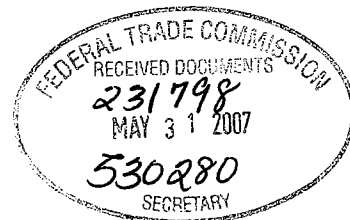


ORIGINAL

PUBLIC

UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION



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In the Matter of

Docket No. 9320

REALCOMP II LTD.,

Chief Administrative Law Judge  
Stephen J. McGuire

Respondent.

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**RESPONDENT REALCOMP II, LTD'S ANSWER OPPOSING COMPLAINT**  
**COUNSEL'S MOTION *IN LIMINE* TO BAR LAY OPINION**  
**TESTIMONY REGARDING JUSTIFICATIONS FOR**  
**REALCOMP'S RULES AND POLICIES**

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Dated: May 30, 2007

## INTRODUCTION

On May 18, 2007 Complaint Counsel filed a motion *in limine* to exclude the testimony of Robert Gleason, Douglas Hardy, and Douglas Whitehouse “relating to any supposed justifications for Respondent Realcomp II, Ltd (“Realcomp”) Website and Search Function Policies (together the “Policies”) without adequate foundation in that witness’ personal knowledge.” (for simplicity, “Justification Motion”, p 1). Complaint Counsel assert that since Realcom's witnesses were not on Realcomp’s Board of Governors when the Policies were enacted, they lack personal knowledge of why the Policies were implemented then, and therefore cannot testify about why the Policies are justified. Complaint Counsel ignore that the Complaint does not challenge the reasons that the Policies were implemented in the first place, but instead contends that the Policies are not currently justified and should be changed. Realcomp's witnesses will offer appropriate responsive testimony. Complaint Counsel also assert that since Realcomp's witnesses may have had conversations with others who share their understanding of the Policies, their testimony must be based on hearsay. However, the testimony that each witness will offer is based on the witness's own understanding of why the Policies are justified based on their first hand knowledge of the Multiple Listing Service (“MLS”), its rules, and their individual experience.

## ARGUMENT

### **I. LAY WITNESSES MAY PRESENT TESTIMONY, INCLUDING OPINIONS AND INFERENCES, BASED ON THEIR EXPERIENCE.**

Paragraphs 20 and 21 of the Scheduling Order refer to F.R.E. 602 and F.R.E. 701, which state:

Rule 602: Lack of Personal Knowledge

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of rule 703, relating to opinion testimony by expert witnesses.

#### Rule 701: Opinion Testimony by Lay Witnesses

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Under F.R.E. 602, testimony should not be excluded for lack of personal knowledge unless a reasonable trier of fact could not believe the witness had personal knowledge. *United States v Hickey*, 917 F.2d 901, 904 (6<sup>th</sup> Cir. 1990). For purposes of F.R.E. 602, "knowledge includes the witnesses inferences and opinions, so long as they are grounded in personal observation and experience. *United States v. Doe*, 960 F.2d 221 (1st Cir. 1992). See, for example, *United States v. Pavia*, 892 F.2d 148, 157 (1<sup>st</sup> Cir. 1989) ("The individual experience and knowledge of a lay witness may establish his or her competence, without qualification as an expert, to express an opinion on a particular subject outside the realm of common knowledge."); *United States v. Thompson*, 559 F.2d 552 (9<sup>th</sup> Cir. 1977) (recognizing that a restaurant manager had ample personal knowledge to testify about restaurant procedures).

With respect to F.R.E. 701, Complaint Counsel acknowledge that a lay witness may testify in the form of opinions or inferences that are rationally based on the perception of the witness (Justification Motion, p 2). Realcomp's witnesses have substantial knowledge of, and experience

in, the real estate industry. Industry knowledge and experience provide a sufficient foundation for lay opinion testimony. *Agro Air Assocs., Inc. v. Houston Casualty Co.*, 128 F.3d 1452, 1455 (11th Cir. 1997) (affirming the admission of lay witness opinion testimony "based on the witnesses' personal observations and knowledge of, and experience in, the aviation industry"); *Burlington Northern R. Co. v. State of Neb.*, 802 F.2d 994, 1004 (8th Cir. 1977) ("personal knowledge or perception acquired through review of records prepared in the ordinary course of business, or perceptions based on industry experience, is a sufficient foundation for lay opinion testimony").

**II. THE WITNESSES TESTIMONY ON THE CURRENT JUSTIFICATIONS FOR THE POLICIES IS RELEVANT AND WITHIN THEIR PERSONAL KNOWLEDGE.**

Complaint Counsel assert that "To testify to Realcomp's reasons for the Policies, including the problems the Policies were meant to address, Realcomp's witnesses must be able to testify from actual personal knowledge of what Realcomp did and why." (Justification Motion, p 3). Complaint Counsel's assertion is inconsistent with their allegations against the Policies. Although the initial justifications of the Policies may be relevant,<sup>1</sup> the current justifications for the Policies are

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<sup>1</sup>An often-quoted description of the rule of reason was set forth by Justice Brandeis in *Board of Trade of City of Chicago v United States*, 246 US 231, 238; 38 S Ct 242; 62 L Ed 683 (1918):

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider 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. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

particularly significant because the Complaint challenges ongoing Policies and seeks to change them. Realcomp's witnesses will respond to the Complaint's allegations with testimony regarding why Realcomp is doing what it is doing now, as well as the actual and probable consequences of Complaint Counsel's proposal to change Realcomp's Policies.

Complaint Counsel's characterization of Realcomp's witnesses' testimony as "mere post hoc rationales for the Policies, devoid of any evidentiary value" (Justification Motion, p 2) is similarly disconnected from the nature of this case. Complaint Counsel cannot, on the one hand, make allegations against ongoing activities and seek future change, but on the other hand claim that any response must be limited to the past and therefore be inadmissible or irrelevant.

Realcomp's witnesses have ample knowledge and experience to support their testimony. Douglas Hardy is the President of Century 21 Today in Birmingham, Michigan. (Hardy Dep. at 5:16, attached at Tab 1). Mr. Hardy became the President of Realcomp on January 1, 2007. (*Id.* at 14:9.) Mr. Hardy has served on the Realcomp Board of Governors since 2004, and served as Vice President in 2006. (*Id.* at 14:21 - 15:20). Robert Gleason is the President and broker of record at Snyder, Kinney, & Bennet in Birmingham, Michigan. (Gleason Dep. at 7:2-13, attached as Tab 2). He has served as on the Realcomp Board of Governors for the past three years. (*Id.* at 8:20 - 9:6). Douglas Whitehouse was a member of the Realcomp Board of Governors during the mid 1980s, and he now serves as on the board of directors for the National Association of Realtors. (Whitehouse Dep. p 5:18 - 6:6, attached as Tab 3).

These witnesses have personal knowledge of the MLS system and its rules based on years of experience in the real estate industry. Their testimony speaks to the current justifications for Realcomp's policies rather than historical justifications. Their years of experience in the real estate

industry along with their experience with the MLS system allow them to testify to their own understanding of why the practices at issue are important and justifiable.

Complaint Counsel attempt to support their position by relying on *Hart v O'Brien*, 127 F3d 424; 438 (5<sup>th</sup> Cir. 1997) (excluding a police officer's opinion about the motivation of other officers during an arrest), and *Kaczmarek v. Allied Chemical Corp.*, 836 F3d 1055, 160-61 (7<sup>th</sup> Cir 1997) (where a safety director was not employed by a company at the time of an accident, the safety director's testimony on the safety procedures in place at the time was excluded). Complaint Counsel's reliance on these cases is misplaced because Realcomp's witnesses will offer testimony about the present and ongoing benefits of Realcomp's policies to their industry based on their personal experience and knowledge. Unlike *Hart*, they will not offer testimony based on their impressions of an event in which they did not participate, but rather their own current understanding of why the Policies are justifiable and important. Unlike *Kaczmarek*, this case is not about past procedures, and Realcomp's witnesses will offer their understanding of the utility of the ongoing Policies.

Thus, Complaint Counsel's "straw man" argument fails for lack of relevance in light of Complaint Counsel's own Complaint, and as inconsistent with Realcomp's witnesses' actual testimony and the applicable law. Moreover, it should be noted that Complaint Counsel's position that only a person with personal knowledge of past events may testify regarding present conditions is overstated and illogical. By Complaint Counsel's logic, if nobody were alive with personal knowledge of why a bridge was built and somebody proposed to remove it, then nobody could testify in response that the bridge is still needed and should not be removed.

### III. THE PROPOSED TESTIMONY IS NOT BASED IN HEARSAY OR CONJECTURE.

Complaint Counsel has asserted that the proposed witnesses are trying to offer “opinions that are necessarily based, in the absence of any personal knowledge of why Realcomp did what it did, on hearsay and speculation about facts not in evidence.” (Justification Motion, p 6). As an example, Complaint Counsel cite to a passage from Mr. Whitehouse’s deposition where he testified about what he heard from agents in other areas (which supports his testimony that forwarding Exclusive Agency (“EA”) listings and treating them in the manner sought by Complaint's Counsel would require Realcomp members to pay for and promote a means and method that would undercut their own business activity). (Whitehouse Dep. 111:12-112:6). This particular anecdote would be objectionable as hearsay only if it were offered to prove the truth of the matter asserted by the out-of-court declarant. F.R.E. 801(c). In other words, Complaint Counsel might have a hearsay objection to the truth of what Mr. Whitehouse was told (if such evidence were offered), but Complaint Counsel has no valid objection to whether Mr. Whitehouse was, in fact, told what he heard. Moreover, what Mr. Whitehouse heard from agents forms part of his experience. Mr. Whitehouse may testify that he believes the Policies are justified based on his experience, without raising any issue regarding hearsay or expert opinion testimony. *Indemnity Insurance Company of North America v. American Eurocopter LLC*, 227 F.R.D. 421, 424 (D. N.C. 2005) ("a person with specialized training does not testify as an expert by giving first-hand participant testimony, even though it appears to be expert testimony").

Even if Mr. Whitehouse or Realcomp's other witnesses relied on hearsay to some extent, it is reversible error to exclude a lay opinion that was based only in part on hearsay. *Stuart v. UNUM*

*Life Ins. Co.*, 217 F3d 1145, 1154-1155 (9<sup>th</sup> Cir. 2000). A person's employment and experience can supply a sufficient basis for testimony on matters related to that experience. *United States v. Doe*, 960 F2d 221, 223 (1st Cir 1992). *Doe* held that a sports shop owner had firsthand knowledge from which he could infer that a particular pistol was manufactured in Brazil based on its brand name. *Id.* Even though the shop owner was not qualified as an expert, his inferences on where the pistol had been manufactured based the pistol's brand were admissible because they were grounded in his personal observations and experience. *Id.*

Here, Complaint Counsel's assertion that the proposed testimony is solely based on hearsay ignores the witnesses' experience and employment. Like the shop owner in *Doe* and the hospital's Vice President in *Stuart*, Realcomp's witnesses have unique understandings of the Policies based on their positions within the real estate industry in Southeastern Michigan. To the extent they had conversations with others who share their views, this simply reflects that their views are commonly-held.

#### **IV. THERE IS NO MERIT IN COMPLAINT COUNSEL'S ATTEMPT TO PRECLUDE REALCOMP FROM PRESENTING A RESPONSIVE CASE.**

Complaint Counsel seek a procedural advantage by attempting to limit the ability of Realcomp's witnesses to testify about what they are doing, or what would happen if they were forced to change their business model as Complaint Counsel proposes. Realcomp's witnesses are uniquely qualified by their knowledge and experience to respond to these issues, as indicated above. Moreover, as a matter of fundamental due process, Realcomp has a right to respond to Complaint Counsel's accusations and proposals.

Realcomp intends to offer the testimony of lay witnesses who, because of their knowledge and experience, could be qualified as experts in certain matters. *Farner v Paccar, Inc*, 562 F.2d 518,



529 (8th Cir. 1977) (recognizing that the mere fact that the witness, by virtue of his education, training, or experience, is capable of being qualified as an expert, does not serve as a valid objection to his expression of lay opinion testimony). Realcomp submits that it properly designated these witnesses as lay witnesses under the Scheduling Order,<sup>2</sup> Any opinion testimony that they may offer would be admissible under the F.R.E. 701. Complaint Counsel seeks extreme and overbroad relief in attempting to completely preclude such testimony.

Complaint Counsel also ignore the Commission's expertise and seeks to impair the Commission's search for the truth.<sup>3</sup> Realcomp presents its testimony to assist the Commission in understanding relevant market conditions in the Realcomp Service Area. The Commission can decide how much weight to give that testimony, but should not refuse to hear it at all. To the extent Complaint Counsel believes that certain testimony is unfounded or wrong, then Complaint Counsel can explore it on cross examination, or present contrary evidence.

### **RELIEF**

Realcomp respectfully requests that Complaint Counsel's Motion in Limine to Bar Lay Opinion Testimony Regarding Supposed Comparisons of Southeastern Michigan with Other Locales be denied.

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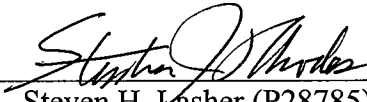
<sup>2</sup> In contrast, for example, both Complaint Counsel and Realcomp identified expert witnesses who have produced lengthy reports. See generally, F.R.C.P. 26 (a)(2)(B).

<sup>3</sup>For example, even in jury trials, evidence subject to a hearsay objection is often admitted for limited, permissible purposes.

Respectfully submitted,

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

Dated: May 30, 2007

By:   
\_\_\_\_\_  
Steven H. Lasher (P28785)  
Scott L. Mandel (P33453)  
Stephen J. Rhodes (P40112)

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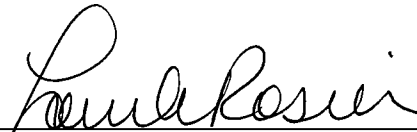
**CERTIFICATE OF SERVICE**

This is to certify that on May 30, 2007, I caused a copy of the attached Respondent Realcomp II, Ltd.'s Answer Opposing Complaint Counsel's Motion *In Limine* to Bar Lay Opinion Testimony Regarding Justifications for Realcomp's Rules and Policies to be served upon the following persons by Electronic Transmission and First Class Mail:

Sean P. Gates, Esq.  
601 New Jersey Ave., N.W.  
Rm. NJ-6219  
Washington, DC 20001

And two copies of same hand delivered by overnight courier to:

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

  
\_\_\_\_\_  
Lorri A. Rosier

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1 Farmington Hills, Michigan  
2 Wednesday, February 21, 2007  
3 9:40 a.m.

4  
5 DOUGLAS HARDY,  
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. Hardy, how are you?

13 A. Fine, thank you.

14 Q. Good. Now, are you an owner essentially with Century  
15 21 Today?

16 A. I'm not an owner. President of Century 21 Today.

17 Q. Okay. Are you Douglas A. Hardy or Douglas H?

18 A. Douglas H. Hardy. A is my dad.

19 Q. Is your father. Okay. You're president of Century 21  
20 Today, do you have any ownership interest in it at  
21 all?

22 A. No.

23 Q. And who is the owner?

24 A. My dad.

25 Q. That's a franchise of Century 21?

1 Q. That's fine.

2 A. 15,000.

3 Q. So approximately three thousand a year, is that fair?

4 A. I'm thinking that. I don't know the numbers, though,  
5 so -- because I don't know -- I don't track our  
6 listings.

7 Q. Backing up for a second, right now what is your  
8 position at Realcomp?

9 A. I'm the president of Realcomp as of January 1st.

10 Q. And are you also a member of the Board of Governors?

11 A. Where?

12 Q. Of Realcomp.

13 A. I think by definition the president I'm on the Board  
14 of Governors of Realcomp.

15 Q. Okay. Well, that's what I want to find out.

16 So as president you're an officer of  
17 Realcomp?

18 A. Yes, sir.

19 Q. Okay. And you said this was as of January 2007, do  
20 you have any positions at Realcomp prior to that?

21 A. Yes. Last year I was vice president, and I believe  
22 the year before that I think I was treasurer.

23 MR. LASHER: You can't ask me, Doug.

24 A. I was just hoping it was true. Unless I was  
25 secretary, but I'm pretty sure I was treasurer.

1 BY MR. GATES:

2 Q. Let's look at 2006, you were vice president then?

3 A. Yes, sir.

4 Q. As an officer of Realcomp?

5 A. Yes, sir.

6 Q. Were you also by definition a member of the Board of  
7 Governors?

8 A. Yes.

9 Q. In 2005 you were -- you also had an officer position  
10 at Realcomp, right?

11 A. Yes, sir.

12 Q. And maybe treasurer, maybe secretary.

13 A. Most likely treasurer.

14 Q. And were you also on the Board of Governors then?

15 A. Yes, sir.

16 Q. What about 2004?

17 A. I was on the Board of Governors. I was not an  
18 officer.

19 Q. Okay. 2003?

20 A. No, sir.

21 Q. When you were in 2004 you were on the Board of  
22 Governors, were you a primary or an alternate?

23 A. Primary.

24 Q. What about 2002?

25 A. No, sir.

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1 A. Right.

2 Q. What's your position with Snyder, Kinney & Bennett?

3 A. I'm president.

4 Q. And as president what are your duties?

5 A. I'm managing the office.

6 Q. Are you still involved in representing clients who are  
7 selling or buying homes?

8 A. No, I am not personally.

9 Q. Not personally at all?

10 A. No.

11 Q. Okay. And then are you the -- as the president, are  
12 you also the broker for the office?

13 A. Yes, correct.

14 Q. So you're the broker of record for the office?

15 A. Correct.

16 Q. And how many agents are with Snyder, Kinney and  
17 Bennett?

18 A. Approximately 90.

19 Q. How many offices?

20 A. One.

21 Q. And where is that located?

22 A. 348 East Maple in Birmingham.

23 Q. And what is the geographic area in which Snyder,  
24 Kinney and Bennett operates?

25 A. Oakland County, parts of Macomb County.

1 Q. How many listings would Snyder, Kinney and Bennett  
2 have approximately right now?

3 A. 413.

4 Q. That's an exact number?

5 A. That's all we have right now.

6 Q. How many of those are in Oakland County, if you can  
7 tell me?

8 A. The majority of them are in Oakland County. I would  
9 say 90 percent are in Oakland County.

10 Q. And the other 10 percent in Macomb?

11 A. Mm-hmm.

12 MR. MANDEL: Is that yes?

13 THE WITNESS: Yes. I'm sorry.

14 BY MR. GATES:

15 Q. Okay. What have your positions been at Realcomp since  
16 about let's say 2000?

17 A. I've been on the board of governors for three years.  
18 I'm starting my second term of three years as of  
19 January this year.

20 Q. Okay. So when was your first term of three years on  
21 the board of governors?

22 A. Three years ago.

23 Q. So that would be 2004 through 2006?

24 A. Yes.

25 Q. And then you just started another term?

1 A. Another three-year term in January of this year.

2 Q. For which board -- which board are you representing?

3 A. MCAR, Michigan Consolidated Association of Realtors.

4 Q. And are you an alternate or a primary governor in  
5 Realcomp?

6 A. Primary.

7 Q. Have you been a primary or alternate governor during  
8 your entire time? Excuse me, that's a compound  
9 question there.

10 You have been a primary governor your  
11 entire time at Realcomp?

12 A. Yes.

13 Q. Mr. Gleason, I'll give you what's previously been  
14 marked as CX 211. It's a roster for the Realcomp  
15 board of governors dated 2007.

16 Do you see that?

17 A. Okay.

18 Q. Just going down that list, do you see on the second  
19 page you're listed under MCAR and it says that you're  
20 at SKB Sotheby's International; right?

21 A. Correct.

22 Q. And you see on the other board of governors they also  
23 have their offices and addresses listed there; right?

24 A. Mm-hmm.

25 Q. You have to say yes or no.

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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

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. 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.