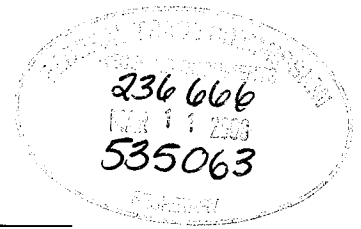


ORIGINAL



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

DOCKET NO. 9320

PUBLIC VERSION

**IN THE MATTER OF
REALCOMP II LTD.**

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Dated: March 11, 2008

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I. INTRODUCTION

Complaint Counsel detailed in their opening brief the key facts. EA listings offer consumers a contingent discount on brokerage commissions. ERTS listings, by contrast, do not. They require sellers to pay the full commission regardless of whether a cooperating broker is involved. To be effective and valuable to consumers, listings must obtain exposure on key websites and through the MLS. Realcomp, a combination of competitors with market power, imposed Policies (the Website and Search Function Policies) that limit the exposure of EA listings. The Policies exclude these listings from three of the top four categories of real estate websites. They also discriminate against these listings within the MLS. These competitors imposed the Policies because EA listings offer a contingent discount. The Policies therefore penalize the use of EA listings and the discounting they represent. They also withhold from consumers a product they desire: EA listings with full exposure through the Realcomp MLS.

Realcomp nonetheless claims that it should be free to continue these practices. According to Realcomp, concerted action by competing brokers with market power that penalizes discounting and withholds from the market a product that consumers desire is not enough to show a violation of Section 5. Realcomp claims that the Commission may only condemn these practices if it employs a “full-blown” rule of reason analysis and finds direct evidence of actual anticompetitive effects. Realcomp’s argument that Complaint Counsel failed to meet their burden is wrong on the facts and wrong on the law.

Realcomp is wrong on the facts. There is ample direct evidence of anticompetitive effects. Realcomp just misses it. The evidence shows that the Policies caused consumers to

switch to ERTS listings. Realcomp admits this, but fails to grasp the significance. Realcomp believes that because brokers can offer discounts on ERTS listings, these listings are a full substitute for EA listings. But that is not true. Only EA listings offer the ability to avoid paying the offer of compensation (typically 3%). Realcomp required consumers to purchase a set of minimum services with all ERTS listings. And even Realcomp admits that ERTS listings are more expensive. The switch therefore shows actual anticompetitive effects. All of Realcomp's arguments about data, statistics, and regression analyses therefore miss the big picture – the Policies reduce the effectiveness and use of EA listings and thereby restrain important forms of competition.

Realcomp is also wrong on the law. The point of the rule of reason is to determine the principal tendency of a restraint. Direct proof of actual effects is one means of showing this. But indirect evidence is also sufficient, *viz.*, a showing that defendants possess market power and that the character of the restraint tends to restrict competition. Realcomp simply cannot dodge the impact of the indirect evidence. A rule of reason analysis – whether “full,” “traditional,” “abbreviated,” or any other label – demonstrates that Realcomp's Policies are anticompetitive. They are not justified, and the Commission should enjoin Realcomp from denying consumers the benefits of competition.

II. ARGUMENT

Realcomp invokes *Chicago Board of Trade* to insist that the Commission put on blinders and focus only on direct evidence of actual effects. But that case makes it clear that the rule of reason requires consideration of the complete picture – “the facts peculiar to the business to

which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint; and its effect actual or probable.” (RAB at 55 (quoting *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238-39 (1918)).¹ That is precisely the analysis Complaint Counsel present here.

The complete picture shows that the principal tendency of the Policies is to restrict, not enhance, competition. The facts peculiar to the business – the context – show that EA listings represent important forms of competition. EA listings deliver discounting and unbundled services. Before the Policies were imposed, EA listings and ERTS listings both enjoyed full exposure through the Realcomp MLS. Through the concerted action of competing real estate brokers, however, Realcomp denies to EA listings the full value and range of MLS services.

Realcomp’s market power and the anticompetitive nature of the Policies demonstrate probable anticompetitive effects. This is especially important because the Commission is concerned with the restraint’s likely effects going forward. It is also sufficient under the rule of reason. Nevertheless, this inference is confirmed by abundant evidence of actual effects.

A. Realcomp Fails to Rebut the Anticompetitive Character of the Policies

Realcomp concedes that the Policies were implemented by a combination of competitors with market power, but insists that this is of little consequence. According to Realcomp, market

¹ The following abbreviations are used throughout:

ID	Initial Decision
IDF	Initial Decision Finding
CAB	Complaint Counsel’s Appeal Brief
CCPF	Complaint Counsel’s Proposed Findings
CCRF	Complaint Counsel’s Response to Realcomp’s Proposed Findings
RAB	Respondents Answering Brief (on appeal)
RPF	Respondent’s Proposed Findings
RRPF	Respondent’s Reply to Complaint Counsel’s Proposed Findings

power has no bearing on the question of whether there are anticompetitive effects: “the requirement for proof of market power can be obviated by evidence of actual anticompetitive effects, not the other way around.” (RAB at 53). This is flat wrong. It is black letter law that market power combined with the nature of the restraint shows anticompetitive effects. *See, e.g.*, ABA ANTITRUST SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 65 (6th ed. 2007); ABA ANTITRUST SECTION OF ANTITRUST LAW, MONOGRAPH NO. 23, THE RULE OF REASON 161-63 (1999) (even if there is “no observable effect of a restraint on competition,” proof of market power and nature of restraint is enough to show anticompetitive effects under the rule of reason). The cases stating this proposition are legion.² Realcomp cannot sidestep the significance of its concession. The issue then is whether the nature of the Policies is anticompetitive.

1. Realcomp Fails to Rebut the Fact That By Punishing Discounting, the Policies Come Close to a Form of Price-Fixing

The anticompetitive tendency of the Policies is apparent. Realcomp never denies that EA listings offer a contingent discount, *i.e.*, reducing the listing broker’s commission if no cooperating broker is used in the transaction. Nor does it deny that the Policies target EA listings because of this form of discounting. (RRPF 771; CX 89; RAB at 56-59). It does not dispute that

² *See, e.g.*, *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (market power is a “surrogate” for competitive effects); *Brookins v. Intern. Motor Contest Assn.*, 219 F.3d 849, 852 (8th Cir. 2000) (“Injury to competition requires proof either of market power in a relevant market, or of an actual adverse effect on competition.”); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (antitrust plaintiff has “two independent means by which to satisfy the adverse-effect requirement,” namely, direct proof of “actual adverse effect on competition” or indirect proof of “sufficient market power to cause an adverse effect on competition”); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (“plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects”); *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993).

the Policies penalize the use of EA listings (only the severity of this penalty). In fact, Realcomp explicitly recognizes that the Policies make EA listings less valuable to consumers. (RAB at 57-59 (Policies are designed to reduce incidence of contingent discount)). Nor can Realcomp deny that the Policies withhold from consumers a particular product – EA listings that are fully disseminated through the Realcomp MLS. That is simply a fact.

a. Punishing Discounting is Anticompetitive, No Matter Who Offers the Discount

Instead of dealing with these facts, Realcomp claims that this case is “not about competition between full service and discount brokers,” because its expert supposedly found that traditional brokers “account for as much as 60% of EA listings on the Realcomp MLS.” (RAB at 6, 20). This statement is false. Realcomp’s expert only found that eight “non-traditional brokerages who operate statewide” account for “approximately 40 percent of the limited service property listings in Realcomp.” (CX 133-014 & n.31 (cited in RRPf 190)). He did not, however, make any finding regarding the remaining 60%. There is no evidence in the record that any traditional broker uses EA listings. To the contrary, every traditional, full service broker that testified acknowledged using only ERTS listings. (RRPF 189; *see also* CX 40 (Elya, Dep. at 57 (only uses ERTS)); CX 43 (Hardy, Dep. at 58) (Century 21 brokerage uses only ERTS); CX 38 (Gleason, Dep. at 37) (SKBK brokerage uses only ERTS); CX 39 (Taylor, Dep. at 18 (only uses ERTS; EA use not in business model)).

More important, it misses the point. EA listings are an important form of competition regardless of who offers them. If traditional brokers offer EA listings, that is discounting too. This case is not about discount brokers *per se*, though the evidence shows discount brokers use

EA listings and put price pressure on traditional broker commissions. (RRPF 221-26; IDF 99-101). It is about the ability of consumers to obtain the competitive benefits of EA listings. Realcomp's boast that "[a]ll participants in the Realcomp MLS are equally subject to the Realcomp Policies" therefore confirms the anticompetitive effect of the Policies; they impact all of the nearly 14,000 Realcomp members. The fact that the Policies are an "equal opportunity," market-wide punishment for discounting makes them more, not less, anticompetitive.

b. Realcomp's Efforts to Distinguish the Case Law is Unavailing

Realcomp misunderstands the significance of the case law cited by Complaint Counsel. For instance, Realcomp distinguishes *Denny's Marina* as a "secondary boycott held to constitute *per se* unlawful price-fixing." (RAB at 47). But the point of the case is that conduct punishing discounting (in that case denial of access to two trade shows) is anticompetitive. *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1221 (7th Cir. 1993). The Realcomp Policies have the same character; they punish a form of discounting. *See also United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961) (punishing discounting by picketing and withholding supplies anticompetitive).³ The fact that the Policies are implemented by a potentially procompetitive collaboration – an MLS – may save them from *per se* condemnation, but it does not change the character of the restraint.

Similarly, Realcomp attempts to distinguish *Indiana Federation of Dentists (IFD)* because of the "naked character of the restraint" that did not involve a potentially procompetitive collaboration. (RAB at 7 n.4). But this distinction makes no difference. The Court in *IFD* held

³ Realcomp's attempt to distinguish *Gasoline Retailers* because Realcomp did not enforce its agreement through these means is unavailing. Realcomp enforced its Policies; the method of enforcement is irrelevant to the issues in this case.

that an agreement among rivals to withhold a product consumers desire is anticompetitive, “absent a countervailing procompetitive virtue.” *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459 (1986). The Court therefore allowed for legitimate justifications. But Realcomp’s Policies are not simply “different rules for different types of real estate listing ‘products.’” (RAB at 1). By withholding the desired product, EA listings with full exposure, the Policies adversely impact competition among Realcomp members. The Court’s rationale in *IFD* is fully applicable;⁴ the Policies limit consumer choice. *See also Glen Holly Entertainment Inc. v. Tektronix Inc.*, 352 F.3d 367 (9th Cir. 2003) (recognizing competitive harm from horizontal agreement to remove product from market); *Sullivan v. NFL*, 34 F.3d 1091, 1101 (1st Cir. 1994) (condemning horizontal agreement to eliminate a certain type of ownership interest in NFL teams because it makes market “plainly unresponsive to consumer demand”); *Toys “R” Us*, 126 F.T.C. 415, 610 (1996) (finding actual anticompetitive effects because agreement to sell toys to discount warehouse clubs only in “combo pack” meant that consumers either had to buy “their second-choice goods . . . at their first-choice stores” or “first-choice goods . . . at their second-choice stores”).

At bottom, Realcomp’s Policies restrict forms of competition among brokers – providing contingent discounts, providing unbundled services, and offering these with full exposure. That type of agreement tends to restrict competition. *See, e.g., United States v. VISA U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) (condemning joint venture rule that prohibited members from competing “in a manner which the consortium considers harmful to its combined interest”);

⁴ Realcomp also attempts to distinguish *IFD* by asserting that there was no expert testimony to establish that EA listings with full exposure represent a separate product market. This, of course, is unnecessary. *See IFD*, 476 U.S. at 460-63 (discussing market for dental services, not provision of x-rays).

Detroit Auto Dealers Ass'n v. FTC, 955 F.2d 457, 472 (6th Cir. 1992) (agreement limiting auto dealer showroom hours was anticompetitive because it limited an important form of competition). The fact that Realcomp's Policies do not eliminate *all* forms of price competition does not save its Policies.

Realcomp's "this is not a price-fixing case" refrain therefore rings hollow. No matter how it is done, punishing discounting comes close to a form of price-fixing. While Realcomp repeatedly claims (without citation) that Complaint Counsel stipulated that the Realcomp Policies are non-price restraints (RAB at 48), this is not true. There is nothing of this sort in the parties' stipulations. (JX-1). Moreover, Complaint Counsel has always contended that the Realcomp Policies affected the price of brokerage services. (CCPF 1207-43). Neither does the fact that Complaint Counsel did not bring a *per se* charge distinguish these cases (RAB 47-48); not all price-fixing is a *per se* violation.

2. Realcomp Fails to Rebut the Evidence That the Policies are an Effective Penalty on Discounting and Limit a Means of Competition

Realcomp's Policies limit competition by reducing the exposure of EA listings. The Policies exclude these listings from three of the top four categories of real estate websites and inhibit their dissemination within the MLS. Realcomp does not deny the importance of exposure in selling real estate, that consumers want full exposure for EA listings, or that brokers compete based on how much exposure (particularly Internet exposure) they offer to consumers. (RRPF 454-62, 536-91, 870, 1164-73). Instead, Realcomp argues that consumers can substitute "flat fee ERTS" listings for EA listings and that there are sufficient alternatives to obtain exposure for EA listings. These assertions are unsupported.

a. “Flat Fee” ERTS Listings are Not a Substitute for EA Listings

Realcomp is simply wrong in insisting that the Policies do not harm competition because discount brokers offer what Realcomp calls “flat fee” ERTS listings. (RAB 8-9, 40-41). These are no substitute for EA listings. Under Realcomp’s rules, consumers were required to purchase the minimum services to obtain these ERTS listings.⁵ (CCPF 636, 1034, 1053). But more important, an ERTS listing – whether offered by a traditional broker or a discount broker – does not provide a discount contingent on the sale to an unrepresented buyer. (CCPF 1012, 1032-34; D. Moody, Tr. 489-90). Though consumers may pay an up-front “flat fee” for these listings (which Realcomp admits is at least \$200 more costly than EA listings), consumers still pay the entire agreed-to commission – which includes the offer of compensation – regardless of whether a cooperating broker is involved. (*See, e.g.*, D. Moody, Tr. 489-90; Mincy, Tr. 371, 373-74). These listings therefore do not break the offer of compensation “price floor” created by the structure of ERTS listings. (*See* CX 498A-043-045 (describing how use of ERTS contracts effectively creates a price floor at the prevailing offer of compensation (3%)).

The difference to consumers between EA and these “flat fee ERTS” listings is substantial. Comparing the EA listing from Greater Michigan Realty with its flat fee ERTS listing (CCPF 1033-34) for a \$300,000 home, for instance:

⁵ Just before trial Realcomp removed the minimum services requirement for ERTS listings. But as Realcomp’s counsel admitted, absent a Commission order, a future Realcomp Board of Governors may reimpose this requirement. (Pre-Trial Hearing, Tr. 12).

	Cooperating Broker	No Cooperating Broker
“Flat Fee” ERTS	Fee to listing broker \$599 + offer of compensation (3%) to cooperating broker (<i>Total: \$9,599</i>)	Fee to listing broker \$599 + 3% (<i>Total: \$9,599</i>)
EA	Fee to listing broker (\$299) + offer of compensation (3%) to cooperating broker (<i>Total: \$9,299</i>)	Fee to listing broker (\$299); <i>No offer of compensation paid (Total: \$299)</i>

Realcomp glosses over these facts and lumps together two very different types of listings to give the impression that “flat fee ERTS” listings offer the contingent discount. (RAB at 41). Realcomp specifically labels the ERTS offerings of all discount brokers as “flat fee ERTS” listings though these offer no contingent discount.⁶ But Realcomp also puts under this label the so-called “flat fee ERTS” offered by one broker – AmeriSell Realty – that is nothing more than an EA listing mislabeled as an ERTS. (RAB at 41; CAB at 18-19). Thus, Realcomp claims that consumers are able to obtain “the full benefit of the Realcomp public website distribution” without “payment of an offer of compensation to a cooperating broker when no such broker participates in the transaction.” (RAB at 41).

This is sleight of hand. Realcomp knows full well that the so-called “flat fee ERTS” from AmeriSell Realty is a mislabeled EA listing. As discussed in Complaint Counsel’s opening brief, AmeriSell Realty labels these listings “ERTS” to get around Realcomp’s rules. (CAB at 18-19). Realcomp now attempts to rely on this breach of its Policies to muddy the waters. But the ability to avoid paying the offer of compensation if the buyer is unrepresented is what distinguishes an EA from an ERTS listing. Realcomp has repeatedly admitted this and the entirety of its efficiency defense rests on this distinction:

⁶ This is based on Realcomp’s expert (RAB at 8; RPF 115 (citing CX 133-30-31)), who labeled any ERTS offering by a discount broker to be a “flat fee ERTS.” (CX 133-30 n. 84 (labeling ERTS offering from Greater Michigan Realty and MichiganListing.com as “flat-fee ERTS” listings); D. Moody, Tr. 489-90 (Greater Michigan ERTS offering has no contingent discount); Mincy, Tr. 371, 373-74 (MichiganListing.com ERTS offering has no contingent discount)).

- *In its answer*, Realcomp admitted that an ERTS listing requires payment of a commission no matter who sells the property, but an EA listing “reserves to the seller a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid *a reduced or no commission* when the property is sold.” (CX 32-004 (emphasis added)).
- *In the post-trial findings*, it is undisputed that “Exclusive Agency contracts allow sellers to save the cost of an offer of compensation to a cooperating broker – money that under an Exclusive Right to Sell listing would be paid to the listing broker – if the seller sells the property to an unrepresented buyer themselves.” (RRPF 184). Nor is there any dispute that the “significant economic factor of an Exclusive Right to Sell listing is that the home seller commits to pay the full amount of the negotiated commission (both the listing commission and the offer of compensation) if the house sells during the contract period, regardless of whether or not a cooperating broker is involved in the transaction.” (RRPF 1144).
- *In its expert report*, Realcomp rested its efficiency defense on the fact that under an EA listing, “the property owner pays no [cooperating broker] commission unless the buyer is procured by a cooperating agent.” (CX 133-032). “In contrast, a seller with an ERTS contract pays a [cooperating broker’s] commission whether or not the buyer is represented by a [cooperating broker].” (CX 133-033).
- *In its appellate brief*, Realcomp justifies banning EA listings from its dissemination to public websites on the grounds that “home sellers who sign EA listing agreements (by definition) do not pay a cooperating broker commission if they find their own buyer.” (RAB 56-58).⁷

Absent a Commission order, Realcomp will be free to slam the door on any listing that offers a contingent discount, no matter how labeled. There is no reason to doubt that Realcomp will do just that; its justification for the Website Policy is entirely based on the supposed “harm” caused by the contingent discount. (RAB at 56-62).

b. Realcomp Only Points to Alternatives Offering Inferior Exposure

Realcomp’s assertion that there are adequate alternatives to obtain exposure for EA

⁷ See also CX 175, 285, 329 (form ERTS contracts); DENNIS S. TOSH, JR., HANDBOOK OF REAL ESTATE TERMS 194-195 (1992) (defining EA and ERTS listings); HENRY S. HARRISON, ILLUSTRATED DICTIONARY OF REAL ESTATE AND APPRAISAL 99 (1983) (same).

listings is also wrong. There is no serious dispute about the significance of Internet marketing generally or the significance of Internet marketing on the Approved Websites specifically. (RRPF 536-87 (importance of Internet marketing); RRPf 588-676 (importance of Approved Websites)). Numerous industry studies, consumer survey responses from buyers in Southeastern Michigan, industry expert opinion, and Realcomp member testimony confirm that the Approved Websites are the most important websites for marketing listings. (RRPF 588-676).

Realcomp cannot deny any of these key facts and so it simply ignores them. In fact, Realcomp pretends that the IDX and MoveInMichigan.com – key websites foreclosed to EA listings by the Realcomp Policies – simply do not exist. (RAB at 9-13 (nowhere discussing the Realcomp IDX or MoveInMichigan.com)). But the number of consumer visits to MoveInMichigan.com is “large” and “significant” (RRPF 631-34), and the competitive significance of marketing on IDX websites is “large and growing.” (CCPF 645). They represent three of the top four categories of real estate websites. (CCPF 592-99; CX 373-046).

Instead of confronting these facts, Realcomp relies on one “statistic” regarding the ability of brokers to reach consumers through the MLS and Realtor.com. Complaint Counsel demonstrated that this “statistic” is unsupported, contradicted by reliable industry studies, and inconsistent with valid website statistics. (CAB at 30-31). Yet Realcomp completely ignores all this.⁸ Further, the only way EA listings reach Realtor.com is “double listing,” which is insufficient for two reasons. First, consumers must pay more money for this option (in order to

⁸ Although Realcomp points out that this claim – that brokers can reach 80% of buyers through the MLS and, in conjunction with Realtor.com, reach 90% of buyers – was on the websites of two brokers called by Complaint Counsel at trial, Realcomp does not provide any foundation for the statistic nor does it even argue that the statistic is somehow *not* against the overwhelming weight of evidence.

compensate brokers for the increased costs associated with double listing)⁹ and their listings still do not reach the IDX or MoveInMichigan.com and therefore still receive inferior exposure. As Realcomp's own economist stated, IDX websites "are more important sources of internet exposure" than Realtor.com. (RRPF 898). Second, this alternative presumes that other MLSs will not adopt a similar website policy, a proposition that is questionable if the ALJ's decision is allowed to stand. In this regard, it is especially ironic that Realcomp relies on the ability of brokers to place EA listings on MiRealSource, an adjacent MLS that only allows those listings because of a Commission consent order.

Finally, Realcomp points out that there are thousands of real estate websites other than the Approved Websites. But these simply are not effective alternatives in terms of cost or in the amount of exposure to potential buyers. (CCPF 899-907). Realcomp (and the ALJ) rely on the contrary opinion of Realcomp's economist, who has no background in real estate. (IDF 446; RPF 119). But he ignored the industry studies and other evidence confirming the importance of the Approved Websites, instead relying on the existence of such websites as Owner.com (a website that specializes in posting listings for sellers who do not use brokers), Realtytrac.com (a website that specializes in foreclosures), and Loopnet.com (a commercial real estate website). (CX 133-018, -115; CX 140, 161, 162). Moreover, brokers could post their listings on *all* of the thousands of "other" real estate websites – including Google and Trulia – and still reach only a

⁹ Realcomp's assertion by its economist that double listing represents only a nominal cost to brokers is contrary to the weight of evidence. The industry expert, Realcomp Governors and Realcomp's own witness at trial all testified that brokers avoid belonging to two MLSs and "double listing" because of the "significant cost" and "administrative burden." (RRPF 494-501; CX 443-01 (double listing cost discount broker 10.97 man-weeks per year)). The fact that discount brokers can pass these costs on to consumers only demonstrates consumer harm.

fraction of the buyers reached by the Approved Websites. (RRPF 592-97).

c. Realcomp Ignores the Evidence Showing That the Policies Reduce the Efficacy and Desirability of EA Listings

The market participants affected by Realcomp's Policies testified to the exact effects one would expect – their EA listings were rendered less effective. Denied exposure on three of the top four categories of websites and segregated into an inferior status within the MLS search function, brokers found their EA listings to be less successful than in other Michigan MLSs and less successful than their ERTS listings in Realcomp. (CCPF 1037, 1041, 1055, 1057; Mincy, Tr. 419 (EA listings outside of Realcomp area get more activity), 316 (ERTS listings more successful); D. Moody, Tr. 535-37 (EA listings far more successful in other MLSs than in Realcomp), 532-33 (EA listings in Realcomp get less activity than ERTS, not the case in other MLSs)). Realcomp does not address this evidence or offer any explanation why this would be the case.

Nor does Realcomp deal with the evidence that discount brokers uniformly received complaints from customers that their EA listings were not found on the MLS or the Approved Websites – complaints these brokers did not receive in other MLSs. (RRPF 964-65, 988-91, 1044-45, 1061). For instance, one discount broker customer wrote:

I've called 2 separate real estate agents just to see if they could locate my listing on the MLS. In both of their searches my listing did not come up. The only way it was found was by entering the MLS number. Can you tell me why this is happening??? What good is it to have it on the MLS if it doesn't come up in a search??

(RX 67-006; CCPF 933). Another customer disputed a discount broker's credit card charge, complaining about the EA listing:

- a. It did not appear in the regular MLS search for a house with my property's characteristics. That was the whole idea of the service.
 - i. Agents could not find it in the MLS database.
 - ii. Property was hidden in the MLS database, unlike a regular listing
- b. MLS Listing did not automatically appear on Yahoo, as regular listing in Michigan does appear on Yahoo.

(RX 40-002; CCPF 988). Yet another wrote that he asked "different real estate offices" to find his EA listing on the MLS, "Guess how many of them found it? ZERO IT DID NOT COME UP FOR ANY OF THEM." (RX 45-002).

Realcomp posits that the data showing that Realcomp brokers viewed and emailed EA listings only a fraction as often as ERTS listings simply reflects broker members steering their clients away from EA listings. (RAB at 20-21). But this does not explain why EA listing customers discovered that brokers could not find their listings. Nor does it explain the fact that discount brokers receive calls every week from Realcomp members (including Realcomp Governors) unable to find EA listings in searches on the Realcomp MLS. (RRPF 932-36). Moreover, even if the reduction were due to steering, Realcomp's Website Policy facilitates this anticompetitive result. *See Competition in the Real Estate Brokerage Industry*, A Report by the Fed. Trade Comm'n and U.S. Dep't of Justice, 69-70 (April 2007) ("2007 Report") (dissemination of discount broker listings to public websites reduces ability of brokers to steer).

These impacts reduced consumer demand for EA listings. Consumers demand low cost brokerage services in a down economy such as Southeast Michigan. (See CCPF 216-18 (expert and broker testimony as well as NAR study that poor housing market increases demand for EA listings)). But once aware of the limitations imposed by Realcomp's Policies, many consumers

switched to more expensive alternatives. (RRPF 992 (lost sales because listings will not go to Approved Websites); 1025-29 (lost customers or customers choosing ERTS over EA listings)).

B. Realcomp Fails to Rebut the Direct Evidence of Anticompetitive Effects

The reduction in consumer demand for EA listings is direct evidence of anticompetitive effects. EA listings offer consumers contingent discounts and unbundled services. By curtailing the use of EA listings, the Policies restrict these important forms of competition.

1. Realcomp Fails to Understand the Import of the Evidence Showing That the Policies Impact How Brokers Compete

Realcomp claims that its Policies do not harm competition because discount brokers offer ERTS listings. Realcomp actually touts the fact that “[i]n the Realcomp service area, discount brokers use ERTS listing contracts with great frequency, and on average at twice the rate of EA contracts. This ratio is about four times higher than in nearby Washtenaw County.” (RAB at 5). But Realcomp draws the wrong conclusion from this evidence.

a. That the Policies Caused Consumers to Switch to ERTS Listings Is Direct Evidence of Harm

Contrary to Realcomp’s position, the diversion of sales from EA listings to ERTS listings is direct evidence of actual anticompetitive effects. This shows that the Realcomp Policies reduced the use of EA listings. The MLS in “nearby Washtenaw County” (the Ann Arbor MLS) does not have any policies that restrict the dissemination of EA listings. (RRPF 1108). A comparison of the use of EA and ERTS listings by discount brokers who operate in both Realcomp and Ann Arbor shows that they use ERTS listings to a much greater extent in Realcomp. (CX 133-030). In other words, the Policies cause the very same broker to compete differently in these two adjacent MLSs; absent the Policies, consumers in Southeast Michigan are

far more likely to choose EA listings.

The reduced use of EA listings hurts consumers in two ways. (CCPF 1123-43). EA listings represent the provision of unbundled services. By reducing their use, Realcomp's Policies restrained this form of competition. (CCPF 1228-33). EA listings also represent an important form of price competition, which ERTS listings (discounted or otherwise) cannot replace. (CCPF 1207-27; CX 498-A-043-047).

The use of EA listings is especially important given the lack of price competition in the real estate brokerage industry.¹⁰ The evidence from Southeast Michigan shows that traditional brokers using ERTS listings typically charge a 6% commission. (CCPF 190). In fact, the president of a large Century 21 franchise bragged that his brokerage was able to obtain a 6% commission in 98.5% of its transactions. (CX 413 (Kersten, Dep. at 31)). He explained that his firm is able to "neutralize" discounting by other traditional brokers through retaliatory price cuts, and "now they don't offer the discount." (*Id.* at 31-32). By offering EA listings with low up-front fees and contingent discounts, discount brokers put price pressure on traditional broker commissions. (IDF 99-100).

The use of ERTS listings, which require the consumer to pay the offer of compensation no matter what, sets a price floor for brokerage services at the prevailing offer of compensation. (CCPF 1212-18). EA listings break that price floor because consumers pay the offer of compensation only if the buyer is represented. (CCPF 1219-23). By reducing the use of EA listings, the Policies protect the price floor. (CCPF 1124-27). This is why penalizing the use of

¹⁰ See, e.g., FTC Staff Report, *The Residential Real Estate Brokerage Industry*, at 11-13, 64 (Dec. 1983); 2007 Report at 45; CCPF 1130-31.

EA listings, even though they constitute a small percentage of the market, is anticompetitive. *See, e.g., Toys "R" Us*, 126 F.T.C. at 527-28, 597, 609-11 (reduction in market share of innovative discount competitor from 1.9% to 1.4% of market showed anticompetitive effect under "full rule of reason"); *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 937 & n.12 (1976) (condemning MLS restriction under rule of reason even though plaintiff offered "no evidence" excluded brokers discounted from the "prevailing commission" but these brokers "may be less subject to the informal and often unspoken peer group pressure that some commentators indicate is responsible for maintaining standard prices in many industries").

b. Realcomp's Focus on the "Growth" of Discount Brokers is Misplaced

The fact that the Policies caused consumers to switch to ERTS listings shows that the "growth" of discount brokers is irrelevant. By focusing on the success or failure of discount brokers, Realcomp glosses over the fact that the Policies changed the way discount brokers compete.¹¹ The Policies had their intended effect. They reduced the use of EA listings and thereby forms of competition.

Realcomp's insistence that discount brokers are "growing" is thus a red herring. (RAB at 15-17). Not only do Realcomp's figures include discount broker growth in areas outside of the Realcomp area,¹² but more importantly, due to the Policies any growth includes twice as many

¹¹ Brokers who did not change their business model either exited or chose not to enter. (CCPF 954-1006). Realcomp contends that YourIgloo exited because of reasons other than the Policies. But YourIgloo's problems were precipitated by Realcomp's Policies, as shown by the fact that its revenues dropped dramatically when the Policies were implemented. (CCPF 960-65 (describing problems); CX 422 (Aronson, Dep. at 28-29 (drop in revenues due "to the fact that Realcomp prevented [his company] from performing [its] business model")). YourIgloo chose to exit rather than offer ERTS listings because its customers did not want ERTS listings. (CX 526 (Groggins, Dep. at 19-21)).

¹² For instance, while Realcomp points to the "growth" of Greater Michigan Realty, that broker specifically explained that any growth is due to the company's expanded geographic area and

ERTS listings as EA listings.¹³ (RAB at 5). It is therefore irrelevant whether the discount brokers' revenues or profits rose or fell.¹⁴ The forced switch to ERTS listings limits competition.

c. Realcomp's Argument That Consumers Are Not Harmed Because They "Get More" With ERTS Listings Is Wrong

Realcomp attempts to claim that a coerced switch to ERTS listings is not consumer harm. According to Realcomp, "If consumers pay more, they get more. This is not consumer injury." (RAB at 42).

This is clearly wrong. Consumers are harmed when a group of competitors with market power collectively decide what products to offer, thereby preempting the workings of the market. *See, e.g., IFD*, 476 U.S. at 462; *United States v. American Radiator & Stand. Sanitary Corp.*, 433 F.2d 174 (3d Cir. 1970) (condemning horizontal agreement that included removing a lower-price line of plumbing fixtures from market).¹⁵ There is no evidence that consumers switch to ERTS listings because they want additional services. Rather, the undisputed evidence shows that these

participation in additional MLSs, and even with this expansion, any growth "pretty much leveled off" in 2005-06. (D. Moody, Tr. 544).

¹³ Realcomp also contends that BuySelf Realty (Albert Hepp) was not deterred from entry but grew its "Exclusive Agency business" in Southeastern Michigan. (RAB at 15). Realcomp fails to tell the Commission that this "business" is only referring customers to other brokers. (Hepp, Tr. 604-05, 608-609). That business is irrelevant; it does not represent direct competition in the market. This broker chose not to enter the market as a direct competitor because of Realcomp's Policies. (RRPF 944-1006).

¹⁴ Realcomp's assertion that no witness testified that the Policies effected "any decline in the prospects of his or her business" is nonetheless wrong. (*See, e.g., Mincy*, Tr. 425 (lost business); CC PF 988-92 (increased costs and lost business); CX 443-001-002 (identifying costs of Realcomp Policies); Hepp, Tr. 604-05, 608-609 (lost referral business)).

¹⁵ *See also* Letter from Hon. Deborah Platt Majoras, Chairman of FTC, and R. Hewitt Pate, Assistant Attorney General, to the Honorable Alan Sanborn, Chairman of the Committee on Economic Development, Small Business & Regulatory Reform at 6 (Oct. 18, 2005) (explaining harm to consumers of mandated minimum services).

consumers do not want the additional services and are switching to ERTS contracts to get more exposure for their listings. (RRPF 194-197, 654; CX 533-041 (noting “consumer demand for lower cost brokerage services where consumers are willing to carry out some of the home selling tasks themselves that otherwise would be performed by real estate professionals.”); Kermath, Tr. 740-42 (customers who want and initially select an EA listing end up switching to an ERTS listing to get more exposure)).

2. Realcomp’s Statistical Evidence and Criticisms are Wholly Unreliable

Realcomp seems to believe that it can save its Policies by convincing the Commission that its expert is right and Complaint Counsel’s expert is wrong about the intricacies of various aspects of the empirical evidence, such as selection criteria, regression analyses, coefficients, and tests for multicollinearity.

Realcomp’s efforts are threefold. It relies first on a days-on-market regression to say that the Policies were actually good for consumers. Realcomp then attempts to muddle the straightforward time series and benchmark comparisons, which show that Realcomp’s Policies reduced the share of EA listings. Lastly, Realcomp spends most of its time attempting to convince the Commission that its expert’s regression analyses are better than Complaint Counsel’s. All this not only misses the forest for the trees, but Realcomp’s attempts to rely on the empirical evidence founder.

a. Realcomp’s Days-on-Market Statistics are Unreliable

Realcomp first claims that the Policies did consumers a favor. Based on a days-on-market regression analysis done by its expert, Realcomp claims that the reduced exposure of EA listings actually made those listings sell faster. (RAB at 43). But Realcomp makes no effort to

explain why the Commission should rely on these statistics when they are based on the very same regression model that the ALJ found was unreliable when used to examine sales prices. (CAB at 55 n.21; ID 115-17; CCRF 235-36). These statistics are meaningless.

b. Realcomp's Criticisms of the Time Series and Benchmark Comparisons Founder Against the Facts

Realcomp also claims that the Commission should not rely on Complaint Counsel's time series analysis, which shows that the share of EA listings dropped by at least 52% after Realcomp implemented its Policies. According to Realcomp, despite all the evidence that the Policies reduce the effectiveness of EA listings and cause discount brokers to switch to ERTS listings, the Commission cannot infer that this drop is due to the Policies rather than economic conditions. This is directly contrary to Realcomp's own economist, who admitted that the drop in the Realcomp EA listings cannot be attributed solely to economic or demographic conditions, and who presented a similar time series showing an identical drop (52%) in another MLS with a website policy. (CCPF 1106; Eisenstadt, Tr. 1621-22).

Realcomp also claims that the Commission cannot rely on Complaint Counsel's benchmark comparisons. Realcomp argues that the Commission should only use Dayton for comparison – excluding the other five MLSs – because Dayton is the most “similar” to Detroit based on a combination of seven economic and demographic criteria.¹⁶ (RAB at 23-24). Realcomp glosses over the fact that all six of the benchmark MLSs are more similar to the Detroit area than any of the hundreds of other potential MLSs. It makes perfect sense to use the average of these six for comparison.

¹⁶ Even this comparison shows a 20% drop in EA listings associated with Realcomp's Policies.

Realcomp nonetheless presents a graph that purports to show a “strong association” between an MLS’s similarity to Detroit and its share of EA listings. (RAB at 24). This is the economic equivalent of a parlor trick. The bottom axis of the graph mysteriously starts at 4 instead of 0, thus creating a “lying graphic.” EDWARD R. TUFTE, THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION 52, 74-77 (2d ed. 2001) (showing deceptive use of context in graphical charts). The simple expedient of a ruler to extend the axes of the graph and the “association” line demonstrates the deception. This shows that the predicted EA listing share in Detroit is *negative* 20% (an impossibility) and in Los Angeles (16.69 “units from Detroit” (RX 161-27)) about 64% (highly improbable). This is unscientific twaddle.

Realcomp also complains that the average EA listing share of the six control MLSs is not a valid benchmark because that average does not take into account the “closeness” of each MLS. (RAB 26-27). Simple math demonstrates that Realcomp’s criticism is vacuous.¹⁷ Taking into account the “closeness” of each MLS and averaging them results in a benchmark of 5.51%, almost no change from the weighted average of 5.6%.

Realcomp also charges that the use of the “restricted” MLSs was unsound because they are not “close” to Detroit. Again Realcomp misunderstands the import of the evidence. If the only features shared by very different MLSs are the existence of a website policy and low EA listing shares, that confirms that website policies reduce EA listing usage.

¹⁷ The share for each MLS can be weighted by the reciprocal of the distance of the MLS from Detroit divided by the sum of the reciprocal of the distance for each MLS. This puts the greatest weight on the closest MLS and the least weight on the MLS that is farthest away.

c. Realcomp's Regression Analyses are Unsound, Unscientific, and Infirm

Realcomp pins its hopes on its expert's regression analyses, contending that these "strongly suggested" that "the lower EA shares in the Realcomp MLS are attributable to the economic and demographic characteristics." (RAB at 40). These analyses, however, have been demonstrated to be unreliable.

Although regression analysis is complicated, the problems with Realcomp's analyses are not. Regression analysis attempts to measure the "degree of correlation" between a "dependent variable" (in this case the share of EA listings) and "independent variables" that economic theory indicates may influence the dependent variable (for instance, the presence of a website policy). ABA SECTION OF ANTITRUST LAW, *ECONOMETRICS* 4 (2005) ("ABA ECONOMETRICS"). The analysis seeks to isolate the degree of correlation for each independent variable by controlling for the influence of the other independent variables. *Id.* at 4. The degree of correlation is represented by the "coefficient" or "estimator" associated with the independent variable. Reliable regression analysis therefore requires (1) sound economic theory regarding which independent variables to include,¹⁸ and (2) an absence of strong relationships between the independent variables ("multicollinearity") that would prevent the regression from isolating effects.¹⁹ Realcomp's regressions do not meet either condition.

¹⁸ "Without some economic theory about which variables are likely to matter, throwing a great number of variables into the hopper is likely to lead to spurious results." *In re Polypropylene Carpet Antitrust Litig.*, 996 F. Supp. 18, 28 (N.D. Ga. 1997).

¹⁹ Multicollinearity can result from a causal connection between two independent variables (e.g., education level and wealth) or simply be a function of the available data: "Multicollinearity does not depend on any theoretical or actual linear relationship among any of the [independent variables]; it depends on the existence of an approximate linear relationship in the data set at hand." PETER KENNEDY, *A GUIDE TO ECONOMETRICS* 184 (4th ed. 1998).

Realcomp has sown much confusion about exactly what the numerous regression analyses show. To be clear, Complaint Counsel's initial expert report included three regression analyses that showed Realcomp's Policies are associated with a 5.5 to 6.15 percentage point reduction in EA listings (*i.e.*, but for the Policies, the share of EA listings would be 6.25% to 6.9% instead of 0.75%). (CX 498-A-041, -071). Realcomp later produced a supplemental expert report with regressions that included additional independent variables and purported to find that Realcomp's Policies are not associated with a reduction in EA listings. (RX 161-014-017). Complaint Counsel responded to these criticisms in a surrebuttal report, which shows the problems with Realcomp's analyses and presents a number of new regression analyses that again demonstrate that the Realcomp Policies are associated with a reduction in EA listing share between 2.97 and 5.77 percentage points. (CX 560-006-014, 019-020).

In its supplemental expert report, Realcomp's expert criticized Complaint Counsel's initial regression analyses because they did not include as independent variables the eight criteria used to select the sample MLSs.²⁰ (RX 161-014). These criteria were various economic and demographic factors measured at the metropolitan statistical area (MSA) level (*e.g.*, population, median household income, etc.). According to Realcomp, its expert therefore "re-estimated Dr. Williams' analysis, using the *same* regression model but adding separate independent variables for each of the *eight* economic and demographic factors that Dr. Williams identified as relevant to the prevalence of EA listings." (RAB at 29 (emphasis added)). This is false.

Realcomp's expert did not include all eight of the selection factors. He omitted two –

²⁰ In making this criticism, Realcomp fails to understand that by using these eight factors as selection criteria, the resulting sample includes only a small variation in these factors compared to the hundreds of other MLSs that were excluded. (*See* RX 161-040 (showing variation in top fifty MSAs)).

population and population density. Why? On cross-examination, he admitted that he dropped these two MSA variables because of concerns about multicollinearity, which would prevent the regression analysis from separating the effects of the Realcomp Policies from these two variables. (Eisenstadt, Tr. 1569-70). Instead, Respondent's expert added the six remaining MSA variables as well as several variables of his own choosing, including several measuring the same characteristic at both the MSA level and county or zip code level (*e.g.*, he included a variable for the percentage of high school graduates in the MSA and in each county within the MSA). In total, he used 36 independent variables.

The inclusion of both MSA level and county or zip code level variables made Realcomp's regressions unreliable. First, their inclusion violates the first principle of regression analysis – sound economic theory for the inclusion of each variable. (This is explained at length in CX 560-006-009 and CCRF 228). Second, the inclusion of these variables (whether “duplicative” or not) violated the second principle of regression analysis by creating a multicollinearity problem. (CX 560-009-015; CCRF 228-29).

There are multiple indicators of the presence of multicollinearity. First, a standard test for multicollinearity demonstrated its presence. A diagnostic procedure in Stata (a statistics software program) showed a high correlation between the coefficient of the variable for the restrictive policies and the coefficients of several other variables included by Respondent's expert, indicating a multicollinearity problem.²¹ (CCRF 228); *see also* PETER KENNEDY, A

²¹ Realcomp protests that the test results were initially mislabeled as another test for multicollinearity. (RAB at 34-37). Realcomp protests that “the definition of ‘collinearity’ is in the record: it concerns the correlation between variables, not their coefficients.” (RAB at 37). But this confuses the issue of multicollinearity with the *test* for multicollinearity. The mislabeling created much confused testimony because of the failure to make this distinction, but the evidence shows that this is a

GUIDE TO ECONOMETRICS 185-86 (4th ed. 1998) (stating that multicollinearity leads to high covariance between estimators); DOMADAR N. GUJARATI, BASIC ECONOMETRICS 328 (3d ed. 1995) (correlation of estimators increases with correlation of variables).

Second, contrary to the industry expert and Realcomp's own witness, Realcomp's regression analysis predicts that a hot housing market would *decrease* the use of EA listings. (CCRF 229). This obviously incorrect result is another indication of multicollinearity. *See* ALEXANDER VON EYE & CHRISTOF SHUSTER, REGRESSION ANALYSIS FOR SOCIAL SCIENCES 136 (1998) (VON EYE & SHUSTER) (indicators of multicollinearity include "[t]he sign of a predictor is counterintuitive or even illogical"). It also demonstrates that the analyses are unreliable. (CCRF 228-29).

Third, we know that Realcomp's regressions have a multicollinearity problem because when only one of the thirty-six variables is dropped, there is a large change in the calculated effect of the Realcomp Policies. *See* VON EYE & SHUSTER at 136 (another indicator of multicollinearity is "[l]arge changes occur in parameter estimates when a variable is added or removed"). Specifically, dropping the variable measuring median household income at the MSA level while retaining this same measure at the county level resulted in the effect of the Realcomp Policies going from essentially zero to 2.97 percentage points. (CX 560-011, 019; CCRF 229). This shows that the inclusion of the MSA level variable was artificially driving down the computed degree of correlation between the Realcomp Policies and the share of EA listings. *See*

valid test and that it shows a multicollinearity problem. (D. Williams, Tr. 1756-58; CCRF 228); *see also* DAVID A. BELSLEY, ET AL., REGRESSION DIAGNOSTICS: IDENTIFYING INFLUENTIAL DATA AND COLLINEARITY 186 (1980) (showing that correlation matrix of variables and correlation matrix of coefficients are mathematically related).

ABA ECONOMETRICS 22 n.36 (“If an explanatory variable of concern and another explanatory variable are highly correlated, dropping the second variable from the regression can be instructive. If the coefficient on the explanatory variable of concern becomes significant, a relationship between the dependent variable and the explanatory variable is suggested.”).

Dropping just one more MSA level variable, the percent of African Americans, while retaining the same variable at the zip code level resulted in the effect of the Realcomp Policies increasing even further to 3.2 percentage points. (CX 560-011-012, 019; CCRF 229). This also shows – regardless of the cause – that Realcomp’s regressions are not robust.

Complaint Counsel’s economist went on to remove all of the MSA level variables – which theory shows should not have been included and which caused the multicollinearity problem – while keeping the non-MSA level variables. This demonstrated conclusively that the Realcomp Policies, not any economic or demographic factors, reduce EA usage in the Realcomp MLS. These regressions show that the Realcomp Policies are associated with a drop in EA listing share of 5.16 to 5.77 percentage points. (CX 560-011-014 , 019-020; CCRF 229).

Realcomp’s only response to all of this is that these regressions “used some – but not all – of Dr. Eisenstadt’s additional variables.” (RAB at 31). This is technically true: the regressions in Complaint Counsel’s surrebuttal report only use up to 35 out of 36 of the additional variables. Dropping just one MSA level variable (while retaining a measure of the same factor at the county level) showed that the Realcomp Policies are associated with a 2.97 percentage point decrease in EA listing share. Realcomp glosses over this, focusing only on the regressions that drop all of the MSA level variables. (RAB at 31-32). To use all of the variables is demonstrably wrong. Complaint Counsel’s expert followed the very technique used by Realcomp’s expert, dropping

variables that cause multicollinearity. *See also* KONG CHU, PRINCIPLES OF ECONOMETRICS 119 (1968) (suggesting omitting variable “[w]hen we find multicollinearity exists between two explanatory variables”). This is sound statistical technique, particularly when there are non-MSA variables measuring the same economic and demographic factors. And these regressions show that Respondent’s statistical evidence is unreliable and confirm that Realcomp’s Policies reduce the use of EA listings and harm competition.

3. Even if, Contrary to the Facts, Economic or Demographic Factors Reduced the Usage of EA Listings, Realcomp’s Policies Are Still Anticompetitive

Even if one were to grant Realcomp’s counterfactual account of the reasons why EA listing shares in the Realcomp MLS are below 1%, that would not make Realcomp’s Policies any less anticompetitive. Realcomp admits that website policies in general reduce EA listings; its economist found this to be the case in two other MLSs.²² Realcomp points to nothing unique about the Realcomp MLS or the market for brokerage services. Yet Realcomp argues that it should be free to impose restrictions that penalize EA listings and the discounting they represent because consumers supposedly find these listings less attractive given the current economy in Southeast Michigan. (RAB at 43).

The Commission dealt with this very sort of argument in *Detroit Auto Dealers*. In that case, as here, the respondent argued that unique conditions in the Detroit area meant that the restraint had little effect. 111 F.T.C. 417, 500 (1989). The Commission flatly rejected this proposition, explaining that even if the restricted form of competition “would in fact be completely useless to Detroit consumers, the respondents are not justified in making that

²² *See* RRPf 1106-07 (effect in Boulder MLS); Eistenstadt, Tr. 1611 (effect in Williamsburg).

judgment on behalf of consumers.” *Id.* Realcomp’s argument is even less convincing. Even if the economy reduced the use of EA listings, economic conditions change. Realcomp wants the right to punish discounting no matter what the economic circumstance.

C. Realcomp’s Justifications are Unrelated to Any Efficiency

The only thing that we learn from Realcomp’s efficiency arguments is that *because* EA listings represent discounting, the Realcomp Policies are intended to reduce the ability of buyers to find these listings. (RAB at 59). In other words, Realcomp’s own justification shows actual anticompetitive effects. *See National Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 693-94 (1978) (finding justification confirmed anticompetitive effect because its logic rested on the assumption that the restraint would “tend to maintain the price level; if it had no such effect, it would not serve its intended purpose”). These arguments only confirm Complaint Counsel’s case. Realcomp’s argument therefore boils down to “because the MLS enhances efficiency, the Policies must be efficient.” This is wrong-headed:

There is a key distinction between a venture’s efficiency and an access rule’s contribution to that efficiency. . . . Members of joint ventures do not have an unlimited property right to capture the profits that might arise from a collective restriction of output. The main reason for the distinction in antitrust treatment between single firms and joint ventures is that a joint venture involves coordination among competing firms and can be used as a vehicle to suppress competition in ways unrelated to or unnecessary for the efficient provision of the product, as cartels do when they engage in naked price fixing (coordinated pricing that lacks an efficiency justification).

Dennis W. Carlton & Steve C. Salop, *You Keep Knocking But You Can’t Come In: Evaluating Restrictions on Access to Input Joint Ventures*, 9 HARV. J. L. & TECH. 319, 325 (1996); *see also* 13 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2220c (2006).

1. Realcomp Failed to Show That its Policies are Related to any Efficiency

Realcomp fails to show how its Policies are reasonably necessary to an efficiency enhancing integration of resources. *See North Texas Specialty Physicians*, Dkt. No. 9312, 2005 FTC LEXIS 173, *32 n.20 (Nov. 29, 2005) (*NTSP*); Fed. Trade Comm'n & U.S. Dept. of Justice, *Antitrust Guidelines for Collaborations Among Competitors Guidelines* § 3.36 (2000). Here, the efficiency enhancing integration is the aggregation and dissemination of listings. (CAB at 10-11; CX 498-A-018-020). Realcomp fails to show how its Policies are in any way related to this. If anything, the Policies – banning EA listings from the dissemination to Approved Websites and impacting their dissemination within the MLS – *reduce* that efficiency.

For instance, nowhere in Realcomp's "bidding disadvantage" argument is there any indication of how eliminating this "advantage" makes the MLS more efficient. (RAB 58-59). Realcomp's only argument is that buyers using Realcomp cooperating brokers benefit because the Policies ensure that unrepresented buyers are less likely to find the homes listed under EA contracts. That is not economically efficient, nor is it related to the efficiency of the MLS.

Nor does Realcomp point to any evidence of procompetitive effects rather than mere theory. For instance, there is no evidence that because of the supposed "free riding" issue brokers will reduce their services (for instance by leaving the MLS). In fact, the evidence is to the contrary. (CAB at 42-43; CCPF 1263, RRPF 1249). This is fatal. *See Graphic Products Distributors, Inc. v. ITEK Corp.*, 717 F.2d 1560, 1576 (11th Cir. 1983) ("merely offering a rationale for a . . . restraint will not suffice; the record must support a finding that the restraint is in fact necessary to enhance competition and does indeed have a pro-competitive benefit").

2. Realcomp's Free Riding Argument Does Not Withstand Scrutiny

In addition, Realcomp's free riding argument lacks a theoretical basis. It rests on the notion that home sellers using EA listings receive some services that they do not pay for. But Realcomp does not even attempt to deal with the Commission's refutation of this argument. *See Analysis of Agreements Containing Consent Orders to Aid Public Comment, Information and Real Estate Services, LLC*, File No. 061-0087 at 7 (Oct. 12, 2006). Rather, Realcomp attempts to claim that a seller using an EA listing would (absent the rules) somehow get more from Realcomp than a seller using an ERTS contract. That is simply not true.

Absent the rules, a seller using an EA listing would receive the same benefits as one using an ERTS listing, not more. Both types of listings require the seller to employ a listing broker who is a member of Realcomp. Both sellers would then receive the benefit of unhindered dissemination of their listing to cooperating brokers through the MLS. And both would receive the benefit of dissemination of their listing to the Realcomp Approved Websites. Both types of sellers pay for these benefits (through the listing broker).

The only difference between the two sellers is the commission paid if the buyer is unrepresented. If the seller is using an ERTS listing, the seller pays the full commission.²³ If the seller is using an EA listing, the seller pays "a reduced or no commission." (CX 32-004 (Answer)). But this benefit does not come from Realcomp; it comes from the listing broker. In either case no cooperating broker is paid. Nor is there any difference in the amount of money Realcomp receives. The only difference is the amount paid to the broker, not to the MLS.

²³ Sales under an ERTS listing to unrepresented buyers occur at about the same frequency as with EA listings. (Sweeney, Tr. 1362-64; CX 39 (Taylor, Dep. at 42-43 (15%)).

Realcomp confuses these two.²⁴ From the perspective of the MLS, a transaction with an unrepresented buyer is the same regardless of the type of listing agreement.

This shows the fallacy in Realcomp's attempt to transform a home seller into a cooperating broker. Not only is it a word game (CAB at 39-40), but a home seller using an EA listing gets no additional benefits from the MLS (as would a cooperating broker). These sellers, for instance, are not able to search the MLS on behalf of buyers, they cannot access the MLS data for comparable sales, nor are they protected by the "procuring cause" rule.²⁵ Moreover, these sellers (unlike a cooperating broker) offer to pay any of the 14,000 members of Realcomp if their buyer purchases the home. The fact that these sellers would receive the contingent discount in 20% of EA transactions does not show a "free rider problem"; it shows that EA listings benefit consumers and that Realcomp's Policies, designed to reduce the incidence of these discounts, are anticompetitive.²⁶

D. Realcomp's Policies Violate Section 5 Under a Rule of Reason Analysis

The evidence clearly shows that the principal tendency of Realcomp's Policies is to restrict rather than enhance competition. EA listings represent important forms of competition

²⁴ This reflects a fundamental misunderstanding of the case. Realcomp's economist analyzed the Policies as though Realcomp were a single entity, not a combination of competing brokers. (Eisenstadt, Tr. 1522).

²⁵ Indeed, the ALJ found (and Realcomp does not dispute) that home sellers who sell on their own are *not* in the relevant market for real estate brokerage services. (IDF 287-97).

²⁶ In its answering brief, Realcomp for the first time ever claims that the Search Function Policy addresses free riding. (RAB at 61). There is no logical, evidentiary, or other support for this assertion. Realcomp's expert never testified to this, nor did Realcomp ever state this in response to Complaint Counsel's interrogatories asking point blank for all justifications for the Policy. (CX 33-004-007). Further, Realcomp admits that there is no procompetitive justification for the minimum services requirement. (Closing, Tr. 1914).

among real estate brokers, *viz.*, contingent discounts and unbundled services. Realcomp admits that it, a combination of competitors with market power, imposed the Policies precisely because EA listings (in contrast to ERTS listings) offer contingent discounts. The Policies penalize a form of discounting and withhold from consumers a product they desire. This is not justified, and it caused consumer harm. As Realcomp points out, discount brokers (and consumers) have switched to the more expensive ERTS listings to obtain full exposure through the Realcomp MLS. Realcomp's Policies therefore violate Section 5 because they are unreasonable restraints on competition.

Complaint Counsel do not rely on a quick look analysis for this conclusion.²⁷ While, contrary to Realcomp's argument, the Supreme Court has made it clear that going beyond a quick look does not necessarily require the "fullest market analysis" nor a "plenary market examination,"²⁸ *California Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999), the Policies fail under any level of analysis.²⁹ The anticompetitive tendency of the Policies is apparent from the actual effects as well as from Realcomp's market power and the nature of the restraints.

The evidence therefore shows that the Policies are anticompetitive even if, as Realcomp incorrectly contends, there were no evidence of actual effects. Realcomp possesses market

²⁷ A quick look analysis does not require "proof of market definition and market power." *NTSP*, 2005 FTC LEXIS 173, at *91-92.

²⁸ For instance, in *Polygram Holding, Inc.*, in addition to its quick look analysis, the Commission found that restraints affecting three record albums during a ten-week period were anticompetitive under the rule of reason based on "evidence of industry practice and the past practices of the [respondents], as well as the consistent economic literature regarding the likely effect of such practices." 136 F.T.C. 310, 369, 374-75 (2003).

²⁹ The analysis of concerted action does not (as Realcomp insists) fall into three distinct categories – *per se*, "quick look," and "full rule of reason" – but lies along a continuum. *See Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005).

power, which combined with the nature of the restraints shows anticompetitive effects.³⁰ That evidence is sufficient under the “traditional” (or any other) rule of reason analysis.³¹ *See, e.g., Gordon v. Lewiston Hosp.*, 423 F.3d 184, 210 (3d Cir. 2005) (“under the traditional rule of reason ... [b]ecause proof that the concerted action actually caused anticompetitive effects is often impossible to sustain, proof of the defendant’s market power will suffice”).

Realcomp’s faulty legal exposition is of no consequence in any event. The fact is that the Realcomp Policies reduced the use of EA listings and the forms of competition they represent. That is direct evidence of anticompetitive effects. Under any standard, the evidence shows that Realcomp’s Policies violate Section 5.

III. CONCLUSION

The courts and the Commission have dealt with traditional broker efforts to use the MLS to stifle competition for years. In fact, the Commission has dealt with broker efforts to choke out the very form of competition at issue in this case – the use of EA listings to offer discounted brokerage services. Yet Realcomp insists that it is different. Even though the Policies deny full MLS services to EA listings, reserving these services for ERTS listings, Realcomp insists that this is all right *because* EA listings offer contingent discounts while ERTS listings do not.

³⁰ Realcomp argues that so long as it has some “plausible” justification, Complaint Counsel must prove actual competitive effects. (RAB at 51-52). This too is wrong. “Either showing – market power or actual detrimental effects – shifts the burden to defendant to demonstrate pro-competitive effects.” *Flegel v. Christian Hospital, NE-NW*, 4 F.3d 682, 688 (8th Cir. 1993).

³¹ Although *United States v. VISA U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003), states that “the proper inquiry is whether there has been an ‘actual adverse effect on competition as a whole,’” the quoted text traces back to *Capital Imaging Assocs., P.C. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537, 543 (2d Cir. 1993), in which the Second Circuit made it clear that a plaintiff can meet this burden by proving market power, which serves as a “surrogate for detrimental effects.” *Id.* at 546.

Realcomp also claims that it should be allowed to continue with its Policies because consumers can switch to ERTS listings (yes, those are more expensive, but consumers receive more services as mandated by the Policies). And Realcomp contends it should get a free pass because its economist's regression analyses purport to show that economic or demographic factors in Southeast Michigan affected the use of EA listings.

But the record shows that this free pass would harm competition. The Policies penalize a form of discounting. They remove from the market a product desired by consumers. This reduces important forms of competition. The restraint is not inconsequential; Realcomp has considerable market power. The likely effect of the Policies is to reduce competition, and the record shows that is exactly what happened in Southeast Michigan. Even if economic conditions impacted the use of EA listings, Realcomp is not therefore entitled to penalize their use.

The Commission should reverse the ALJ's decision and enter an order enjoining Realcomp's practices. The ALJ's decision would allow Realcomp to continue to penalize discounting, in bad economic times and in good. Absent a Commission order, Realcomp can close off any leaks in its Website Policy and ban all listings – no matter how labeled – that offer a discount contingent on a sale to an unrepresented buyer. Absent a Commission order, as Realcomp's counsel admitted, a future Realcomp Board of Governors could reimpose the Search Function Policy and the minimum services requirement for ERTS listings. To protect consumers in Southeast Michigan, the Commission should hold Realcomp liable for violating Section 5 and enter the Proposed Order.

Respectfully submitted,

Handwritten signature of Sean Gates in cursive, with a horizontal line underneath.

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Dated: March 11, 2008

CERTIFICATE OF SERVICE

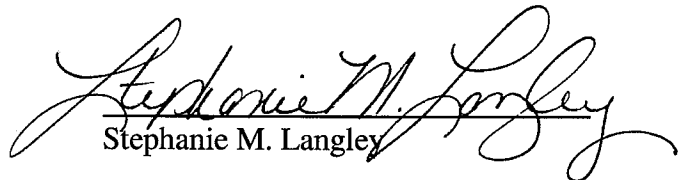
This is to certify that on March 11, 2008, I caused a copy of the attached Reply Brief of Counsel Supporting the Complaint, to be served upon the following persons:

by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
via Office of the Secretary, Room H-135
Federal Trade Commission
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