publication is published in the next issue?
- 24 A. No, you can't change what's already printed.
- 25 Q. Mr. Whitehouse, we're going to mark this next exhibit

1 as CX 315.

2 MARKED BY THE REPORTER:

3 DEPOSITION EXHIBIT NUMBER CX 315

4 11:53 a.m.

5 BY MR. GATES:

6 Q. CX 315 is one of your listings displayed on
7 Realtor.com?

8 A. Correct.

9 Q. If you look at the MLS ID number, you recognize that
10 this listing was listed on MI Real Source, right?

11 A. Correct.

12 Q. And you double listed this listing on both MI Real
13 Source and Realcomp?

14 A. Correct.

15 Q. So if we could look at CX 316.

16 MARKED BY THE REPORTER:

17 DEPOSITION EXHIBIT NUMBER CX 316

18 11:54 a.m.

19 BY MR. GATES:

20 Q. CX 316 is that same listing but on MoveInMichigan.com,
21 right?

22 A. Correct.

23 Q. But this listing has the Realcomp MLS ID number,
24 correct?

25 A. Correct.

1 MARKED BY THE REPORTER:
2 DEPOSITION EXHIBIT NUMBER CX 317.
3 11:54 a.m.

4 BY MR. GATES:

5 Q. CX 317 you recognize that as the same listing as in CX
6 316 and CX 315?

7 A. I do. Has the address right there.

8 Q. And this listing is showing up on -- this is a Remax
9 Showcase Homes listing, right?

10 A. Correct.

11 Q. And if you look at the MLS ID number, you recognize
12 that on the Remax Showcase Homes site it's the
13 Realcomp listing -- correct? -- the MLS number is
14 right above the IDX symbol.

15 A. Okay.

16 Q. So that listing is from the Realcomp MLS, right?

17 A. Yes, it is.

18 Q. And you recognize that IDX symbol as being from the
19 Realcomp IDX?

20 A. I do.

21 Q. So this listing got to this particular website via the
22 Realcomp IDX?

23 A. Correct.

24 Q. And even though it was -- we know that it was listed
25 in the MI Real Source MLS, at least when it got -- how

1 it got to this particular site is through the Realcomp
2 MLS, right?

3 A. Correct.

4 MARKED BY THE REPORTER:

5 DEPOSITION EXHIBIT NUMBER CX 318

6 11:56 a.m.

7 BY MR. GATES:

8 Q. And you recognize CX 318 as the same listing we saw in
9 the CX 317 and CX 316 and CX 315?

10 A. I do.

11 Q. And although many of the graphics are blocked out here
12 you can recognize from the second page that this is
13 from the Real Estate One website, correct?

14 A. Yep.

15 Q. And we know that this listing got to the Real Estate
16 One website via the Realcomp IDX, right?

17 A. Correct.

18 Q. And we know that because, one, the listing number is
19 the Realcomp MLS number, right?

20 A. I don't see it off hand but --

21 Q. It's on the second page at the top.

22 A. Correct.

23 Q. And we also know it because it says that the IDX
24 information was provided through Realcomp II on the
25 second page, right?

1 A. Correct.

2 MARKED BY THE REPORTER:

3 DEPOSITION EXHIBIT NUMBER CX 319

4 11:57 a.m.

5 BY MR. GATES:

6 Q. You recognize CX 319 as the listing that's the same
7 listing as in CX 315 through 318, right?

8 A. Correct.

9 Q. And this listing is showing up on the Keller Williams
10 Realty website, right?

11 A. Correct.

12 Q. And that listing got to the Keller Williams site via
13 the Realcomp IDX system?

14 A. Correct.

15 Q. And we do know though that this listing was also
16 listed in the MI Real Source MLS, right?

17 A. Correct.

18 MARKED BY THE REPORTER:

19 DEPOSITION EXHIBIT NUMBER CX 320

20 11:58 a.m.

21 BY MR. GATES:

22 Q. Tell us what CX 320 is. Do you recognize it?

23 A. Yes.

24 Q. Okay. Can you tell us what it is?

25 A. It's a letter of -- showing some of the things we do

1 in marketing properties.

2 Q. So this is a letter that's created by your brokerage?

3 A. Correct.

4 Q. And this is -- in particular it's from the director of
5 advertising at your firm?

6 A. Correct.

7 Q. And this is intended to be given to potential clients?

8 A. Correct.

9 Q. So we see in the second paragraph it states, in
10 addition to print media, the Internet has become
11 increasingly -- an increasingly important tool,
12 computer savvy home buyers, over 80 percent of all
13 home buyers, access information about your property on
14 our website and can contact our agent immediately for
15 an appointment to have their questions answered via
16 E-mail.

17 Is that a true statement?

18 A. Yes.

19 Q. So 80 percent of all home buyers access information
20 about properties on websites, right? You say on your
21 website, is that right?

22 A. 80 percent, that's the best of our understanding,
23 yeah.

24 (Recess taken at 12:00 p.m.)

25 (Back on the record at 12:35 p.m.)

1 BY MR. GATES:

2 Q. Mr. Whitehouse, when you or one of your agents is
3 representing a buyer, has there been an occasion where
4 a buyer has wanted to see a house that is for sale by
5 owner?

6 A. Yeah.

7 Q. How do you deal with that situation as a Realtor?

8 A. Depends on my agency relationship with the buyer.
9 Depends on the relationship that I have and what the
10 agency status is with that buyer.

11 In fact, one of the things I ask a buyer
12 when I establish an agency relationship with that
13 buyer is on what basis do they wish to operate. By
14 that I mean do they wish to see for sale by owners, do
15 they wish to see properties where the commission is
16 less than what they've agreed to pay, because in most
17 cases the buyer's unable to finance the commission if
18 it's less and so they have to make a decision whether
19 they're willing to pay it out of pocket, or whether,
20 you know, they don't want to see those listings and
21 they want to just go with a listing that is paying
22 them what they're willing to pay.

23 Q. So assume you have a buyer's agency agreement with
24 your client and they say, yes, I want to see for sale
25 by owners, I want you to see if you can negotiate a

1 commission directly from the seller, can that be done?

2 A. I cannot -- well, I shouldn't say that. Yes, I can
3 negotiate a commission with a for sale by owner.

4 Q. Have you done that in the past?

5 A. Yes.

6 Q. So there's nothing -- you don't tell your clients no,
7 I won't show you for sale by owner properties?

8 A. No, not for sale by owner but, however, I don't -- I
9 don't go out and seek them out, and I let my clients
10 know that I'm not going to be seeking out the for sale
11 by owner per se because, you know, I have to go out
12 and do it. I have to go out and seek it out and, you
13 know, if they have for sale by owner they want to see,
14 I'll show it to them.

15 Q. Let me ask you this. If you don't have a buyer's
16 agency agreement with a client, and they bring a
17 listing to you, or a flier to you, it's a for sale by
18 owner and say, Mr. Whitehouse, please show me this
19 house, it's a for sale by owner, how would you handle
20 that situation?

21 A. I would ask them to sign a protection letter on that
22 listing.

23 Q. Can you tell me what a protection letter is?

24 A. It's basically a buyer agency for that one property.

25 Q. For that single property?

1 A. For that property, if I don't already have a buyer
2 brokerage arrangement with them.

3 Q. Thank you.

4 MARKED BY THE REPORTER:

5 DEPOSITION EXHIBIT NUMBER CX 321

6 12:39 p.m.

7 BY MR. GATES:

8 Q. CX 321 is entitled, 2005 Analysis Online Real Estate
9 Advertising. It's produced by Borrell Associates,
10 Inc., can you tell me where did you get this report?

11 A. Most likely on the Internet.

12 Q. So this is something that you downloaded from the
13 Internet?

14 A. Probably.

15 Q. And --

16 A. Tells you the report was created at the Real Estate
17 Connect Conference.

18 Q. What is the Real Estate Connect Conference?

19 A. I think that's an online convention, real estate
20 convention.

21 Q. So you downloaded this and did you rely on this at
22 all? Did you read it?

23 A. I've got it but I don't remember reading it off hand.

24 Q. So you don't remember using this information at all?

25 A. I don't know whether I used it or not. I really don't

1 without reading it again.

2 MARKED BY THE REPORTER:

3 DEPOSITION EXHIBIT NUMBER CX 322

4 12:40 p.m.

5 BY MR. GATES:

6 Q. CX 322 is entitled, Classified Intelligence Real
7 Estate Advertising Annual, Time to Listen Or Lose,
8 produced by Classified Intelligence, L.L.C.

9 This is a document that you produced to us
10 pursuant to subpoena, correct?

11 A. Maybe. I honestly don't remember.

12 Q. Is this a document that you downloaded off the
13 Internet as well?

14 A. I would say absolutely. I sure didn't type it.

15 Q. Okay. And do you remember from where you got this
16 document other than just from the Internet?

17 A. No, I don't.

18 Q. Do you remember why it is that you downloaded this
19 particular publication?

20 A. I download a lot of things to try to stay current, try
21 to stay up to date, and no, I don't have an answer for
22 why I downloaded this particular one.

23 Q. But this is something in general you would have
24 downloaded in order to keep current in real estate
25 trends?

1 A. Yes.

2 Q. And it's important for you to keep current in real
3 estate trends why?

4 A. Because I think that's part of my responsibility as a
5 Realtor.

6 Q. Why is it part of your responsibility as a Realtor?

7 A. Well, if I'm going to consult with people, I'm going
8 to give them advice and everything, I try and stay as
9 current as possible.

10 MR. GATES: Let's mark the transcript as
11 restricted confidential from this point forward until
12 we go out, and I'll give you what we'll mark as CX
13 323.

14 THE FOLLOWING EXHIBITS CX 323-325 AND TESTIMONY CONCERNING
15 SAME IS RESTRICTED AND CONFIDENTIAL.

16 MARKED BY THE REPORTER:

17 DEPOSITION EXHIBIT NUMBER CX 323

18 12:42 p.m.

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BY MR. GATES:

- 1 Q. Mr. Whitehouse, can you explain to me what CX 325 is?
- 2 A. You asked for a recap of my last 20 transactions and
3 the commission rates that those transactions
4 represented, and that's what this is a recap of.
- 5 Q. So this came from your accounting system at your
6 brokerage?
- 7 A. On my commissions, correct.
- 8 Q. If you look at the first page then, at the top it says
9 an agent double ender, do you see that?
- 10 A. Correct.
- 11 Q. So this is an instance in which your brokerage was
12 both -- represented both sides of the transaction,
13 right?
- 14 A. This is an instance in which I represented both sides
15 of the transaction.
- 16 Q. You personally represented both sides of the
17 transaction?
- 18 A. Correct.
- 19 Q. So therefore under your accounting system you got both
20 the listing commission and the selling commission?
- 21 A. Correct.
- 22 Q. If you go to the second page of the document it says
23 that this is a listing side at the top, do I
24 understand that means that you were the listing side
25 broker for this transaction?

- 1 A. That is correct.
- 2 Q. So when it says listing commission rate 3 percent?
- 3 A. Correct.
- 4 Q. That's the amount, it shows the amount of commission
5 that your brokerage received for this sale, right?
- 6 A. Correct.
- 7 Q. And it says selling commission rate zero.
- 8 A. Correct.
- 9 Q. That doesn't mean there wasn't an offer of
10 compensation, right?
- 11 A. That is correct. There was an offer of compensation.
- 12 Q. So in this transaction there was an offer of
13 compensation, there was commission paid to a
14 cooperating broker?
- 15 A. Correct.
- 16 Q. Just not reflected in your --
- 17 A. Doesn't reflect on our side because we don't get the
18 money.
- 19 Q. Got it. Just wanted to make sure I could read that
20 correctly. Thank you.
- 21 A. And you'll notice some of the others in there, it's
22 differing commission rates.
- 23 Q. Yes. Thank you.

24 MARKED BY THE REPORTER:
25 DEPOSITION EXHIBIT NUMBER CX 326

1 12:48 p.m.

2

3 BY MR. GATES:

4 Q. I don't know if it's supposed to be confidential. You
5 can tell us. Should that be confidential,
6 Mr. Whitehouse?

7 A. No.

8 MR. GATES: Then we can go out of
9 restricted confidential.

10 THIS MARKS THE END OF THE RESTRICTED AND CONFIDENTIAL
11 DESIGNATION FOR EXHIBITS 323-325 AND TESTIMONY CONCERNING
12 SAME.

13 BY MR. GATES:

14 Q. Looking at CX 326, just tell us what that is.

15 A. It's a -- looks like -- looks like a document showing
16 pending sales and sold properties.

17 Q. Do you know why this report was generated?

18 A. Not off hand. Looks like it was generated for a
19 market analysis but I don't know how it would have
20 gotten into -- I have no idea.

21 Q. Maybe it was a mistake.

22 A. That's my first inclination because this is simply
23 information that I provide when I do a market
24 analysis.

25 Q. Okay. So your first inclination is that's a market

1 analysis?

2 A. Yeah.

3 Q. Okay. Thank you.

4 MARKED BY THE REPORTER:

5 DEPOSITION EXHIBIT NUMBER CX 327

6 12:50 p.m.

7 BY MR. GATES:

8 Q. CX 327 is a letter from Karen Kage to you dated
9 September 18th, 2006, right?

10 A. Yes, it is.

11 Q. And in the middle of the page it talks about
12 Realcomp's MLS rules and regulations that are subject
13 to the Federal Trade Commission's litigation, right?

14 A. Yep.

15 Q. And it talks about the first bullet point is exclusive
16 agency, limited service, MLS entry only listings will
17 not be distributed to any real estate Internet
18 advertising sites, right?

19 A. Correct.

20 Q. So that's one of the rules that you understand is part
21 of the Federal Trade Commission's suit, right?

22 A. Correct.

23 Q. Second one is that listing information downloaded or
24 otherwise displayed pursuant to IDX shall be limited
25 to properties listed on an exclusive right-to-sell

1 basis.

2 A. Correct.

3 Q. So those two rules have to do with the distribution of
4 listings on to the Internet, right?

5 A. Correct.

6 Q. Now, you weren't on the Board of Governors when
7 Realcomp implemented these two rules, were you?

8 A. No, I was not.

9 Q. Do you know when they implemented these two rules?

10 A. No.

11 Q. When did you first become aware of the two rules?

12 A. I couldn't give you a date. I really --

13 Q. Did you know about them before you got the letter from
14 Karen Kage?

15 A. I would say so.

16 Q. How long before that?

17 A. I honestly don't know.

18 Q. Did you know about them in 2005?

19 A. I would say so but I don't remember a date.

20 Q. Did the Realcomp Board of Governors consult you at all
21 regarding passing these rules?

22 A. No.

23 Q. So you don't have any firsthand knowledge of why it
24 was that the Realcomp Board of Governors passed these
25 rules?

1 A. No, I don't have any information on why they made the
2 decision. I have my own opinion but --

3 Q. You have your opinion but you don't know exactly why
4 they did?

5 A. No, I do not.

6 Q. On the third bullet point it says, additionally, the
7 fact that the listing type search criteria on Realcomp
8 Online automatically defaults to exclusive
9 right-to-sell and unknown.

10 Do you understand that to be one of the
11 rules that's subject to the FTC litigation, right?

12 A. Yes.

13 Q. And you were not on the Realcomp Board of Governors
14 when they passed that rule?

15 A. No.

16 Q. They didn't consult you when they passed that rule?

17 A. No.

18 Q. You don't know why it was that they passed that rule
19 originally?

20 A. No.

21 Q. When did you first learn about that rule if you
22 remember?

23 A. Again, I don't recall a date. It would have been some
24 time ago but I don't recall a date.

25 Q. Were you aware of these three rules prior to the FTC

1 investigating Realcomp?

2 A. Yeah, absolutely.

3 Q. Below that, right below the three bullet points, the
4 second part of the sentence says, Realcomp
5 incorporated the above rules to protect the interests
6 of MLS subscribing brokers and agents.

7 You understand that to refer to all three
8 of the rules, right?

9 A. Yes.

10 Q. But you don't have any firsthand knowledge of why it
11 was that Realcomp passed any of these rules?

12 A. I can tell you that, you know, as far as when I was
13 familiar -- when I became familiar with these rules
14 was probably when they were implemented on the
15 computer system.

16 Q. Okay.

17 A. I would definitely be -- I was familiar with them at
18 that point in time, because very candidly I used, for
19 example, the third bullet point where it defaults to
20 exclusive right-to-sell and unknown, I use that, and I
21 am very conscious of what I'm selecting there on every
22 search that I do.

23 Q. Okay.

24 A. Simply put, because I need to know -- I need to make
25 that decision on what I send out based on what my

- 1 agency relationship is on who I'm sending it to.
- 2 Q. But you don't remember when it was implemented?
- 3 A. No. No. And whenever it was implemented I would have
- 4 been -- I would have become conscious of it at that
- 5 point in time.
- 6 Q. Now, the first two rules talking about feeding only
- 7 exclusive right-to-sell listings to the Internet, how
- 8 would you have become aware of that?
- 9 A. Probably through word of mouth at some point in time.
- 10 I don't know. I don't know.
- 11 Q. It's not visible on Realcomp Online, right?
- 12 A. It's in the rules. I believe it's in the rules and
- 13 regulations.
- 14 Q. It's in the rules and regulations. How often do you
- 15 read the rules and regulations?
- 16 A. Every time they're republished.
- 17 Q. Every time it's republished you read them?
- 18 A. Yep.
- 19 Q. In their entirety?
- 20 A. Yep. Or I ask what's been changed.
- 21 Q. Do all your agents do that?
- 22 A. Probably not.
- 23 Q. Okay. It's your opinion, isn't it, that MLSs should
- 24 not provide their listings to public Internet sites?
- 25 A. The MLS should not provide their listings to -- I do

- 1 not believe that the MLS should have its own public
2 Internet site.
- 3 Q. Should the MLS feed listings to other Internet sites?
- 4 A. I think as Realtors we should have a site that has our
5 listings on it that's available to the public, yes.
- 6 Q. A site, a single site?
- 7 A. I think we should have -- I think every broker should
8 have their own site. I think that there needs to be a
9 gathering of all those sites under one common roof.
- 10 Q. You would agree that in your opinion the MLS system
11 should not be providing public access on their own to
12 any listing information, right?
- 13 A. Correct.
- 14 Q. So it should be --
- 15 A. By the broker.
- 16 Q. Should be by the broker and they should be required to
17 opt in to any feed of their listing information to
18 public websites, right?
- 19 A. Correct.
- 20 Q. Now, you have opinions about Realcomp's rules, right?
- 21 A. Sure.
- 22 Q. Okay. And let me -- but you don't -- let's look at
23 the rules about the Internet publication of only
24 exclusive right-to-sell listings, okay? Can you tell
25 me from firsthand knowledge of any problems or

1 incidents that have occurred because of the
2 publication of a nonexclusive right-to-sell listing on
3 the Internet?

4 A. I can't give you specific times and dates; however, I
5 have heard of members of the public using that
6 information to find out about a property and then buy
7 it directly from the seller.

8 Q. And you have heard about that happening where?

9 A. Here locally.

10 Q. Here locally?

11 A. Yeah.

12 Q. And how did those -- how did those listings get to the
13 Internet then?

14 A. I'm sorry, not from -- okay. I have heard about --
15 I'm sorry. You're saying exclusive right-to-sell?

16 Q. Anything -- I'm asking of any problems --

17 A. Please restate the question. I'm not sure I
18 understand.

19 Q. That's fine. I'm asking you, tell me from firsthand
20 knowledge any problems that have been caused by the
21 publication of nonexclusive right-to-sell listings on
22 Internet sites fed by a local multiple listing
23 service.

24 A. Well, right now there are no Internet sites fed with
25 the exclusive agency listings.

- 1 Q. Okay. So going back in your experience, you know,
2 prior to 2000 even, tell me of all the problems that
3 you can tell me of from firsthand knowledge.
- 4 A. From firsthand experiencing a problem myself?
- 5 Q. Yes.
- 6 A. I can't. I can only tell you secondhand.
- 7 Q. So you only have secondhand knowledge of any problems
8 that the publication of exclusive agency listings on
9 to Internet sites causes?
- 10 A. Correct. I have not experienced that myself in my
11 sale.
- 12 Q. The secondhand knowledge is what, you've heard from
13 what sources?
- 14 A. From other agents around the country.
- 15 Q. So this is not in Michigan but from other agents in
16 other MLSs?
- 17 A. From other agents in other MLSs.
- 18 Q. So you have heard from, what, stories have been told
19 to you?
- 20 A. Correct.
- 21 Q. And from whom have you heard these stories?
- 22 A. Agents all over the country.
- 23 Q. Agents all over the country?
- 24 A. Yeah.
- 25 Q. Can you give me the names?

- 1 A. No, I can't.
- 2 Q. Can you tell me how many?
- 3 A. No.
- 4 Q. In person?
- 5 A. It's either in person, E-mail, chat groups, chat
6 rooms.
- 7 Q. Okay. So, Mr. Whitehouse, you produced to us a large
8 number of E-mails and things that came from chat
9 rooms, right?
- 10 A. From Internet reading, yes.
- 11 Q. And so we would expect to find those types of
12 complaints in those materials that you produced to us?
- 13 A. Not necessarily. I don't keep everything.
- 14 Q. So we have --
- 15 A. If I kept everything, we couldn't move in this room.
- 16 Q. So you haven't kept those types of complaints?
- 17 A. No.
- 18 Q. Why not?
- 19 A. Not enough room.
- 20 Q. Didn't think it was important?
- 21 A. Not enough room to keep them.
- 22 Q. You kept a lot of other stuff but you're telling me --
- 23 A. I keep articles that are readable and that are
24 quotable, you know, but no, I don't -- I haven't kept
25 those types of things.

1 Q. So the only thing that you can tell us about then is
2 from your memory, right?

3 A. Correct.

4 Q. You don't have any documents verifying any of these
5 complaints, right?

6 A. Correct.

7 Q. And you don't have any names of any agents who have
8 given these complaints?

9 A. No, I do not. Could probably go out and get them.

10 Q. Well, but you can't today testify to any names?

11 A. No, I cannot.

12 Q. And you know, for example, that other MLSs across the
13 country do allow EA's listings --

14 A. I do know there are some, yes.

15 Q. To go out to public Internet sites?

16 A. Correct.

17 Q. And have any of those MLSs collapsed because they've
18 done that?

19 A. Well, it's not a matter of the MLS collapsing. It's a
20 matter of the agent not getting compensated for the
21 work they're doing and for what they're paying for
22 being done. They're supporting the MLS and the MLS's
23 marketing and the -- and yet they're paying their
24 dollars to go out and advertise a piece of property
25 and get cut out of the transaction.

- 1 Q. So let me understand, which agent are you talking
2 about was getting cut out of the transaction, the
3 listing agent or the cooperating broker?
- 4 A. Both have been cut out of the transaction.
- 5 Q. When you say somebody is spending money to advertise a
6 listing, who is it that's spending money to advertise
7 the listing?
- 8 A. Both listing and selling agents.
- 9 Q. So how is the selling agent spending money to
10 advertise the listing?
- 11 A. They support the MLS's wealth and put data out from
12 MLSs.
- 13 Q. So --
- 14 A. The listing agent does.
- 15 Q. I'm sorry, go ahead.
- 16 A. Just as the listing agent does.
- 17 Q. Both the listing agent and selling agent are spending
18 money to advertise listings in general by paying their
19 MLS dues and by providing their own websites, right?
- 20 A. Correct.
- 21 Q. So it's your opinion that publishing EA's from MLSs is
22 a bad thing because those, the listing agent and the
23 selling agent may not be compensated for those
24 advertising expenditures?
- 25 A. May not be compensated for their efforts and

1 advertising and for the fact that they're the ones
2 marketing those properties.

3 Q. Which efforts are you talking about? Which efforts
4 are they not be compensated for?

5 A. Which efforts are they not being compensated for? For
6 the fact they are out marketing those properties when
7 there's an exclusive agency and the buyer can buy it
8 around them.

9 Q. Let's back up for a second. Under an exclusive agency
10 agreement, is it your understanding that a listing
11 agent gets no compensation whatsoever if they do not
12 bring the buyer to the transaction?

13 A. No. Under an exclusive agency transaction the listing
14 agent may or may not be compensated.

15 Q. And that's --

16 A. Depending on what their arrangement is with the
17 seller.

18 Q. That's entirely up to the listing agent?

19 A. That is correct.

20 Q. Is it your opinion that the MLS should dictate whether
21 or not a listing agent is compensated by a seller in
22 their arrangement?

23 A. Nope.

24 Q. So the MLS should not be in the business of dictating
25 that?

1 A. I absolutely agree.

2 Q. So is it your opinion that if a listing agent decides
3 to agree to list a property let's say for no
4 compensation whatsoever, that should not be put on the
5 MLS?

6 A. If a listing agent decides to put it on the MLS, it's
7 up to them what they charge to do so.

8 Q. So it's entirely up to them?

9 A. Correct.

10 Q. Now, under -- is it entirely up to the listing agent
11 then whether or not to enter into an exclusive agency
12 agreement or not?

13 A. Yes.

14 Q. Under Realcomp's rules, a limited service listing is
15 something in which the broker does not provide certain
16 minimum services, right?

17 A. Limited service, unbundled transaction, whatever you
18 want to call it.

19 Q. So a limited service listing under the Realcomp rules
20 is one in which the broker is not providing certain
21 services, right?

22 A. Yeah, that's correct. They're being selective in what
23 they provide.

24 Q. And it could be the case that their form of contract
25 is an exclusive right-to-sell contract, isn't it?

- 1 A. Doesn't have to be.
- 2 Q. It could be, right?
- 3 A. It could be, yes.
- 4 Q. So under Realcomp's rules, a listing broker could
5 enter into an exclusive right-to-sell form of contract
6 but because they don't provide certain services, it is
7 categorized by Realcomp as a limited service listing,
8 right?
- 9 A. I don't think I -- we're crossing terminology there.
- 10 Q. Let's look at the rules. I'm going to give to you
11 what is CX 100. Okay. CX 100, let's look at a page
12 marked RC 1341. You recognize CX 100, you'll agree
13 with me this is the Realcomp rules and regulations
14 revised October 2006, right?
- 15 A. Okay.
- 16 Q. And on the page that's marked RC 1341 we have the
17 definitions of a limited service listing, right?
- 18 A. Correct.
- 19 Q. Section 1.2.2 defines a limited service as a listing
20 agreement under which the listing broker will not
21 provide one or more of the following services, right?
- 22 A. Okay.
- 23 Q. So a broker could enter into an agreement with a
24 seller under which they will be compensated no matter
25 who sells the home, but if they don't provide these

- 1 five services, it is classified by Realcomp as a
2 limited service listing, isn't that right?
- 3 A. Correct.
- 4 Q. Okay. So in that instance, under that contract, the
5 listing broker will be compensated for their efforts,
6 correct?
- 7 A. Correct.
- 8 Q. Despite that, under Realcomp's rules it will not be
9 put out on the Internet, right?
- 10 A. Correct.
- 11 Q. What's your understanding of why that is?
- 12 A. You're subjecting the selling broker to other and
13 additional potential duties and the potential of
14 undisclosed dual agency, or the risk of undisclosed
15 dual agency, in a situation where the seller is not
16 being provided a full bundle of services.
- 17 Q. Okay.
- 18 A. And therefore it needs to be known and the broker has
19 to have -- has to willingly accept that risk and that
20 potential.
- 21 Q. Okay. Under Realcomp's rules, every listing type must
22 be identified, correct? Every listing must be
23 identified by a listing type, right?
- 24 A. Correct.
- 25 Q. And that shows up in the listing right at the very top

1 of the detailed listing, it tells you what listing
2 type that is?

3 A. Correct.

4 Q. So if a broker or an agent pulls up a listing, they
5 will know once they look at the detailed listing what
6 type of listing arrangement there is between the
7 seller and the agent, correct?

8 A. Correct.

9 Q. So they then know if it's a limited service listing or
10 not, right?

11 A. Correct.

12 Q. Now, you said earlier the reason in your opinion that
13 limited service listings should not go out to public
14 Internet sites from the Realcomp MLS is because
15 there's no guaranty that the brokers on either side
16 will be compensated for their services, right?

17 A. I don't know. I might have said that.

18 Q. That's what you testified to, right? You're not sure?

19 A. I was talking about an exclusive agency listing.

20 Q. You also told me under an exclusive agency listing,
21 depending on the agreement between the seller and the
22 broker, the broker could be compensated even if the
23 buyer sells the home, right?

24 A. Absolutely correct.

25 Q. So the listing broker, depending on how they wrote the

1 contract, could be compensated for their services
2 under an exclusive agency listing, right?

3 A. Yes.

4 Q. So your justification for these not being sent out to
5 the public Internet sites isn't exactly correct, is
6 it?

7 A. Well, no. You're putting words in my mouth as far as
8 my justification. The reason --

9 Q. You agreed to those words, did you not?

10 A. No.

11 Q. So you don't agree to the words?

12 A. No.

13 Q. You're changing your mind?

14 A. Not changing my mind. I'm not sure I understood what
15 you were saying.

16 Q. Okay. Go ahead. Tell me what you understand I'm
17 saying.

18 MR. MANDEL: Do you want his answer or want
19 him to tell --

20 MR. GATES: I want him to tell me what his
21 understanding of the question is that's on the table.

22 A. You'll have to reask the question, because I don't
23 know what the question is, first.

24 BY MR. GATES:

25 Q. I asked you, I said, you testified to earlier that

1 under an exclusive agency listing, depending on how
2 the contract is written, the listing broker could be
3 compensated no matter who sells the home, isn't that
4 right?

5 A. That is correct.

6 Q. And you also told me the reason why exclusive agency
7 listing should not go out under public Internet sites
8 from the MLS is because neither side is guaranteed
9 compensation for their services, right?

10 A. No, I didn't -- if I made that statement, that's -- if
11 you're interpreting it that way, that's incorrect.

12 Q. Okay. So that's not a correct statement?

13 A. No, it is not.

14 Q. Give me your opinion then of why it is that anything
15 except for exclusive right-to-sell listings should be
16 fed from the Realcomp MLS out to public Internet
17 sites?

18 A. Why they should or should not be?

19 Q. Why they should not be. Thank you.

20 A. Exclusive -- anything other than an exclusive
21 right-to-sell fed out to a public site is subjecting
22 the brokers who are supporting that site, and who are
23 paying for that service, to an unknown variable, which
24 they don't know when the public takes a look at that
25 listing and decides what -- you know, that -- brings

1 it to the broker. The broker has no idea of, he's
2 paying to market something that he has no idea whether
3 he's going to be compensated for or not.

4 Q. Which broker is paying to be --

5 A. The selling broker.

6 Q. So now the problem is solely on the selling broker
7 side, right?

8 A. The selling broker is in a position of not knowing
9 where they're at.

10 Q. What do you mean by not knowing where they're at?

11 What do you mean by not knowing where they're at?

12 A. Well, if you're going to put out an exclusive agency
13 where the seller reserves the right to sell the home
14 themselves on the Internet, I'm helping to pay for the
15 cost of Realtor.com, for example, and therefore I'm
16 helping to market the property that I may not be
17 compensated for marketing. If I'm putting it on my
18 IDX site, I'm helping to pay for the cost of marketing
19 that property and I have no way of knowing whether
20 I'll be compensated for marketing that property or
21 not.

22 Q. Okay. So if you're a selling broker, you're telling
23 me that you're funding advertising on Realtor.com,
24 right?

25 A. Um-hum.

- 1 Q. And how is it that you're funding advertising on
2 Realtor.com?
- 3 A. How am I funding Realtor.com? By anything that I pay
4 them for enhancements.
- 5 Q. So --
- 6 A. By anything that's paid to them for their marketing
7 efforts.
- 8 Q. So just simply the fact that you're paying money to
9 Realtor.com, that's the -- that's the advertising
10 efforts?
- 11 A. That's part of the marketing efforts.
- 12 Q. And so if you paid money, for example, to some other
13 website --
- 14 A. It would be like asking me to go out and pay money to
15 forsalebyowner.com, to help fund them.
- 16 Q. In your opinion should any EA listings be listed on
17 Realtor.com?
- 18 A. No.
- 19 Q. And you understand of course that NAR is associated
20 with Realtor.com?
- 21 A. Correct.
- 22 Q. And exclusive agency listings have been listed on
23 Realtor.com since it started in existence, hasn't it?
24 Isn't that true?
- 25 A. I don't have an answer for that. I don't know.

- 1 Q. You know that EA listings from other MLSs are listed
2 on Realtor.com?
- 3 A. I believe that's correct.
- 4 Q. And NAR has not stopped that, have they?
- 5 A. No.
- 6 Q. Is it your opinion that EA listings should be on the
7 MLS at all?
- 8 A. Yes.
- 9 Q. They should be on the MLS?
- 10 A. Absolutely.
- 11 Q. Why?
- 12 A. Because I think that -- I want to know about them. I
13 want to know about an exclusive agency and if I have a
14 buyer brokerage arrangement with somebody, then I will
15 share with them an exclusive agency listing.
- 16 Q. So in your opinion --
- 17 A. If I'm protected on the commission.
- 18 Q. And an EA listing that's on the MLS will have an offer
19 of compensation and you are protected for that offer
20 of compensation, right?
- 21 A. Yeah. Many times it's not a compatible offer. I
22 mean, I've seen them for a dollar.
- 23 Q. Where have you seen them for a dollar, on what MLS
24 have you seen them for a dollar?
- 25 A. I can't say that I've seen it locally but I have seen

- 1 it from other agents.
- 2 Q. Is it your position that the MLS should dictate what
3 compensation -- offers of compensation are made by
4 listing brokers?
- 5 A. Absolutely not.
- 6 Q. Is it up to the listing broker what that should be?
- 7 A. Absolutely.
- 8 Q. If a listing broker decides to put one dollar of
9 compensation, MLS should have nothing to do about
10 that, right?
- 11 A. Absolutely correct.
- 12 Q. So let me go back. In your opinion EA listings should
13 be on the MLS?
- 14 A. An exclusive agency listing should be on the MLS.
- 15 Q. And that's because Realtors should be able to see
16 those listings, right?
- 17 A. Absolutely.
- 18 Q. What you object to is the public seeing those
19 listings?
- 20 A. That is correct. In fact, actually, I'm going to tell
21 you right now, I don't object to the public seeing
22 those kind of listings if it's the public that, for
23 example, when I do a buyer brokerage with somebody and
24 I'm protected on my commission, I don't object to that
25 public seeing. I don't care what the offer of

- 1 compensation is.
- 2 Q. What's a buyer brokerage? I'm sorry.
- 3 A. When I have a buyer brokerage contract.
- 4 Q. Okay. So if you have a buyer brokerage contract, you
5 don't care if the public sees an EA listing or not?
- 6 A. The public that I have a buyer brokerage with,
7 contract with, no, I don't care, because I've already
8 agreed to my compensation.
- 9 Q. So you have a means to protect yourself from --
- 10 A. But they do care, because in many cases they can't
11 finance it.
- 12 Q. I'm sorry. They --
- 13 A. The public that I have a buyer brokerage arrangement
14 with does care as to what the compensation is, because
15 they may be responsible for the compensation versus
16 the seller.
- 17 Q. I understand that. Okay.
- 18 A. Okay.
- 19 Q. There's nothing in the MLS rules that prevent you from
20 negotiating a commission rate with a listing agent,
21 right?
- 22 A. Nothing -- I'm sorry?
- 23 Q. Nothing in the MLS rules that prevent you from
24 negotiating an offer of compensation with a listing
25 broker, right?

- 1 A. Oh yeah. I mean, I can't use the MLS to renegotiate
2 what's been offered me.
- 3 Q. Well, let's say that there's an offer of compensation
4 for 2.5 percent on the MLS. All right?
- 5 A. Correct.
- 6 Q. It's an exclusive right-to-sell contract. Okay?
- 7 A. Okay.
- 8 Q. Just to make it easy.
- 9 A. Okay.
- 10 Q. And you're representing a buyer, you have a buyer's
11 agency agreement for 3 percent.
- 12 A. Okay.
- 13 Q. Could you on behalf of your client go to the listing
14 agent and say, my client's interested in this home,
15 they would like to, you know, but they want to make
16 sure that I get compensated 3 percent, could you do
17 that?
- 18 A. If my client instructs me to do that.
- 19 Q. Yes.
- 20 A. Okay. I cannot do it on my own. I can't use the
21 offer of compensation to renegotiate -- I can't
22 renegotiate the offer of compensation on my behalf. I
23 can share with a client, a buyer client, that this
24 particular property is offering \$1 compensation, and
25 then it's up to the client if they want to, one, see

1 that property, two, if they want to ask if they will
2 consider other compensation, and in fact the client
3 can make it part of their offer.

4 Q. Okay.

5 A. If they so choose, but I do not have that privilege as
6 an agent.

7 Q. I understand. So it's up to the client then?

8 A. Correct.

9 Q. And the client can ask you to go and try to negotiate?

10 A. Correct.

11 Q. A commission. In fact, they could make that part of
12 the offer?

13 A. If they so chose, yes.

14 Q. Just like when you're dealing with a for sale by
15 owner, then you can go negotiate on your client's
16 behalf to try to insure that you are paid a
17 commission?

18 A. I can follow my client's instructions, yes.

19 Q. What if you're acting as a selling agent and don't
20 have an agency agreement with a buyer, can you then
21 negotiate an offer of compensation?

22 A. I don't believe so. I believe the offer of
23 compensation that is listed in the MLS, once I go and
24 agree to show that property, I've accepted that offer
25 of compensation.

1 Q. Got you. So if there's an offer of compensation
2 that's below 3 percent, you may decide that you don't
3 want to show that property if you're acting as a
4 selling agent?

5 A. Correct.

6 Q. Now --

7 A. I'm sorry, acting as --

8 Q. A selling agent. You don't have an agency agreement
9 with the buyer.

10 A. Okay.

11 Q. With that understanding your answer is -- previous
12 answer stays the same, right?

13 A. Yes.

14 Q. Thank you. Now, I'm trying to go back to this
15 Internet rule, and I want to understand your
16 testimony. Okay?

17 So your opinion that these types of
18 agreements should not -- these types of listings
19 should not be fed out to public Internet sites by the
20 MLS because the selling agents help to fund
21 advertising and they may not be compensated for -- for
22 their efforts?

23 A. It's not only for their efforts, but it's also the
24 fact that they are being -- may be placed into a
25 situation of potential undisclosed dual agency,

1 potential additional tasks that need to be performed
2 because the listing side is not performing them.

3 Q. Okay.

4 A. I.e., in the limited service.

5 Q. Before an agent shows a home, they can pull up a
6 listing on the Realcomp Online system and know whether
7 it's an exclusive right-to-sell listing, limited
8 service listing, EA listing, or MEO listing?

9 A. Correct.

10 Q. In fact, there is now technology where you can do that
11 from your PDA, right?

12 A. Correct.

13 Q. So you could be sitting in front of a house with your
14 PDA and --

15 A. I don't know whether the PDA tells me what type of
16 listing it is. I would have to look at that one.

17 Q. You don't know whether the detailed listing comes up
18 on the PDA?

19 A. I don't know that it tells me the type of listing it
20 is.

21 Q. If you have access to a detailed listing you would
22 know?

23 A. Absolutely.

24 Q. If I had my laptop in my car when I'm on a wireless
25 modem, I could pull up the Realcomp Online listing?

1 A. Correct.

2 Q. And I would know what --

3 A. Yes, you would.

4 Q. Limited service, exclusive right-to-sell?

5 A. Yes, you would.

6 Q. When you say that agents might be put into undisclosed
7 dual agencies, if they know what the listing agreement
8 is, how would that happen?

9 A. Because the buyer already knows what the listing is
10 there and is telling you that they want to see it.

11 Q. Okay.

12 A. And you don't have a choice at that point.

13 Q. So the problem is that if you put these -- if you put
14 these types of listings out on the Internet, buyers
15 can see them and then ask their agents to show them?

16 A. Correct.

17 Q. And so what you want to prevent is agents being put in
18 that position?

19 A. Correct. And agents shouldn't be put in a position
20 for working for nothing.

21 Q. Let me understand that, agents are being put in a
22 position for working for nothing?

23 A. Take for example the exclusive right-to-sell, I'm
24 sorry, take for example the exclusive agency, or
25 better yet, take for example the MLS entry only, in

1 those cases the homeowner has reserved the right to
2 sell the home themselves and that's most likely their
3 intent. That's why they put in MLS entry only, and if
4 you put that listing out to the public, if, for
5 example, if I'm subjected to supplying that listing to
6 the public via a search that I do for them, because I
7 was -- established a contact with that person, and I
8 supply them that listing and they drive by that
9 listing and there's a for sale by owner sign there,
10 they walk up to the for sale by owner, purchase the
11 property from the for sale by owner, I've helped them
12 find the property, I've supplied the information to
13 them and then they've gone directly to the for sale by
14 owner and purchased it.

15 Q. Let me understand. Given those circumstances, is it
16 your understanding that the broker would be the
17 procuring cause of that sale?

18 A. No.

19 Q. So if -- under the MLS rules, a broker's only entitled
20 to compensation if they are the procuring cause,
21 correct?

22 A. Correct.

23 Q. So under the MLS rules under your scenario that broker
24 wouldn't be entitled to compensation no matter what
25 the listing type, right?

1 A. No, no, I don't agree with what you're saying.

2 Q. If it were an ERTS listing, the broker would become
3 the procuring cause?

4 A. No. If it was an exclusive right-to-sell listing,
5 there would not be a for sale by owner sign in front
6 of the house. The purchaser would not have gone
7 around the selling broker and bought the home without
8 the aid of a selling broker, and the selling broker
9 would have been paid a commission for that house.

10 The fact that the purchaser goes out and
11 sees the home with a for sale by owner sign in front
12 of it and walks up to that home and buys it direct is
13 the result of the fact that the information was
14 provided to them by a Realtor and that Realtor did not
15 become compensated for those efforts.

16 Q. So it's your position that Realtors should be
17 compensated for their efforts whether or not they're
18 the procuring cause of sale?

19 A. You know? I guess you're putting language into
20 procuring cause that I don't understand. I mean, the
21 definition that I don't -- I don't necessarily agree
22 with. I don't understand.

23 Q. You told me earlier that the example that you gave
24 under those conditions the broker would not be the
25 procuring cause of sale, isn't that right?

- 1 A. The broker would not be part of the sale, period.
- 2 Q. Okay. So if a broker's not part of a sale, period,
3 why should they be compensated for their services?
- 4 A. They provided the information. They provided the
5 access to the property. It was through their efforts,
6 through their marketing, through their dollars that
7 this -- that the purchaser found out about the
8 property.
- 9 Q. Okay. Let's back up.
- 10 A. And only because there's a for sale sign in front of
11 the property that the purchaser, for sale by owner
12 sign in front of the property that the purchaser
13 walked in and bought it without that Realtor.
- 14 Q. So let me understand this. All right. A real estate
15 agent is a member of Realcomp, okay? And they're a
16 member of NAR. Let's take that, right?
- 17 A. Okay.
- 18 Q. And they pay dues to Realcomp, right?
- 19 A. Correct.
- 20 Q. And they pay dues to NAR?
- 21 A. Correct.
- 22 Q. And those dues are used for the multiple listing
23 service and for the feed to Internet sites from the
24 multiple listing service, right?
- 25 A. No, the dues are not used for that. The fee to

1 Realcomp is used for that.

2 Q. Right. And the dues to NAR is used for Realtor.com,
3 right, part of it?

4 A. Part of it may be. I'm not sure what the compensation
5 is there.

6 Q. And so those payments, should they be compensated for
7 those payments no matter whether or not they procured
8 the cause of a given sale?

9 A. They're making those payments so that they can
10 continue to earn a living in this business.

11 Q. And so who should compensate them for their efforts
12 then?

13 A. They should be compensated via the sales that they are
14 creating the information for, via the communications
15 that they're enabling, by --

16 Q. All sales that have been happening through the MLS
17 they should be compensated for?

18 A. No. I mean, you're going beyond reasonable.

19 Q. I'm trying to understand your testimony here because
20 I'm frankly quite confused on how you understand that
21 Realtors should be compensated for their efforts if
22 they're not a procuring cause of sale. That's what I
23 don't understand.

24 A. If I introduce a buyer to a property through my
25 efforts, I should be compensated for the fact that

- 1 they bought that property.
- 2 Q. Okay. So your understanding then, if you introduce a
3 buyer to a property and they eventually consummate
4 that sale, you should be compensated for those
5 efforts, right?
- 6 A. Correct.
- 7 Q. That's what you testified to?
- 8 A. Correct.
- 9 Q. Now, I want to understand under the Realcomp rules it
10 says that an agent is compensated, a cooperating
11 broker is compensated if they are the procuring cause
12 of that sale, right?
- 13 A. Yes.
- 14 Q. Do you think the Realcomp rules should be amended?
- 15 A. No.
- 16 Q. So going back to your example, if a broker introduces
17 a property to a seller, excuse me, to a buyer, and
18 that buyer consummates the sale, is it your
19 understanding that that broker was the procuring cause
20 of sale?
- 21 A. Correct.
- 22 Q. Okay. So under the Realcomp rules then they would
23 be -- as procuring cause of sale be entitled to the
24 offer of compensation on that home, right?
- 25 A. Correct.

- 1 Q. And so if it were the case that an agent provided a
2 listing to a buyer and the buyer went off, looked at
3 the home, there's a for sale by owner sign in front,
4 they made a deal with the seller -- right? -- that
5 agent who first introduced the home would be entitled
6 to whatever offer of compensation there was for that
7 listing, right?
- 8 A. Depends on how you say procuring cause. Procuring
9 cause has been defined many, many different ways, and
10 to this date I don't think there's a decent definition
11 of procuring cause.
- 12 Q. Okay. So the problem then that you're identifying is
13 in the definition of procuring cause, right?
- 14 A. It's probably in the definition of procuring cause and
15 it's probably in the fact that the property, the
16 homeowner has reserved the right to sell that property
17 themselves, and the homeowner does not know that that
18 buyer has come through the efforts of another --
19 through the efforts of a selling Realtor, that the
20 buyer has come through the efforts of a selling
21 Realtor.
- 22 Q. Now, the homeowner may not know that, but it's the
23 listing agent who is on the hook for the offer of
24 compensation, right?
- 25 A. Correct.

1 Q. So if an agent representing a buyer introduces the
2 buyer to that property, and the buyer goes and
3 negotiates with the seller on their own, so long as
4 the agent was the procuring cause of sale, they are
5 entitled to the offer of compensation and it's the
6 listing broker who has to insure that they are paid
7 that offer of compensation?

8 A. I don't know how you would prove the procuring cause
9 in that particular situation, plus the fact that
10 you've put the acceptance of an offer of compensation
11 outside of the broker's decision.

12 Example, if that offer of cooperation and
13 compensation was \$1, and as you propose that listing
14 was published to the public and provided by a selling
15 Realtor to a member of the public, that member of the
16 public could go out and look at that home and by
17 buying it, if you want to use whatever you're calling
18 procuring cause, that broker has just been subject to
19 selling their services for \$1, and they haven't had
20 the opportunity to accept or reject that decision
21 themselves.

22 Q. In your hypothetical you just told me that it was the
23 broker who provided the listing to the buyer, right?

24 A. Right. And that's where you're saying that all
25 listings, limited service, minimal compensation, MLS

1 entry only would be provided to the public and the
2 broker hasn't had a decision on whether or not they've
3 provided that to the public, because you're mandating
4 that it be provided to the public, or you're trying to
5 mandate that it is.

6 Q. So if the rule were changed and these types of
7 listings were sent on the Internet, the problem is
8 that the public could find them on their own.

9 A. Correct.

10 Q. Without the aid of a real estate broker?

11 A. Or it could be sent out by a Realtor to the public.

12 Q. So a Realtor could be -- what do you mean sent out to
13 the public by a Realtor?

14 A. If a public -- member of the public says send me
15 everything that's listed in Birmingham, Michigan
16 between a half a million and a million dollars, and if
17 your scenario is the case where you have to provide
18 the MLS entry only, the exclusive agency and limited
19 service, then you're sending out things that you have
20 no idea what your compensation or what your
21 relationship's going to be, what your -- what your
22 agency relationship's going to be, anything.

23 Q. When you say send out, what do you mean? You mean
24 like somebody calls a real estate agent and says I
25 would like to look at homes between whatever, 150 and

1 \$200,000 in Birmingham?

2 A. Right, and I set up a search so that person gets the
3 information on those homes on a daily basis.

4 Q. When you set up that search, don't you have a choice
5 to set it up so that it only searches certain listing
6 types?

7 A. I do now.

8 Q. And is your understanding that the FTC is trying to
9 mandate that you will not have the ability to search
10 based on listing type?

11 A. No. No. It's my understanding that the FTC wants us
12 to publicize all of this to the public.

13 Q. Now, I'm trying to understand what that has to do with
14 a real estate agent who on his own is sending listings
15 to a member of the public.

16 MR. MANDEL: Just so we're clear, this was
17 predicated by the response being that the customer's
18 request is send me all listings. That's how we got
19 this, the customer's asking for all listings.

20 BY MR. GATES:

21 Q. Are you talking about somebody who has a buyer's
22 agency?

23 A. May or may not. May simply just be a customer, not a
24 client.

25 Q. Okay. And so what you're saying is that -- how is it

1 that changing these rules in the Realcomp MLS would
2 then require an individual real estate agent doing a
3 search on behalf of a client to send out all listings
4 to them?

5 A. We're not talking about changing the rules there.
6 We're talking about the public advertising and putting
7 it up on a public accessible website. You're
8 talking -- those are two distinctly different things.

9 Q. Okay. Let's back up. Let's say the rules were
10 changed so that Realcomp was required to send to
11 public Internet sites all of its listings, it couldn't
12 discriminate. I want to understand the problem that
13 you've identified, which is that a real estate agent
14 gets a call from a member of the public who says,
15 please send me all listings in this price range in
16 this city, how does the fact that Realcomp is sending
17 these things out to the Internet affect that situation
18 at all?

19 A. You're still comparing two different things. You're
20 comparing what was on a public website and what is on
21 a requested search.

22 Q. Okay. So tell me what the problem is with a requested
23 search.

24 A. As long as I can ascertain the type of listing that
25 I'm sending out, then I can determine based on my

1 relationship with the client customer what I'm going
2 to send them.

3 Q. Okay. I understand that. And is it your
4 understanding then that the FTC is trying to prevent
5 Realcomp members from being able to know what type of
6 listing they have?

7 A. No.

8 Q. So long as listings are identified, then a real estate
9 agent in doing a requested search can decide which
10 types of listings types to send out?

11 A. Correct.

12 Q. Let's talk about the search function policy. Okay?
13 So a search function policy is Realcomp has a search
14 function on Realcomp Online and right now it is set so
15 it defaults to show only exclusive right-to-sell and
16 unknown listings, you understand that, right?

17 A. Um-hum.

18 Q. Give me -- what is your opinion about how that
19 benefits Realcomp members?

20 A. I would say efficiency, very simply put. I'm going to
21 guesstimate, and I'm going to say 98, 99 percent of
22 the listings are exclusive right-to-sell listings, and
23 when I go in there it's just like residential is
24 preselected, because almost all the time, or the
25 majority of the time I'm searching for residential

1 property, not searching for multifamily or commercial,
2 so that's a, you know, a predetermined or preset
3 default, in an effort I would say to make it easier
4 for me.

5 Q. So your understanding of the benefit to Realcomp
6 members is simply that this is -- this default is set
7 to exclusive right-to-sell to make it more faster for
8 them to search?

9 A. Absolutely. I will look at that and I will make a
10 determination what I want to add to that based on my
11 relationship with who I'm sending it to.

12 Q. Okay. And you know of course that you can change that
13 default if you want to?

14 A. Absolutely. I can set up a search any way I want to
15 set up a search.

16 Q. Right. And so but it's more efficient and better for
17 Realcomp members in your opinion for Realcomp to
18 determine what the default should be?

19 A. It's more efficient. I mean, if I had to deselect
20 every time I searched, the majority of times I
21 searched I would be deselecting two or three other
22 things. I would have to be deselecting multifamily,
23 deselecting MLS entry only, I would have to deselect
24 the things that I don't want, and obviously that would
25 be much more time consuming as, you know, than

1 accepting something that's there.

2 Q. And you said it's because 98 percent of the listings
3 in Realcomp are exclusive right-to-sell, it's more
4 efficient for the default to be set to exclusive
5 right-to-sell, right?

6 A. Yeah.

7 Q. What if it were the case that only 60 percent of the
8 listings were exclusive right-to-sell, would it still
9 be more efficient?

10 A. If that's -- yeah, if that's the majority of what I'm
11 searching for, yes, just like the majority of what I'm
12 searching for is residential. I would say probably 70
13 percent of the time I'm searching for residential, 30
14 percent of the time for condo. Is it more efficient
15 to have residential checked? Absolutely.

16 Q. So if it were 50/50, ERTS and nonERTS, more efficient?

17 A. Still more efficient from the standpoint that you have
18 four or five different selections for nonexclusive
19 right-to-sell and you would have to deselect multiples
20 versus selecting one. The easiest way is select
21 nothing, fill it in with nothing, and let the agent
22 select what they want.

23 Q. That would be the easiest way to do it?

24 A. Well, it wouldn't be the easiest way or most efficient
25 way.

1 Q. What if you just defaulted it to show all listings?

2 A. Then I have a lot more effort to come to the basis
3 that I need to operate under.

4 Q. What's the basis that you need to operate under?

5 A. Knowing what my client relationship is with my buyer
6 and proceeding forward in an appropriate manner.

7 Q. So if you know which types of listings that you want
8 to search because you know your relationship with your
9 buyer, then you have to go select which ones you want
10 to search, right?

11 A. Correct.

12 Q. So if you have a buyer's agency relationship, I think
13 you testified earlier you want to look at all listing
14 types?

15 A. Correct.

16 Q. So you have to go in and actually override the
17 default --

18 A. I have to add the other types of listings to it.

19 Q. So how is it that having the default to exclusive
20 right-to-sell is more efficient in that situation?

21 A. Because in most cases I'm searching for exclusive
22 right-to-sell.

23 Q. Why are you searching for exclusive right-to-sell in
24 most cases?

25 A. Because in most cases I'm dealing with somebody who I

- 1 don't have a buyer brokerage arrangement with.
- 2 Q. I think you testified earlier that 50 percent of the
3 time about you have buyer agency relationships?
- 4 A. When I sell a property, yes, but not when I start a
5 relationship.
- 6 Q. When you sell a property?
- 7 A. Yes.
- 8 Q. When you're representing a seller?
- 9 A. When I'm the selling agent on the property.
- 10 Q. So when --
- 11 A. When I'm representing the buyer --
- 12 Q. When you're representing the buyer, how often do you
13 have an agency relationship?
- 14 A. I would say it's even higher than 50 percent of the
15 time. I would say it's -- it could be 50, 60, 70
16 percent of the time, but it doesn't start out that
17 way.
- 18 Q. So the problem is that before you enter into that
19 agency agreement, you might have to do a search on
20 behalf of that potential client?
- 21 A. Yes.
- 22 Q. And you want that to be defaulted to exclusive
23 right-to-sell because that's the only types of
24 listings you're going to show to that buyer?
- 25 A. That's correct.

1 Q. And that's the only justification you can think of for
2 the search function default policy?

3 A. It's the only one I know of.

4 Q. Have you discussed any of these justifications with
5 any of the members of the Realcomp Board of Governors?

6 A. No.

7 Q. Since the FTC investigation started, have you had any
8 discussions about any of these policies with anybody
9 on the Realcomp Board of Governors?

10 A. I would say that most likely and it would probably be
11 casual conversations just, you know, what is the FTC
12 looking for, where are they going, what's the basis
13 for the suit and, you know.

14 Q. Okay. So but you haven't talked about, well, why is
15 it that we have these particular policies with
16 anybody?

17 A. No. No, I haven't questioned them or asked them
18 specifically.

19 Q. Have you had any of those conversations with any other
20 Realcomp members?

21 A. No.

22 Q. So actually today is the first time that you have
23 really articulated any of those justifications to
24 anybody that has anything to do with Realcomp?

25 A. I think, you know, in discussing the lawsuit I have

1 said, you know, when I understood that this is one of
2 the things that you're questioning, I've ventured an
3 opinion as to why I think that the default is the way
4 it should be.

5 Q. With whom did you venture that opinion?

6 A. Could have been any number of people I've talked to
7 this lawsuit about, just fellow Realtors, people in my
8 own company.

9 Q. Okay. So prior to the FTC lawsuit, did you have any
10 conversations with anybody about why it is that
11 Realcomp had these -- passed these particular rules?

12 A. No.

13 Q. So you've formed your opinion after the FTC then
14 initiated this litigation?

15 A. Well, I had an opinion that I liked what I had when
16 the rule came out, because it made it efficient for me
17 to do my searches.

18 Q. And you're talking about the search default?

19 A. Correct.

20 Q. Okay. But the other two rules you didn't have an
21 opinion until the FTC litigation started?

22 A. The other two rules.

23 Q. About the feed to the Internet sites.

24 A. Oh, I had a feed, yes, absolutely. I had an opinion.

25 Q. When did you form this opinion?

1 A. I've had that opinion a long time, ever since I can
2 remember. When we were talking about coming to the --
3 or providing information to public websites, I have
4 always said that the MLS should not be doing it,
5 period.

6 Q. And for exclusive right-to-sell agreements, why is it
7 that the MLS should not be providing information to
8 public websites in your opinion?

9 A. I don't think that that's their position. I don't
10 think that they should be a marketing vehicle. I
11 think that's up to the broker. I think the brokerage
12 community is responsible for their own marketing.

13 Q. So in your opinion should Realcomp stop sending
14 listings to Realtor.com?

15 A. Unless requested to do so by the broker, absolutely.

16 Q. And same for any other websites?

17 A. Absolutely. Should be entirely a broker driven
18 decision.

19 Q. Rather than an MLS driven decision?

20 A. Absolutely.

21 Q. I understand that. In Michigan there was something --
22 some legislation that was being considered that some
23 people called a minimum services legislation, do you
24 recall that, it was last year?

25 A. Yes.

1 Q. And --

2 A. It's the Agent Responsibility Act.

3 Q. Agent Responsibility Act, and you wouldn't define that
4 as a minimum services?

5 A. Absolutely not.

6 Q. And in your opinion the state legislature should not
7 mandate a minimum set of services that Realtors should
8 provide, right?

9 A. Correct.

10 Q. You do think that Realtors should disclose what
11 services they're going to provide to the clients?

12 A. Absolutely.

13 Q. But the state legislature at least should not be in
14 the business of dictating a minimum set of services,
15 right?

16 A. The state, okay, I'm going to back up a second on that
17 one. I truly believe that in most circumstances the
18 public doesn't know what they're getting, and they are
19 expecting representation when they sign something with
20 a Realtor, and I see nothing wrong with the fact that
21 the state would mandate if you sign an exclusive
22 right-to-sell you need to represent that person in
23 this contract.

24 If you wish to do something other than
25 that, if you wish to unbundle services, God bless you,

1 go do it, you know? But if you're going to represent
2 yourself as an exclusive right-to-sell agent, that
3 there are certain amount of standards that you should
4 be doing in that contract, but preventing you from
5 putting forth whatever type of contract you want to
6 put forth, and negotiating whatever type of contract
7 you want to put forth? No problem. Just make sure
8 it's fully disclosed.

9 Q. So the state should not mandate a minimum set of
10 services. They should, though, perhaps require
11 brokers to disclose what services they're going to be
12 providing?

13 A. It -- they should for an exclusive right-to-sell they
14 should tell you what you will be providing. If you
15 want to do other than that they should require you to
16 disclose exactly what you're doing. So the public
17 should have the right to expect certain things just
18 automatically, and there's nothing wrong with that.

19 Q. But they should be told when they're not going to get
20 that?

21 A. Absolutely.

22 Q. As far as you're concerned, though, if a Realtor or a
23 broker wants to offer unbundled services --

24 A. God bless them, go do it, not a problem.

25 Q. So the state shouldn't be dictating whether or not

1 they can do that?

2 A. Oh no, absolutely. That's to me interfering with a
3 business model.

4 Q. Should anybody be dictating whether a broker offers
5 unbundled services or not?

6 A. No. Broker -- a broker should be able to enter into
7 whatever contract they want as long as it's fully
8 disclosed.

9 Q. Let me go back to a situation. Let's assume that --
10 I'll get you out in just a few minutes.

11 Let's assume that a seller is represented
12 by a listing agent under an exclusive right-to-sell
13 arrangement. Okay?

14 A. Okay.

15 Q. A buyer goes to another agent, obtains some listings
16 from them, well, let's back up.

17 A buyer sees this on the Internet, that
18 exclusive right-to-sell listing, and goes to the home,
19 meets the seller, tells them they're not represented
20 and then the seller says, okay, talk to my agent and
21 then they consummate a transaction, anything wrong
22 with that?

23 A. No.

24 Q. Anything wrong with the fact that the buyer was not
25 represented by an agent?

1 A. No.

2 Q. So even though the only person who is being
3 compensated in that transaction was the agent who was
4 representing the seller --

5 A. He's being compensated for both the listing and
6 selling side.

7 Q. Compensated for both the listing and selling side?

8 A. Correct.

9 Q. That's perfectly okay?

10 A. Yes.

11 Q. So the problem with an exclusive agency listing then
12 is that the -- may not be compensation given to the
13 buyer's side of the transaction, is that the issue?

14 A. That's the issue.

15 Q. I think I understand that.

16 MR. GATES: Okay. Mr. Whitehouse, I don't
17 think I have any further questions for you.

18 THE WITNESS: Thank you.

19 (The deposition was concluded at 1:53 p.m.
20 Signature of the witness was not requested by
21 counsel for the respective parties hereto.)

22

23

24

25

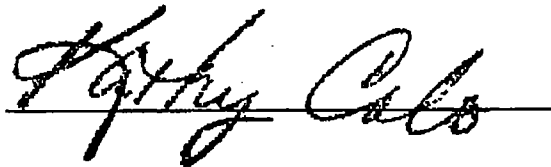
CERTIFICATE OF NOTARY

STATE OF MICHIGAN)

) SS

COUNTY OF OAKLAND)

I, KATHY CALO, a Notary Public in
and for the above county and state, do hereby
certify that the above deposition was taken before
me at the time and place hereinbefore set forth;
that the witness was by me first duly sworn to
testify to the truth, and nothing but the truth;
that the foregoing questions asked and answers made
by the witness were duly recorded by me
stenographically and reduced to computer
transcription; that this is a true, full and correct
transcript of my stenographic notes so taken; and
that I am not related to, nor of counsel to either
party nor interested in the event of this cause.



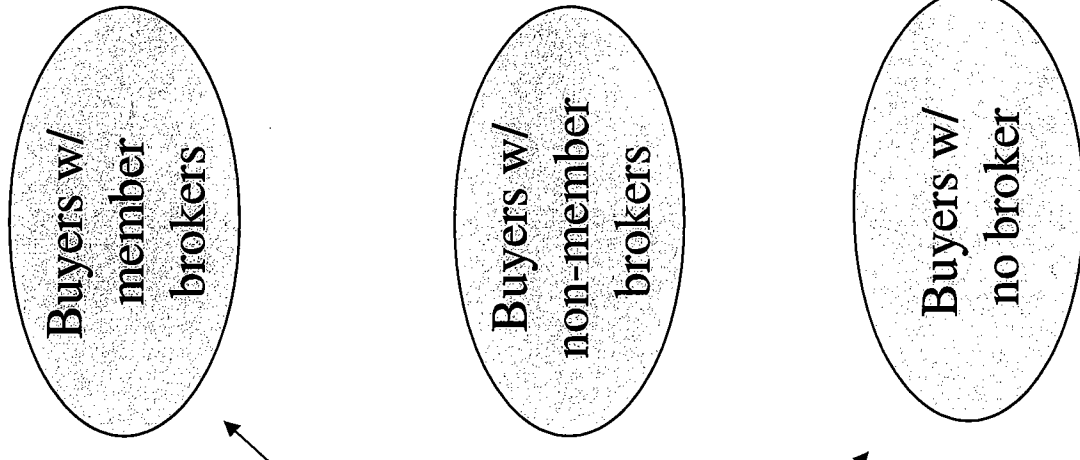
KATHY CALO, CSR-4697

Notary Public,

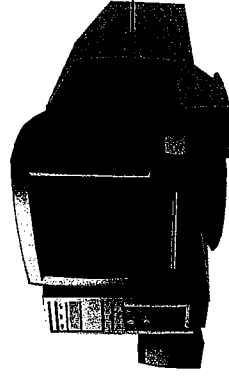
Oakland County, Michigan

My Commission expires: April 10, 2007

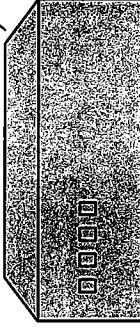
Realcomp's Website Policy Does Not Ensure that a Realcomp Co-operating Broker is Used by Home Buyers



ERTS LISTINGS



IDX FEED



Buyers w/
member
brokers

Buyers w/
non-member
brokers

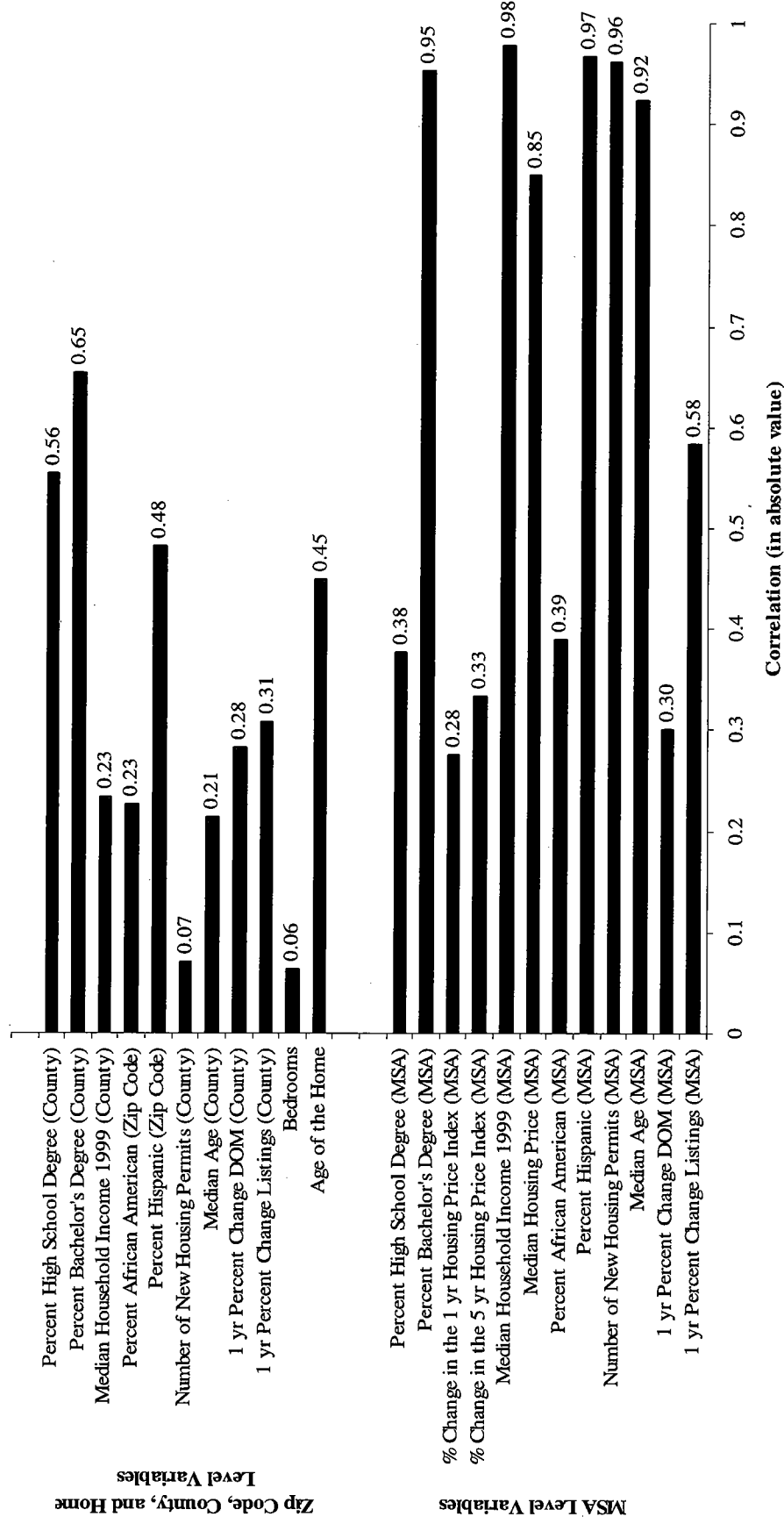
Buyers w/
no broker

Table V - Eisenstadt Supplemental Report (Enlarged)

Variable Description	df/dx	Robust Standard Error
<i>Dependent Variable</i>		
Non-ERTS Contract		
<i>MLS Restrictions</i>		
RULE	-0.002377	0.0194414
<i>Demographic Characteristics</i>		
Percent High School Degree (County) [2000]	0.000428	0.000577
Percent High School Degree (MSA) [2000]	0.0036828***	0.000668
Percent Bachelor's Degree (County) [2000]	0.000008	0.000214
Percent Bachelor's Degree (MSA) [2000]	-0.000799	0.001268
% Change in the 1 Year Housing Price Index (MSA), lagged	-0.0992573***	0.023977
% Change in the 5 Year Housing Price Index (MSA), lagged	0.025006	0.018505
Median Household Income (County) [1999]	0.000000	0.000000
Median Household Income (MSA) [1999]	-0.00000329*	0.000002
Median Housing Price (MSA)	0.0003975***	0.000115
Percent African-American (Zip Code) [2000]	0.002296	0.004748
Percent African-American (MSA) [2000]	0.5462778***	0.113465
Percent Hispanic (Zip Code) [2000]	0.0148439***	0.001915
Percent Hispanic (MSA) [2000]	-0.059829	0.116963
Number of New Housing Permits / Housing Units (County)	-0.024044	0.132747
Number of New Housing Permits / Housing Units (MSA)	0.426401	0.661659
Median Age (County) [2000]	-0.0008422**	0.000391
Median Age (MSA) [2000]	-0.0098843***	0.002647
1 Year % Change in Days on Market (County, by Quarter), lagged	-0.0140383**	0.008438
1 Year % Change in Days on Market (MSA, by Month), lagged	-0.0072459**	0.004345
1 Year % Change in Number of Listings (County, by Quarter), lagged	-0.0000132*	0.000008
1 Year % Change in Number of Listings (MSA, by Month), lagged	-0.0002372*	0.000162
<i>Home Characteristics</i>		
Number of Bedrooms	0.000009	0.000007
Age of the Home	-0.000103**	0.000061
<i>Time Variables</i>		
Listed in 2005	-0.0064639**	0.003134
Listed in 2006	-0.0054581**	0.002385
February	-0.001551	0.001050
March	-0.002269	0.001549
April	-0.000742	0.001864
May	-0.000492	0.001817
June	-0.000092	0.001383
July	-0.0027108**	0.001271
August	-0.000938	0.001957
September	-0.001406	0.001361
October	-0.001742	0.001771
November	-0.002006	0.001830
December	0.001482	0.002946
Number of Observations	721,525	
Pseudo R ²	0.1235	
obs. P	0.040615	
pred. P	0.025507	

* - Denotes significance of the independent variable at various levels of confidence (** ≥ 90%, *** ≥ 95%, **** ≥ 99%)

Correlation Between Rule Variable and Other Explanatory Variables



Regression Results – From Williams Surrebuttal Report Table II

Variable Description	Original Regression from Dr. Williams' First Report		Original Regression on Dr. Eisenstadt's data		Including Dr. Eisenstadt's explanatory variables	
	dF/dx	Std. Error	dF/dx	Std. Error	dF/dx	Std. Error
<i>Dependent Variable</i>						
Non-ERTS Contract						
<i>MLS Restrictions</i>						
RULE						
<i>Demographic Characteristics</i>						
Percent High School Degree (County)					-0.00137	0.00096
Percent Bachelor's Degree (County)					0.00036	0.00032
Median Household Income 1999 (County)					0.00000**	0.00000
Median Housing Price (Zip Code)					0.00000	0.00000
Percent African American (Zip Code)					0.01982*	0.01118
Percent Hispanic (Zip Code)					0.04919**	0.01559
Number of New Housing Permits (County)					-0.59733**	0.20326
Median Age (County)					-0.00461**	0.00173
1 yr Percent Change DOM (County)					-0.01029	0.01358
1 yr Percent Change Listings (County)					0.00001	0.00003
<i>House Characteristics</i>						
Bedrooms					0.00001	0.00001
Age of the Home					-0.00013**	0.00005
<i>Time Variables</i>						
Listed in 2004	-0.0031	0.0041				
Listed in 2005	-0.0070	0.0054				
Listed in 2006	-0.0078	0.0059				
February	-0.0001	0.0012				
March	-0.0013	0.0015				
April	-0.0008	0.0012				
May	-0.0004	0.0011				
June	0.0003	0.0011				
July	-0.0038**	0.0012				
August	-0.0025*	0.0013				
September	-0.0029*	0.0015				
October	-0.0028*	0.0015				
November	-0.0033**	0.0013				
December	0.0001	0.0031				
Number of Observations	1,076,538		1,073,790		843,967	
Pseudo R-squared	0.0684		0.06910		0.10190	
obs. P	0.0398		0.03956		0.03864	

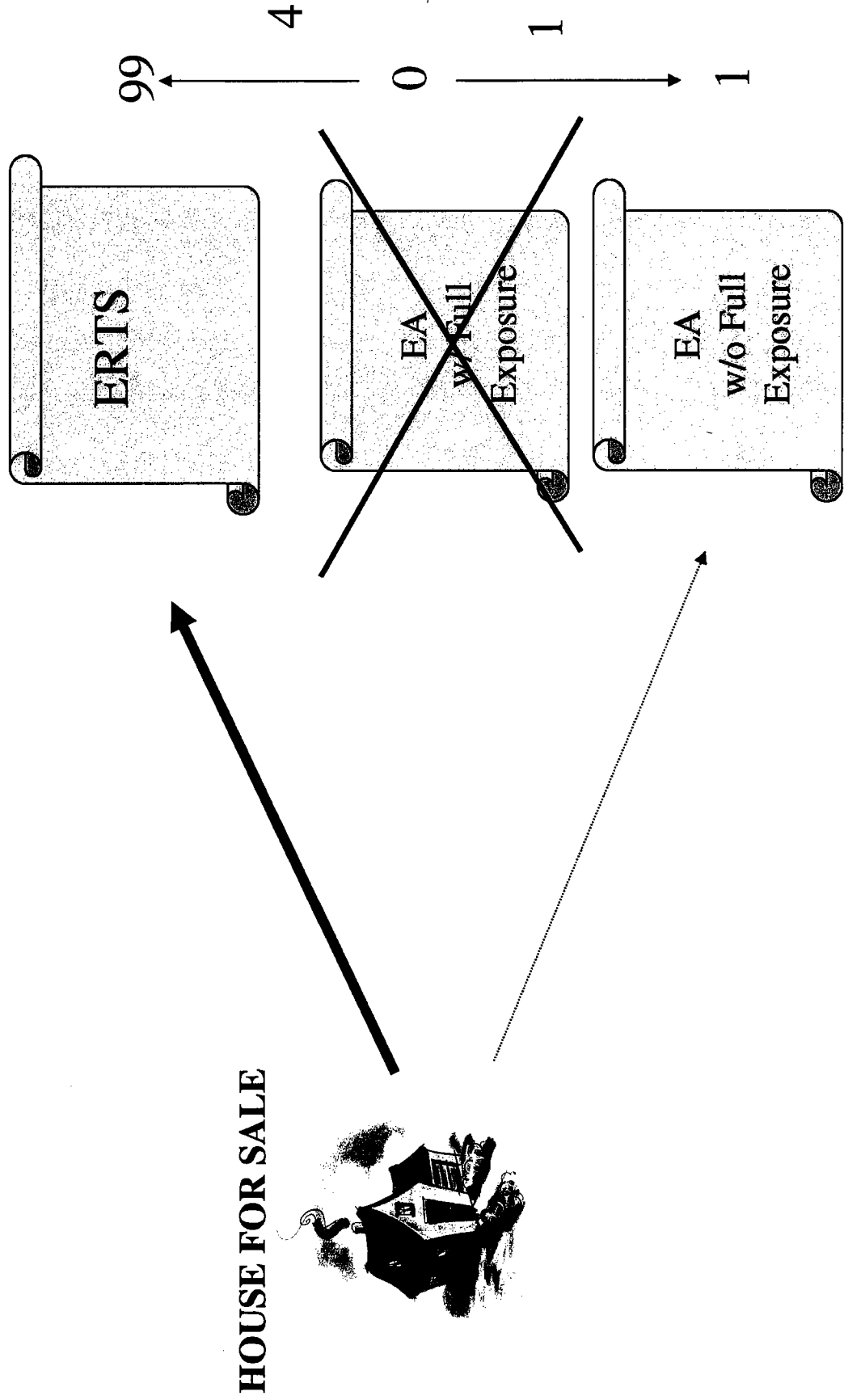
POTENTIAL EFFECT OF REALCOMP'S ACCESS RESTRICTIONS ON DIFFERENT TYPES OF HOME SELLERS

Type of Seller

Potential Effect of Restrictions

- Substitute ERTS for non-ERTS listings
Higher brokerage fees
- Continue to use non-ERTS listings
Higher/lower net sale price for their homes
- Switch to FSBO
No listing broker commission;
higher/lower sale price for their homes
- Always use ERTS
Higher brokerage fees

Choice of Listing Type *with* Restrictions



Anti-Competitive Effects

- Home Sellers that move to ERTS
 - Pay higher commissions for service they don't want.
- Home Sellers that move to EAs
 - Get less exposure for their home.