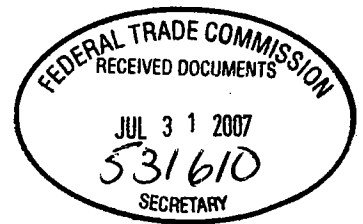


UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
REALCOMP II LTD.)
_____)

PUBLIC

Docket No. 9320
Chief Administrative Law Judge
Stephen J. McGuire

POST-TRIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I.	FACTUAL BACKGROUND.....	1
A.	Respondent and Its Environment.....	1
1.	Realcomp	1
2.	The Nature of a Multiple Listing Service	2
3.	Multiple Listing Services in Southeast Michigan.....	3
4.	The Southeast Michigan Real Estate Market.....	4
B.	Residential Real Estate Listing Types	5
1.	Exclusive Right to Sell ("ERTS") Listings	5
2.	Exclusive Agency ("EA") Listings	5
C.	The Challenged Realcomp Policies	6
1.	The Web Site Policy	6
2.	The Search Function Policy	7
II.	THIS CASE IS GOVERNED BY THE RULE OF REASON.....	8
A.	The Realcomp Policies Are Not a Per Se Unlawful Boycott.....	8
1.	The Elements Most Commonly Associated With Per Se Unlawful Boycotts Are Not Present Here.....	9
2.	This Is Not An "Essential Facility" Case	11
3.	Non-Price "Restraints" of Trade Associations Are Evaluated Under the Rule of Reason	12
B.	The Rule of Reason Requires Proof of Substantial Injury to Consumers.....	13
III.	THE REALCOMP POLICIES HAVE NOT SUBSTANTIALLY LESSENE D COMPETITION IN A RELEVANT MARKET	14
A.	Complaint Counsel's Case Is Premised On A Reduction in Output	14
B.	The Testimony of Market Participants, Including EA Brokers, Does Not Support the Existence of Impediments to Competition by EA Brokers	15
1.	EA Brokers Testified That They Are Thriving.....	15
2.	EA Brokers Are Not Precluded from Public Websites.....	17
3.	EA Brokers Can Easily Obtain Exposure on Realtor.com by Dual- Listing	19
4.	Any Problems That EA Brokers Face in Southeast Michigan Are More Likely a Function of Their Business Model.....	21
5.	The Industry Testimony Does Not Support Complaint Counsel's Case.....	23

C.	Complaint Counsel's Expert Testimony Lacks Credibility and Fails to Demonstrate a Material Adverse Effect on Competition.....	23
1.	Dr. Williams' Before and After Comparison Is Based on a Flawed Assumption	25
2.	Dr. Williams' Selection of Comparative MSAs is Flawed	26
a.	Dr. Williams' Methodology for Selecting the Control MSAs Is Based on Unexplained Assumptions and Omits Obvious Comparisons.....	26
b.	The Selection of the Restriction MSAs Was Wholly Arbitrary.....	28
3.	Dr. Williams' Comparison of Average EA Shares for the Control MSAs and Restriction MSAs Is Not Probative.....	28
4.	Dr Williams' "Probit" Analyses Are Methodologically Flawed.....	30
a.	Dr. Williams Failed to Control for Economic and Demographic Factors Likely to Affect the Prevalence of EA Listings	31
b.	The Housing Variables Included in Dr. Williams' Probit Analysis Do Not Compensate for the Omission of the Economic and Demographic Variables	33
5.	Dr. Eisenstadt Demonstrated No Adverse Effect on EA Shares When He Corrected Dr. Williams' Methodological Errors.....	34
6.	Dr. Eisenstadt Offered Unrebutted Testimony That the Detroit MSA Has More EA Listings Than Would be Expected Based On Its Economic and Demographic Characteristics	35
7.	Dr. Williams' Analyses In Any Event Are Not Probative Because They Measure the Effects of Policies No Longer In Effect and as to Which Complaint Counsel Has Not Requested Relief	36
IV.	REALCOMP'S POLICIES HAVE NOT RESULTED IN INCREASED ECONOMIC COSTS FOR CONSUMERS.....	37
A.	Dr. Williams' Analysis, Even If Valid, Would Not Directly Estimate Harm to Consumers	37
B.	Dr. Eisenstadt's Estimations Demonstrate the Absence of Consumer Harm.....	38
1.	EA Sellers in the Realcomp Service Area Fare Better Than EA Sellers in Ann Arbor	38
2.	The Same Result Was Observed In a Comparison of Home Sale Prices in the Realcomp Service Area Versus Dr. Williams' Control MSAs	39
3.	An Analysis of Days on Market Likewise Supports the Conclusion That No Injury Has Occurred	41

V.	THE REALCOMP POLICIES ARE PRO-COMPETITIVE AND BENEFIT CONSUMERS	42
A.	The Realcomp Policies Correct a Free Rider Problem	42
1.	Elimination of Free Riding Is A Recognized Procompetitive Purpose.....	42
2.	Complaint Counsel's Expert Misunderstood, and Therefore Did Not Refute, the Free Rider Issue.....	43
B.	The Realcomp Policies Create Additional Efficiencies.....	46
C.	The Realcomp Policies Are Not Over-Broad	47
VI.	COMPLAINT COUNSEL'S PROPOSED REMEDIES WOULD HARM, NOT BENEFIT, THE PUBLIC	48
A.	The Proposed Relief Would Require Realcomp Agents and Their Clients to Subsidize EA Home Sellers.....	48
B.	The Proposed Relief Would Disadvantage Buyers Who Choose to Use Cooperating Brokers	49
C.	There Is No Evidence That The Requested Relief Will Produce A Net Gain In Consumer Welfare	50
VII.	CONCLUSION.....	51

TABLE OF AUTHORITIES

Cases

Associated Press v. United States, 326 U.S. 1 (1945).....	11
Board of Trade of the City of Chicago v. United States, 246 U.S. 131 (1918).....	12
Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977)	13
Brunswick Corp. v. Riegel Textile Corp., 752 F.2d 261 (7th Cir. 1984).....	13
Business Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717 (1988)	9
California. Dental Assn. v. FTC, 526 U.S. 756 (1999).....	8, 13
Carpet Group Intern. v. Oriental Rug Importers Assn., Inc., 227 F.3d 62 (3 rd Cir. 2000).....	10
Chicago Professional Sports Ltd. Partnership v. NBA, 961 F.2d 667 (1992).....	42, 48
Collins v. Associated Pathologists, Ltd., 844 F.2d 473 (7 th Cir. 1988).....	10
Derish v San Mateo-Burlington Bd. Of Realtors, 136 Cal. App. 3d 534; 186 Cal. Rptr. 390 (1982)	51
Eastern Retail Lumber Dealers' Assn. v. U.S., 234 U.S. 600 (1914)	10
Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941).....	10
FTC v. Indiana Federation of Dentists, 476 U.S. 447, 458-59 (1986)	12
FTC v. Superior Court Trial Lawyers Assn. 493 U.S. 411 (1990)	9
Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).....	12
Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)	10
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)	42
National Soc'y of Professional Engineers v. United States, 435 U.S. 679 (1978)	12
Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985)	9, 11
Paramount Famous Lasky Corp. v. U.S., 282 U.S. 30 (1930)	10
People v. Colorado Springs Bd. of Realtors, Inc., 692 P.2d 1055 (1984).....	13
Primetime 24 Joint Venture v. National Broadcasting Co., Inc., 219 F.3d 92 (2 nd Cir. 2000).....	11
Radiant Burners, Inc. v. Peoples Gas, Light, & Coke Co., 364 U.S. 656 (1961).....	11
SCFC ILC, Inc. v. Visa USA, Inc., 36 F.3d 958 (10 th Cir. 1994)	14
State Oil Co. v. Khan, 522 U.S. 3, 10 (1997).....	8, 9, 14
Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57 (2004)	10
Toys "R" Us, Inc. v. FTC, 221 F.3d 928 (7 th Cir. 2000)	10

United States v. Brown University, 5 F.3d 658 (3rd Cir. 1993)..... 14
United States v. Terminal R.R. Assn., 224 U.S. 383 (1912)..... 11
Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004) 12
Westman Commission Co. v. Hobart International, Inc., 796 F.2d 1216 (10th Cir. 1986) 10

Statute

Federal Trade Commission Act § 5, 15 U.S.C. §45 13

Other Authorities

Policy Statement on Unfairness (FTC, Dec. 17, 1980)..... 14, 48
S. Rep. No. 103-130, at 13 (1994)..... 13

In this case, Complaint Counsel seeks to enjoin two narrow internal operating policies of a real estate multiple listing service on the theory that those two policies unreasonably restrain competition in the market for residential real estate brokerage services.¹ More specifically, Complaint Counsel alleges that Respondent's "Web Site Policy" and "Search Function Policy," (collectively, the "Realcomp Policies") violate Section 5 of the FTC Act, and has averred that the challenged conduct "reflects concerted action among horizontal competitors, in the nature of a group boycott." Complaint, ¶26; Complaint Counsel's Opposition to Respondent' Realcomp II Ltd.'s Motion for Dismissal (May 4, 2007) at 6-7. The asserted result of these policies is the hindrance of competition from real estate brokers offering "Exclusive Agency" contracts to home sellers. Complaint ¶¶7, 26.

But the facts of this case do not describe a boycott in the classic sense, and there is no credible evidence that there has been any material reduction in the availability of Exclusive Agency contracts as a consequence of Respondent's policies, and no evidence that consumer welfare has been diminished.

I. **FACTUAL BACKGROUND**

A. Respondent and Its Environment

1. Realcomp

Respondent, Realcomp II, Ltd. ("Realcomp" or "Respondent") is a real estate multiple listing service, located in Farmington Hills (Oakland County), Michigan, that is owned and operated by seven local boards of Realtors® serving a portion of Southeast Michigan, including

¹ As of this date, Complaint Counsel and Respondent have entered into a Joint Stipulation as to the relief to be granted, in the form of an injunction, against Respondent's now-discontinued Search Function Policy. Because the Stipulation has not been accepted by the Court and no Order has yet been entered, and because, at least to some extent, the Search Function Policy effects the consideration of Complaint Counsel's experts' opinions, issues concerning the Search Function Policy are addressed in this Brief.

Wayne, Oakland, Macomb, and Livingston Counties. (RPF ¶¶20-21, 28-29.)² Realcomp's primary function is operating the Realcomp Multiple Listing Service ("Realcomp MLS") for the benefit of its members. (RPF ¶¶22, 27.)

Realcomp's membership presently consists of approximately 13,800 brokers, agents, and appraisers. (RPF ¶¶23-24.) Members pay \$99 per quarter membership dues to participate in the Realcomp multiple listing service. (RPF ¶34.) Over the past eighteen months, Realcomp's membership has declined by approximately 8% (1,200 members). (RPF ¶82.)

2. The Nature of a Multiple Listing Service

A multiple listing service ("MLS") is an arrangement for sharing information on real estate listings among the real estate brokers and agents who voluntarily participate in the MLS.³ That is, through the MLS, each participating broker has access to both his or her own listings, and the listings of each other participating broker. To place a listing on the Realcomp MLS, the listing broker must make a unilateral offer of compensation to any cooperating broker who brings the ultimate buyer to the transaction and is the procuring cause of the sale. (RPF ¶36.)

In times past, information sharing through an MLS occurred through a hard copy publication containing all current listings as of the publication date. Today, MLSs operate as on-line computer services, and listing information is accessed via Internet connections. The Realcomp MLS is sometimes referred to as "Realcomp Online."

² Citations to "RPF" refer to Respondent Realcomp II, Ltd.'s Proposed Findings of Fact and Conclusions of Law (July 31, 2007).

³ A real estate broker is a licensed individual who is authorized to engage in the sale of real estate and to provide related services. A real estate agent is a licensed real estate professional who works for, or under the supervision, of a broker. (RPF ¶¶1-2.) For simplicity, this brief will refer to the individuals involved in a sale transaction (i.e., both brokers and agents) as "brokers." Further, references to a "listing broker" will mean a broker who is hired by and acts as the agent of the seller in connection with the sale of residential property, and references to a "cooperating broker" will mean a broker who works with prospective purchasers. (RPF ¶¶3, 5.)

The MLS is a service to brokers, not consumers. Individual buyers and sellers of real estate who are not brokers do not have independent access to MLS listings. Rather, an individual must use the services of a member broker to obtain listing information directly from the MLS database. Complaint Counsel's Opening Statement, Tr. 17. This reflects the fact an MLS is a cooperative arrangement established and funded by brokers for their mutual benefit.

3. Multiple Listing Services in Southeast Michigan

There are a number of multiple listing services operating within and/or proximate to the Realcomp service area. MiRealSource, which, like Realcomp, is headquartered in Oakland County, competes with Realcomp throughout Southeastern Michigan. The costs of belonging to MiRealSource are similar to those of belonging to Realcomp, and there is not a significant cost difference to change membership from one to the other. (RPF ¶¶40-44.)

MiRealSource is ranked in the top 1% of MLSs in the country based on a survey of technology. It is actively recruiting new members, targeting Oakland and Livingston Counties in particular for its growth. MiRealSource's membership has increased 40% in the past four years, and that growth has come from all parts of Southeast Michigan. An estimated two-thirds of MiRealSource's members also belong to Realcomp. However, MiRealSource has members who belong only to it and not Realcomp; and this is true not only in Macomb County, but also in Oakland and Wayne Counties. (RPF ¶¶46-51.)

Other MLSs serving Southeast Michigan include those operated by the Ann Arbor Board of Realtors®, the Downriver Association of Realtors®, the Flint Area Association of Realtors®, and the Lapeer and Upper Thumb Association of Realtors®, all of which border one of the four primary counties that comprise the Realcomp service area. Realcomp maintains data sharing

arrangements with the foregoing MLSs, by virtue of which Realcomp members have access to listings in those MLSs, and vice-versa. (RPF ¶104.)

None of the MLSs described in this section presently maintain policies similar to the Realcomp Policies challenged in this case.

4. The Southeast Michigan Real Estate Market

The Southeast Michigan real estate market "is in a free fall." This situation is the result of a depressed economy, notably within the domestic automobile industry, and the consequent loss of 350,000 jobs in recent years. (RPF ¶¶72-73.) Testimony in this case consistently, and without contravention, described the existence of a "buyer's market" in which the supply of residential real estate in Southeast Michigan significantly exceeds the demand for such properties. (RPF ¶¶68-74.) This situation is manifested in the fact that residential properties on average are remaining on the market for approximately 230 days (as of May, 2007), as compared to approximately 123 days in 2006. (RPF ¶¶77, 80-81.) Consequently, the approximate number of active listings on the Realcomp MLS at the present time is 60,000, double the average number of active listings in 2004-2005. (RPF ¶79.)

One consequence of the current market condition is that homes are constantly and consistently losing value, estimated by one experienced broker to be occurring at the rate of 1% per month. At that rate, a property remaining on the market for the average time of 230 days stands to lose nearly 8% of its value while awaiting a buyer. This loss in value translates directly into a loss of equity for the homeowner, and increases pressure to sell the property in the shortest possible time. (RPF ¶¶ 75.)

Another consequence of the current market is that real estate brokers are consolidating and closing offices, and individual real estate agents are leaving the business. As noted,

Realcomp's membership has declined by 1,200 in the past eighteen months. The Michigan Consolidated Association of Realtors®, one of Realcomp's shareholder boards, has lost 15% of its membership over the past two years. (RPF ¶83.)

B. Residential Real Estate Listing Types

1. Exclusive Right to Sell ("ERTS") Listings

An Exclusive Right to Sell listing is a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. An ERTS listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services.⁴ (RPF ¶10.) Until recently, Realcomp defined ERTS listings synonymously with full-service agreements, such that a listing agreement was required to be full-service in order to be categorized as ERTS on the Realcomp MLS. (RPF ¶14.)

Traditional full service brokers typically charge a percentage of the sale price as commission (a 6% commission is common), and any compensation owed to a cooperating broker (3% is common) is paid by the listing broker from that commission at settlement. (RPF ¶176.) However, ERTS listings also are offered in Southeast Michigan by discount brokers who charge a flat fee, which can be as low as \$499 (plus a commission to a cooperating broker). (RPF ¶114.)

2. Exclusive Agency ("EA") Listings

An alternative form of listing agreement is an Exclusive Agency listing. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of

⁴ "Full service" listings are generally considered to be those in which the broker agrees to arrange appointments for cooperating brokers to show the property, accept and present offers procured by a cooperating broker, assist the seller in developing, communicating, and presenting counter-offers, and participate on behalf of the seller in negotiations leading to the sale. (RPF ¶14.)

the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property directly to a buyer without further assistance of the listing broker subsequent to the time of listing. (RPF ¶11.)

Pursuant to an EA listing agreement, a broker may offer the same full services associated with an ERTS listing, but EA listings are more commonly associated with limited assistance by the broker to the seller. Consistent with the limited service orientation and the fact that the broker may receive no commission if the property is sold by the owner, EA listings are frequently offered in Southeast Michigan on a flat-fee basis. (RPF ¶114.) The narrowest category of limited service agreement is an "MLS-Entry Only" agreement, in which the broker agrees only to place the property listing on the MLS and otherwise provides no assistance to the seller.⁵ (RPF ¶13.)

A seller who has entered into an Exclusive Agency listing has an economic incentive to find a buyer without the assistance of a cooperating broker, and thereby to avoid paying a cooperating broker's commission. (RPF ¶ 137.) In this respect, the seller of a property subject to an Exclusive Agency listing is in competition with prospective selling brokers. Indeed, because a seller who finds a buyer directly "keeps" the cooperating broker's commission, that seller effectively acts as his or her own cooperating broker.

C. The Challenged Realcomp Policies

1. The Web Site Policy

As a service to its members, Realcomp transmits Realcomp MLS listing information to certain public websites. These include Realcomp's own public website, MoveInMichigan.com,

⁵ For simplicity of reference in this brief, we will use the term "EA listing" to refer to all types of non-ERTS listings, and we will refer to brokers and agents who offer EA listing contracts as "EA brokers". It should be borne in mind, however, that some "EA brokers" also offer ERTS contracts to home sellers. (RPF ¶114.)

and Realtor.com, the website of the National Association of Realtors®. (RPF ¶89.) The MoveInMichigan website, in turn, is "framed" by ClickOnDetroit.com, another public website that contains a variety of information concerning the Detroit metropolitan area.⁶ Realcomp makes these submissions voluntarily, and is under no legal obligation to transmit any listing information to any public website at any time.

Realcomp also feeds listings to the individual websites of its member brokers. To receive these listing feeds, a broker must agree to permit his or her own listings to be transmitted to other member-broker websites. (RPF ¶89.)

In 2001, Realcomp adopted the "Web Site Policy," which provides that "Listing information downloaded and/or otherwise displayed pursuant to IDX [Internet Data Exchange] shall be limited to properties listed on an exclusive right to sell basis". Due to the fact that Realcomp did not consistently require listing types to be disclosed by listing brokers until late in 2003, the Web Site Policy was not implemented until 2004. (RPF ¶¶89, 91.)

2. The Search Function Policy

Realcomp members search the MLS for listed properties using Realcomp Online. In or about the fall of 2003, Realcomp changed the Realcomp Online search program to default to Exclusive Right to Sell and "Unknown" listings ("Search Function Policy"). (RPF ¶¶90-91, 124.) Specifically, the search program allows a Realcomp member to select (by checking a box) any or all of the following listing types when preparing a search request: ERTS, EA, MLS-Entry Only, and Unknown. Pursuant to the Search Function Policy, the ERTS and Unknown types are pre-selected for each search query. If a member wishes to also search EA listings, for example,

⁶ "Framing" occurs when the border of the website being viewed remains visible but the main portion of the page opens to a second website. In other words, the first website provides content that actually originates from the second website. (RPF ¶89(b).)

the member must check the EA box on the search screen. Similarly, if the member does not want to search ERTS listings, the member must de-select the ERTS box. In either event, the required action is a single click of the computer mouse. (RPF ¶¶125-126.) It is also possible for an individual member to change the initial defaults on the search screen so that a different combination of listing types (or no listing type) is pre-selected. (RPF ¶¶127-128.)

In April, 2007, Realcomp repealed the Search Function Policy. It also repealed the definitional requirement that ERTS listings be full-service brokerage agreements. (RPF ¶¶133-134.)

II.

THIS CASE IS GOVERNED BY THE RULE OF REASON

The Supreme Court has observed that, “[t]he FTC Act’s prohibition of unfair competition and deceptive acts or practices overlaps the scope of § 1 of the Sherman Act aimed at prohibiting restraint of trade.” *California Dental Assn. v. FTC*, 526 U.S. 756, 763 n.3 (1999) (citations omitted). As noted, Complaint Counsel asserts that the Realcomp policies are in the nature of a group boycott within the scope of § 1 of the Sherman Act

Alleged restraints of trade falling within Section 1 of the Sherman Act may be judged under three separate theories: (1) *per se* categorization, (2) the rule of reason, or (3) a truncated or “quick look” rule of reason. *California Dental Assn.*, 526 U.S. at 763. The rule of reason is the prevailing standard that applies to most such claims, *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997), and is the appropriate standard for analysis of the conduct at issue in this case.

A. **The Realcomp Policies Are Not a Per Se Unlawful Boycott**

Case law is replete with caution against precipitous application of the *per se* standard, particularly in cases where the practices at issue are of a type with which the courts have limited

familiarity. *State Oil*, 522 U.S. at 10 ("*Per se* treatment is appropriate 'once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it'...") (citations omitted). Only conduct that is "manifestly anticompetitive" is appropriate for *per se* condemnation under the antitrust laws. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 298 (1985). (*per se* rule applies only where the challenged practice facially appears to be one that always or almost always would tend to restrain competition and decrease output).

1. The Elements Most Commonly Associated With *Per Se* Unlawful Boycotts Are Not Present Here

Complaint Counsel has stipulated that there is no price-related restraint at issue here. Respondent does not in any manner determine or otherwise regulate the commissions or prices to be charged by listing brokers, or the discounts that any listing broker may offer. Likewise, Respondent does not determine or regulate the offer of compensation to cooperating brokers for any listing in the Realcomp MLS. Respondent does not control in any manner the advertising of prices by its members, and indeed the record here establishes that EA brokers freely advertise non-traditional, flat fee arrangements to the public at large. (RPF ¶ 283.)

Further, the challenged Realcomp Policies do not directly or indirectly allocate geographic markets among the Realcomp members, or between ERTS brokers and EA brokers. Thus, the "boycott" here does not implicate the enforcement of a price agreement or a territorial allocation. An underlying effort to enforce a price (or other *per se* unlawful) agreement characterizes many (if not most) decisions holding a concerted refusal to deal to be *per se* unlawful. See *FTC v. Superior Court Trial Lawyers Assn.* 493 U.S. 411, 436 n. 19 (1990) (characterizing concerted refusal to deal in an effort to coerce higher payment rates as "not only

a boycott but also a horizontal price-fixing arrangement"). Indeed, some courts have held that boycotts are illegal *per se* only if used as a means to enforce agreements that are themselves illegal *per se*. *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 479 (7th Cir. 1988); *Westman Commission Co. v. Hobart International, Inc.*, 796 F.2d 1216 (10th Cir. 1986). The Realcomp Policies do not themselves constitute an illegal agreement, and the boycott characterization should not be used to bootstrap *per se* categorization here.

Additionally, the Realcomp Policies involve no concerted refusal to deal with disfavored suppliers or customers, an element classically associated with an economic boycott. As the First Circuit recently noted:

To the extent the group boycott label is useful at all to describe a *per se* violation, it is principally a warning against anticompetitive secondary boycotts – *e.g.*, manufacturers who agree not to supply a store that buys from a discounting manufacturer.

Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I., 373 F.3d 57, 64 (2004). This existence of a secondary boycott is found in the historically significant Supreme Court decisions attaching *per se* liability to concerted refusals to deal, as well as in recent Circuit decisions reaching such a conclusion.⁷

The Realcomp Policies do not require or cause any form of secondary boycott, and there is no evidence in this case that would support such a conclusion.

⁷ See, *e.g.*, *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (appliance suppliers' boycott of retailer); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941) (concerted agreement by competitors to coerce agreement of third parties to injure competitors' rivals); *Paramount Famous Lasky Corp. v. U.S.* 282 U.S. 30 (1930) (motion picture distributors' refusal to deal with exhibitors who would not agree to standardized contract terms); *Eastern Retail Lumber Dealers' Assn. v. U.S.*, 234 U.S. 600 (1914) (retailer boycott of wholesalers); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (manufacturers' refusal to deal with discount warehouse clubs); *Carpet Group Intern. v. Oriental Rug Importers Assn., Inc.*, 227 F.3d 62 (3rd Cir. 2000) (importers' boycott of trade show).

2. This Is Not An "Essential Facility" Case

In *Northwest Wholesale Stationers*, the Supreme Court, acknowledging that "exactly what types of activity fall into the forbidden [*per se*] category is ... far from certain" 472 U.S. at 293-94, identified certain "indicia" distinguishing cases in which the *per se* standard has applied. The first, consistent with the discussion above, is the presence of "joint efforts by a firm or firms to disadvantage competitors by 'either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle.'" The Court also described cases that involved a denial of "access to a supply, facility, or market necessary to enable the boycotted firm to compete." This statement describes a smaller number of "boycott" cases in which *per se* liability has been imposed on concerted refusals to deal with competitors.⁸

For example, in *Associated Press v. United States*,⁹ the boycotting parties controlled a joint news-gathering service and denied their competitors access to that service, which they required to compete effectively. Similarly, in *United States v. Terminal R.R. Assn.*,¹⁰ a group of railroads controlled access to an essential rail bridge across the Mississippi River, and refused to permit their competitors to utilize the bridge. These two cases are the progenitors of the "essential facilities" doctrine, under which liability has been imposed for withholding access to a resource essential to competition. But these and subsequent cases imposing *per se* liability evidence consistent themes of *complete* exclusion from an *essential* element of competition.¹¹ Where these elements are not present or are in doubt, *per se* treatment is not appropriate.¹²

⁸ The Court did not reach this aspect of *per se* liability in *Northwest Wholesale Stationers*.

⁹ 326 U.S. 1 (1945).

¹⁰ 224 U.S. 383 (1912).

¹¹ See, e.g., *Radiant Burners, Inc. v. Peoples Gas, Light, & Coke Co.*, 364 U.S. 656 (1961) (agreement by manufacturers to manipulate an industry certification standard so as to arbitrarily exclude a competitor's product from the market held *per se* unlawful); *Primetime 24 Joint Venture v. National Broadcasting Co., Inc.*, 219 F.3d 92

Realcomp does not deny membership in the MLS to brokers who use EA contracts, nor does Realcomp prevent brokers from placing EA listings on the MLS. (RPF ¶35.) Rather, the Realcomp Policies treat EA listings differently from ERTS listings only in two specific respects. There is substantial evidence in this case that those differences have not impeded the ability of brokers who use EA contracts to compete in the market.¹³ The fact that the evidence is disputed will of course weigh upon the ultimate disposition, but the absence of clear evidence that the Realcomp Policies have excluded competition, as well as the existence of evidence that there are good and lawful business reasons for the Realcomp Policies¹⁴ requires that the *per se* categorization be rejected in favor of the rule of reason.

3. Non-Price "Restraints" of Trade Associations Are Evaluated Under the Rule of Reason.

In evaluating the conduct of trade associations, courts have consistently applied the rule of reason in cases that, as here, involve non-price restraints.¹⁵ *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-59 (1986) ("we have been slow to condemn rules adopted by professional associations as unreasonable *per se*"). Indeed, the Supreme Court's first articulation of the rule of reason, nearly 90 years ago, occurred in a trade association case, *Board of Trade of the City of Chicago v. United States*, 246 U.S. 131 (1918). Most recently, the Supreme Court

(2nd Cir. 2000) (allegation that four major television networks conspired to deny program licenses to satellite dish broadcast service stated a *per se* boycott claim).

¹² This observation is consistent with the Supreme Court's recent statement in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 411 (2004), characterizing the essential facility doctrine as requiring the "complete unavailability" of the facility at issue. While the Court drew a distinction in its discussion between unilateral denials (under Section 2 of the Sherman Act) and concerted refusals to deal, it did so only in terms of the consequences of the denial, not in terms of the character of the conduct.

¹³ This evidenced is discussed in Section III.B., *infra*.

¹⁴ These reasons are discussed in Section IV, *infra*.

¹⁵ Indeed, even where challenged trade association conduct implicates price-related matters, the Supreme Court has repeatedly explained that such conduct should be evaluated under a different standard than restraints imposed by businesses. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788-89 n. 17 (1975); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 696 (1978).

addressed association restrictions in *California Dental Association*. There, the Court found that even a "quick look" rule of reason analysis, and by implication, *per se* treatment, was inappropriate where the challenged restrictions "might plausibly be thought to have a net procompetitive affect, or possibly no effect at all on competition." *Id.* at 1613.¹⁶

B. The Rule of Reason Requires Proof of Substantial Injury to Consumers

It is well understood that the antitrust laws protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977), quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962); *Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984), *cert. denied*, 472 U.S. 1018 (1985) ("The purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process -- which means . . . to discourage practices that make it hard for consumers to buy at competitive prices -- rather than to promote the welfare of particular competitors."). This case is brought under 15 U.S.C. § 45, which, as noted overlaps the scope of § 1 of the Sherman Act. Subsection (n) of the statute states, "The Commission shall have no authority under this section . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition." Upon the enactment of § 45(n), Congress explained that "substantial injury is not intended to encompass merely trivial or speculative harm. In most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks." S. Rep. No. 103-130, at 13 (1994).

¹⁶ See also *People v. Colorado Springs Bd. of Realtors, Inc.*, 692 P.2d 1055 (1984) (remanding for rule of reason analysis where arrangement limiting access to MLS service was not shown to be designed to destroy abilities of competitors to compete or to restrict the ability of potential sellers and purchasers of homes to enjoy competitive markets).

The Commission's own interpretation of § 45(n) acknowledges that the substantiality of the effects of a challenged practice must be determined on the totality of the facts and circumstances: "The Commission ... will not find that a practice unfairly injures consumers unless it is injurious in its net effects." (*Policy Statement on Unfairness* (FTC, Dec. 17, 1980)).

Rule of reason analysis first requires a determination of whether the challenged restraint has a substantially adverse effect on competition. *United States v. Brown University*, 5 F.3d 658, 668 (3rd Cir. 1993); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994). This determination must take into account specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. *State Oil*, 522 U.S. at 10. If the plaintiff meets this burden, the inquiry then shifts to an evaluation of whether the procompetitive attributes of the conduct justify the otherwise anticompetitive effects. *Brown University*, 5 F.3d at 669.

Thus, the initial burden under the Rule of Reason lies with Complaint Counsel to demonstrate a materially adverse effect on competition attributable to or arising out of the Realcomp Policies. Complaint counsel has not met its burden.

III. **THE REALCOMP POLICIES HAVE NOT SUBSTANTIALLY LESSENED** **COMPETITION IN A RELEVANT MARKET**

A. Complaint Counsel's Case Is Premised On A Reduction in Output

Because the focus of the antitrust laws is on harm to consumers and not competitors, the demonstration of anticompetitive effects requires evidence that consumers have experienced reduced output, increased prices, or a reduction in the quality of goods or services in a relevant market. Complaint Counsel has offered no evidence that the prices of residential real estate brokerage services have increased, or that brokers in the market have reduced the quality of their

services in consequence of the Realcomp Policies. Rather, Complaint Counsel bases its case on a predicted reduction in the availability of EA (limited service) brokerage services in the four-county area served by Realcomp. (RPF ¶194; *see also* Complaint Counsel's Opening Statement, Tr. 71, describing the gravamen of the case as "[l]ess consumer choice"). The evidence does not support this premise.

B. The Testimony of Market Participants, Including EA Brokers, Does Not Support the Existence of Impediments to Competition by EA Brokers

At trial, Complaint Counsel offered the testimony of five EA brokers who claimed to have been disadvantaged by the Realcomp Policies: Mr. Craig Mincy (whose brokerage is known as Michigan Listing.com); Mr. Albert Hepp (BuySelf Realty); Mr. Jeff Kermath (AmeriSell Realty); and Mr. Gary Moody and Ms. Denise Moody (Greater Michigan Realty). But the testimony of those witnesses, as well as other record evidence, belies the theory that the Realcomp Policies have had a significant effect on competition. Indeed, the evidence shows that EA brokers successfully sell their services in Southeast Michigan, even in the face of a depressed housing market, and that perceived "impediments" faced by EA brokers are attributable to factors other than Realcomp.

1. EA Brokers Testified That They Are Thriving

All of the EA brokers who testified for Complaint Counsel admitted that their businesses are growing in the face of a difficult housing market. Illustrative is the testimony of Mr. Mincy, who operates a limited service brokerage called Michigan Listing.com. He testified his business has grown since it began in 2004. Between 2005 and 2006, his business increased 30%, and was trending upward in February 2007. He expects his business to keep growing throughout Southeastern Michigan. (RPF ¶163(c).)

Similarly, Mr. Hepp testified that the EA business of BuySelf Realty has grown 10% to 35% since 2004. (RPF ¶163 (a).) Mr. Kermath testified that AmeriSell has grown substantially since 2003-2004, with over \$46 million in listings and more listings statewide than any other company. (RPF ¶163 (b).) Mr. Moody testified that Greater Michigan Realty has done very well, and is growing. Ms. Moody confirmed that Greater Michigan Realty had approximately 500 listings in 2006, when the industry average was 25, and that the company generated \$23,275,000 in home sales in its first year of operation. (RPF ¶163 (d).)

This testimony is inconsistent with Complaint Counsel's theory that EA brokers have been competitively impaired by the Realcomp Policies. If the Realcomp Policies were severely impairing the ability to offer EA and limited service brokerage contracts, one would expect brokers in the market to testify that their revenues and profits have declined. But the testimony is to the contrary. It is hard to accept the contention that traditional brokers are stacking the rules against alternative business models, when they are "growing by leaps and bounds." (RPF ¶164.)

No EA broker testified that he or she was forced from the market by the Realcomp Policies, with the sole exception of Wayne Aronson, the vice president and general manager of YourIgloo, Inc., an exclusive agent real estate company located in Florida. Mr. Aronson testified that, due to Realcomp's rules, YourIgloo stopped doing business in Michigan. (RPF ¶166 (a)-(d).)

Mr. Aronson admitted, however, that his company continues to do a substantial referral business in Michigan, and receives compensation for each referral.¹⁷ Moreover, Mr. Aronson and his Michigan agent, Anita Groggins, testified as to material problems with YourIgloo's

¹⁷ Between 2001 and 2004, YourIgloo listed between 100 and 500 properties. Since the time that YourIgloo claims it has stopped doing business in Michigan, YourIgloo has sent between 50 and 100 referrals to Gary Moody and additional referrals to another discount broker, Shannon Scott. (RPF ¶166.)

operations during the period in question that had nothing to do with Realcomp. Among these problems was **increased competition**. Mr. Aronson testified that in 2001, when YourIgloo first entered the Michigan market, it faced few competitors, but by 2004, when YourIgloo decided to exit the market, additional competition had "popped up." YourIgloo also was troubled by bad relations between the company's management and Ms. Groggins, its broker for the State of Michigan. (RPF ¶166 (e).)

Further, contrary to Mr. Aronson's statements concerning Realcomp, YourIgloo represented to MiRealSource (to which it also belonged) that it was leaving Michigan because it did not like MiRealSource's requirement that a broker located in Michigan be responsible for payments of MiRealSource's fees and charges. (RPF ¶166 (e).) Indeed, YourIgloo has encountered problems doing business successfully in other states, pulling out of two of the nine states in which it is licensed, Pennsylvania and New Jersey. The company left New Jersey because it did not wish to comply with a requirement to inspect the property listed by the company, and it left Pennsylvania because its operation was not profitable enough. (RPF ¶166 (e).)

There is nothing in the YourIgloo story that lends credence to the idea that the Realcomp Policies caused the company to leave the market. Rather, it appears that, unlike the five witnesses who testified that their businesses are thriving, YourIgloo simply suffered from management problems that made it an ineffective competitor.

2. EA Brokers Are Not Precluded from Public Websites

The thrust of the testimony from the EA brokers concerning the Realcomp Web Site Policy is illustrated by that of Mr. Mincy, who testified that the Realcomp Web Site Policy limits public exposure to his EA listings (called "EZ-Listings") because they are not uploaded to the

IDX system or MoveinMichigan.com. (RPF ¶94.) Again, however, the testimony of Complaint Counsel's witnesses does not bear up in light of the evidence as a whole. First, EA brokers testified that the most important source of Internet exposure is that provided by the MLS. Mr. Hepp, for example, testified that the MLS is substantially more important than any other tool for the sale of residential real estate in Southeastern Michigan, and that the MLS finds a buyer three times more often than other home selling tool. (RPF ¶98 (a)-(c).) Similarly, Mr. Aronson testified at deposition that the MLS is, by a considerable extent, the most effective means of promoting residential real estate in Michigan. (RPF ¶98 (d).)

This testimony is significant because, unlike public websites, access to the MLS is limited to brokers. A prospective buyer, sitting at a home computer, cannot access the MLS. The Realcomp MLS is open to EA brokers and ERTS brokers alike. (RPF ¶35.) EA brokers receive the benefits of exposure to other brokers that comes from participation in the MLS, and this benefit is not affected by the Realcomp Web Site Policy.

The record also reflects that EA home sellers and their listing agents can effectively market properties in the Realcomp Service Area under Exclusive Agency and other limited service contracts to the public without access to the Realcomp Approved Websites. (RPF ¶122.) Realtor.com and the other Approved Websites are but a few among numerous Internet sources from which the general public can, and does, obtain information about real estate listings (RPF ¶120.) In light of their growing popularity, such other websites are an economically viable and effective channel for reaching prospective buyers. (RPF ¶119.)

The EA brokers testified that other publicly available web sites for Exclusive Agents, such as Google and Trulia are gaining momentum. (RPF ¶121.) Complaint Counsel's expert, Dr. Murray, testified that Google presently has a site that is open to Exclusive Agency Listings,

and there is no charge for putting a listing into Google. He stated that Google has publicly announced that it intends to build as large and robust a real estate site as possible. Dr. Murray also noted that Trulia is a public website that does not charge for listings and that has grown substantially in the last several months. (RPF ¶121 (a)-(c).)

Mr. Moody testified that he believes Google Base will be more important than the IDX in the near future.¹⁸ He further testified that MLSs across Michigan are beginning to put their data on to Google Base and Trulia. (RPF ¶121 (d)-(e).)

The witnesses in this case recognized that the Internet is dynamic, and the question of which sites provide the greatest value to real estate marketing efforts is a "moving target." (RPF ¶118.) There is no basis in this testimony to conclude that access to the Realcomp Approved Websites through Realcomp is essential to the ability of EA brokers to compete in Southeast Michigan.

3. EA Brokers Can Easily Obtain Exposure on Realtor.com by Dual-Listing.

Moreover, to the extent EA brokers wish to place their listings on Realtor.com, it is abundantly clear that they can do so (and that they in fact do so) by "dual-listing" the property with another MLS. (RPF ¶¶104-106.) Dual-listing is a prevalent practice among EA brokerage firms. (RPF ¶112.) Indeed, listings are sometimes entered in more than one MLS for reasons that are completely unrelated to accessing public websites, such as situations in which a sale property is located near a county border. (RPF ¶116.)

The EA brokers who testified at trial stated that they use the Ann Arbor, Shiawassee and Flint MLSs to get their Exclusive Agency Listings on Realtor.com. (RPF ¶107.) Exclusive

¹⁸ Mr. Moody's background gives weight to his opinion in this regard, as he testified that he has been involved with computers and databases since 1982 or 1983, website programming since 1985, and database programming since the late eighties, having received an undergraduate degree in electrical engineering, with computers and controls from Michigan Technical University. (RPF ¶121(d).)

agents also can place their listings on Realtor.com by listing them in the MiRealSource MLS, following the consent decree between MiRealSource and the FTC that was due to become effective in April 2007. (RPF ¶108.)

Some EA brokers, for example Mr. Mincy, testified that "dual-listing" his EA listings on another MLS (in addition to Realcomp) is an inconvenience and an additional cost. (RPF ¶110 (b).) However, the testimony clearly established that the costs of dual listing are not significant. The MLSs used by EA brokers to bypass Realcomp charge membership fees (dues) that are comparable to those charged by Realcomp. (RPF ¶109.) Even those modest duplicate dues payments are avoidable, because brokers can join one of the seven MLSs that have data sharing arrangements with Realcomp, and have their listings sent to the Realcomp MLS without joining Realcomp. (RPF ¶102-104.)

It is equally clear that any labor cost associated with dual listing is nominal and recoverable. For example, Mr. Mincy testified that he places his listings from the Realcomp service area on public websites through the Shiawassee MLS. (RPF ¶107) He charges his clients a minimum additional fee of \$100 for dual-listing, and he convinces virtually all of his clients to pay the fee. (RPF ¶113.) It is not uncommon for EA brokers to charge these additional fees. (RPF ¶113.)

Mr. Mincy pays his assistant \$10 per hour to input the dual listings.¹⁹ (RPF ¶110.) The testimony in this case indicates that the time required to input and update a listing over its entire lifespan is between forty minutes and two hours. (RPF ¶110.) Thus, it is a fair inference that Mr. Mincy in fact earns a profit from dual listing his properties.

¹⁹ The testimony generally indicated that exclusive agents pay anywhere from \$7.00 to \$20.00 per hour for data entry. (RPF ¶110.) In fact, employees at Realcomp will enter listing data free of charge to members and subscribers. It takes the Realcomp staff 10-15 minutes to enter a listing, and an additional one to five minutes to update a listing over its life. (RPF ¶110(c).)

4. Any Problems That EA Brokers Face in Southeast Michigan Are More Likely a Function of Their Business Model

The brokers who testified in this matter agreed that Southeast Michigan is a "buyers' market" – *i.e.*, a difficult market for sellers. (RPF ¶¶68-74.) Consequently, it is very difficult to do business in the Southeastern Michigan residential real estate market. Listings are staying on the market for a long time and there are very few sales. (RPF ¶77.) Real estate agents are in fact leaving the business because of these conditions. (RPF ¶76.)

EA brokers sell a different "product" than traditional, ERTS brokers. To that point, the EA brokers who testified stated that agents who offer Exclusive Agency Listings in Southeastern Michigan compete with other agents offering Exclusive Agency Listings. (RPF ¶ 165.) Mr. Sweeney, a traditional ERTS broker, agreed, stating that traditional agents in Southeastern Michigan do not perceive EA brokers to be a threat. (RPF ¶179.)

In the face of the difficult economy, EA listings have not made significant inroads in Southeastern Michigan. (RPF ¶179.) Complaint Counsel's expert, Dr. Murray, testified that, without regard to Realcomp, agents offering Exclusive Agency Listings are not growing. (RPF ¶180.) He noted that agents offering Exclusive Agency listings do not provide the same level of personal service, and do not compete well with full service brokers for trust and professionalism. (RPF ¶ 181.) Mr. Murray testified that, while 77% of sellers using traditional brokers thought that their agent was paid fair compensation, only 58% of sellers using alternative brokers had the same opinion. (RPF ¶182.) Considering that the traditional brokerage model usually bases compensation on a percentage of the sale price, versus the flat-fee compensation prevalent for alternative brokerages, this statistic speaks volumes about the inability of EA brokers to meet seller expectations generally, let alone to meet expectations in a depressed real estate market.

The testifying EA brokers confirmed that they do not provide a high level of personal service. (RPF ¶181.) Mr. Hepp testified that he does not meet any Michigan customers face-to-face. Mr. Kermath likewise testified that he "rarely" meets customers face-to-face. Ms. Moody testified that, generally, she does not meet with her customers on a daily basis or have personal contact with them.

In contrast, Mr. Sweeney testified that in a declining or distressed market, where both the value of a home and the seller's equity are constantly declining, more sellers will choose full service ERTS listings over EA listings because they want and need the professional marketing services of a full-service broker. (RPF ¶197.)

Dr. Murray described national statistics that are consistent with these observations. EA listings grew significantly on a national basis between 2002 and 2005, from 2% to 15% of listings, which Dr. Murray attributed in considerable part to a "hot" real estate market, particularly on the coasts. (RPF ¶168.) However, between 2005 and 2006, the percentage of EA listings fell from 15% to 8%, which Dr. Murray attributed to a softening of the housing market, meaning it was more of a buyers' market with a decrease in sales and increase in inventory. (RPF ¶169.)²⁰ Dr. Murray concluded that alternative (EA) brokerage models are not getting the "traction" that the "industry buzz" would suggest. (RPF ¶171.)

Dr. Murray's observations are consistent with the data presented by Complaint Counsel's economic expert, Dr. Williams. His data showed that, in the six "Control MSAs" used in his study (*i.e.*, where the local MLS had no restrictions similar to the Realcomp Policies), the share of EA listings was roughly flat (*i.e.*, no growth) from September 2003 through the end of 2006.

²⁰ The 8% figure for EA listings in 2006 actually includes all types of listings (EA and ERTS) offered by flat fee brokers, and thus overstates the actual EA share. (RPF ¶170.)

Respondent's expert, Dr. Eisenstadt, reviewed these data and concluded that the evidence does not suggest that discount brokers are going to grow significantly over time beyond their current market share. (RPF ¶173.)

5. The Industry Testimony Does Not Support Complaint Counsel's Case

The evidence shows that Exclusive Agency brokers continue to do business successfully within the Realcomp Service Area, even though sellers (and all types of brokers, both EA and ERTS) of Michigan real estate are enduring a difficult period due to the state of the economy in Southeast Michigan. To the extent Complaint Counsel's witnesses aver that they are disadvantaged in some manner by Respondent, it is nonetheless clear that those witnesses continue to offer services profitably in the Realcomp service area, that the Realcomp Policies are not having a material effect on their marketing efforts, and that their challenges lie instead with promoting a business model based on a reduced level of services in a faltering housing market. Realcomp's service of transmitting listings to public websites and other members' websites is not an essential facility.

C. Complaint Counsel's Expert Testimony Lacks Credibility and Fails to Demonstrate a Material Adverse Effect on Competition.

Complaint counsel relies on the report and testimony of Dr. Darrell Williams in an effort to give substance to the purported linkage between the Realcomp Policies and adverse effects on competition in the Southeast Michigan real estate market. Dr. Williams testified that the effect of the Web Site Policy is to restrict EA listing from "public" websites and from IDX Realtor® websites, and that, in combination with Search Function Policy, it affects "every" channel through which a potential buyer could see an EA listing. (RPF ¶193.) Dr Williams concluded that the Realcomp Policies effected a substantial reduction in the usage of EA listings, resulting

in a decline of competition from limited service brokers. (RPF ¶194.) Dr. Williams based his conclusions on three pieces of work.

- First, based on a "time series" (*i.e.*, before-and-after) analysis, Dr. Williams observed that the percentage of EA listings on the Realcomp MLS declined after the Realcomp Policies were implemented. (RPF ¶195 (a).)
- Second, Dr. Williams compared the prevalence of EA listings in Metropolitan Statistical Areas (MSAs) where the local MLS had no restrictions similar to the Realcomp Policies during 2005-2006 to that in MSAs (including Southeast Michigan) where such restrictions existed during that period. This comparison was based on the overall average percentage of EA listings in each of the two groups, weighting the average according to the number of listings in each MSA. He observed that the weighted average percentage of EA listings is higher in MSAs without restrictions. (RPF ¶195 (b).)
- Finally, Dr. Williams compared the prevalence of EA listings among the same two groups of MSAs using a statistical regression model in an attempt to hold constant certain factors that may account for differences in the raw percentages of EA listings. He purports to find a statistically significant difference between the two groups, from which he concluded that the Realcomp Policies have reduced the share of EA listings compared to what would have existed had those policies not been in effect. (RPF ¶195(c).)

Dr. Williams' analyses are methodologically flawed and unreliable. Respondent's expert, Dr. David Eisenstadt, in addition to presenting contradictory findings, testified specifically to the weaknesses and deficiencies in Dr. Williams' analysis. Dr. Williams failed credibly to rebut Dr. Eisenstadt's testimony.

1. Dr. Williams' Before and After Comparison Is Based on a Flawed Assumption

Dr Williams found evidence of adverse effects from the Realcomp Policies in his determination that the average monthly share of new EA listings (*i.e.*, as a percentage of total new listings) declined approximately 0.8 percentage points, from approximately 1.5% to approximately 0.7%, over the period January, 2004 to September, 2006. (RPF ¶196.) He stated that basing his measurement on the monthly average percent of new EA listings insulated the calculation from "market flux" because the percentage ratio of EA to ERTS listings should not change even if total listings decline. (RPF ¶197.) This is a fundamentally incorrect assumption.

Dr. Williams admitted that he is not a real estate expert. (RPF ¶197.) Respondent's witness, Kelly Sweeney, is an experienced broker who has been in the residential real estate business in Southeast Michigan since 1975. Mr. Sweeney testified that in a declining or distressed market, where both the value of a home and the seller's equity is constantly declining, more sellers will choose full service ERTS listings over EA listings because they want and need the professional marketing services of a full-service broker. Mr. Sweeney observed that the EA model is therefore more prevalent in sellers' markets such as California or Arizona, than in Southeast Michigan. (RPF ¶197.)

Thus, in a continually distressed market such as Southeast Michigan, one *indeed* would expect the relative percentage of EA listings to decline over time. Because Dr. Williams failed to take into account the likely impact of market conditions on the conclusion he purports to draw from the ratios, his time series analysis does not support Complaint Counsel's burden of proving adverse competitive effects.

2. Dr. Williams' Selection of Comparative MSAs is Flawed.

As noted, both Dr. Williams' second and third analyses rely on comparisons of the prevalence of EA listings in Metropolitan Statistical Areas (MSAs) where the local MLS had no restrictions similar to the Realcomp Policies during 2005-2006 (the "Control MLSs") to that in MSAs (including Southeast Michigan) where such restrictions existed during that period (the "Restriction MLSs").

a. *Dr. Williams' Methodology for Selecting the Control MSAs Is Based on Unexplained Assumptions and Omits Obvious Comparisons*

Dr. Williams selected the Control MLSs (Charlotte, Dayton, Denver, Memphis, Toledo, and Wichita) on the basis of seven²¹ economic and demographic characteristics that he believes are "likely to affect the level of non-ERTS listings". (RPF ¶199.) He selected the six Control MLSs by ranking his possible choices according to their respective closeness to Detroit across all of the economic and demographic characteristics. He did so by computing the difference in standard deviation units from Detroit for each of the characteristics and then summing the (absolute value) of those differences for each MSA. (RPF ¶200.)

As Dr. Eisenstadt has explained, the problems with this methodology are significant. Dr. Williams never explained why he would expect any of his criteria (*i.e.*, the economic and demographic characteristics) to affect the choice of an EA contract, or why he gave all of the factors equal weight. Weighting each factor the same would only make sense if each factor had the same effect on the share of EA listings, a condition which is both implausible and counter to the facts. (RPF ¶201.)

²¹ Although Dr. Williams described eight characteristics that he believed to be relevant, he in fact used only seven of them in his analysis, an omission that was never explained.

Additionally, the list of potential choices from which Dr. Williams selected his Control MSAs omits altogether cities (*e.g.*, Pittsburgh, Cleveland, Milwaukee) that intuitively might be thought more similar to Detroit in terms of being Midwestern industrial "rust belt" areas than, for example Charlotte or Memphis. (RPF ¶202.)

The fact that Dr. Williams used a questionable set of comparisons is shown by the wide variation in the percentage of EA listings within that group. The percentages range from a low of approximately 1% in Dayton to a high of almost 14% in Denver. Dayton, the MSA closest to Detroit under Dr. Williams' methodology, had an EA share (1.24%) only slightly above Realcomp's (1.01%). The next lowest MSA, Toledo, has an EA share (3.4%) nearly three times that of Dayton. The MSA with highest EA share, Denver, which was 5th (out of 6) in closeness to Detroit, had a share more than 10 times that of Dayton. (RPF ¶203.) As Dr. Eisenstadt noted, if Dr. Williams had correctly identified economic and demographic factors that determine the share of EA contracts at the MSA level, one would expect the EA shares of the Control MSAs (which had no restrictions imposed by the MLSs operating within those areas) to be very similar. Instead, the wide variation demonstrates that Dr. Williams has not accounted for the factors that are actual determinants of the EA shares in the Control MSAs. (RPF ¶204.)²²

This conclusion is dramatically illustrated by RX 161-Page 36, which graphically depicts the strong positive association between a control MSA's similarity to Detroit and its EA share. That is, MSAs that are statistically closest to the Detroit MSA (even though they may still be very distant in terms of housing market behavior and/or other economic and demographic

²² Dr. Eisenstadt also notes that significant differences exist among the six control MSAs even with respect to the different economic and demographic characteristics that Dr. Williams used. Table III of his Supplemental Report lists the six control MSAs, and the MSA-by-MSA value of each of the eight economic and demographic variables. The table shows that there is significant sample variance, as measured by the sample coefficient of variation, for several of Dr. Williams' economic/demographic factors. These include the one-year median price change, population, population density, and median house price. (RPF ¶205.)

characteristics) have lower EA shares than control MSAs that are statistically more distant. (RPF ¶206.)

b. *The Selection of the Restriction MSAs Was Wholly Arbitrary*

In addition to Realcomp, Dr. Williams' group of Restriction MLSs includes Green Bay, Williamsburg, and Boulder, all of which are much smaller urban areas than Detroit.²³ Significantly, the selection of this grouping was made not by Dr. Williams, but by the FTC, and Dr. Williams could describe no criteria for the selection process other than the availability of data. (RPF ¶207.) In other words, the selection of the Restriction MSAs was arbitrary. If Dr. Williams believed that the integrity of his work depended on selecting Control MSAs based on their comparability to Detroit (*i.e.*, using his economic and demographic factors), the Restriction MSAs also must be comparable based on these same factors. Dr. Williams' failure to do so means that he attributed differences in EA shares between Control MSAs and Restriction MSAs to the restrictions when, in fact, those differences in EA shares could instead be due to variations in his economic and demographic factors. (RPF ¶208.)

The arbitrary selection of the Restriction MLSs negates the credibility of Dr. Williams' comparisons. Those comparisons are of no probative value in support of Complaint Counsel's case.

3. *Dr. Williams' Comparison of Average EA Shares for the Control MSAs and Restriction MSAs Is Not Probative*

CX 524, Exhibit 26 of Dr. Williams' Report (CX 498, *in camera*) purports to track and compare the EA shares of MSAs with and without restrictions over time. The difference in EA

²³ Dr. Eisenstadt notes that Dr. Williams' own analysis shows that the MSA in which Williamsburg is located ranks 28th in terms of closeness to Detroit, significantly more distant than any of the Control MSAs. Further, the Green Bay-Appleton and Boulder MSAs each have populations less than 500,000, and for that reason alone they would have been excluded from Dr. Williams' sample of Control MSAs. (RPF ¶207.)

shares between the two types of MLSs ranges between 5 and 6 percentage points. (RPF ¶209.) Dr. Williams testified that the average EA percentage in Restriction MSAs for the time period studied was 1.4%, and the average EA percentage in the Control MSAs was approximately 7% on average. (RPF ¶210.)

As Dr. Williams explained, his calculation of the average EA percentage share for the Control MSAs and the Restriction MSAs was weighted based on the number of listings. This means the larger MSAs counted more toward the average than the smaller MSAs. Further, by pooling or combining all Control MSAs together, the closeness of any MSA to Detroit (*i.e.*, the lowest summed standard deviations) was not a factor in Dr. Williams' estimate of the difference between EA shares in the two types of MSAs (*i.e.*, those with restrictions similar to the Realcomp Policies, and those without). (RPF ¶211.)

In practical terms, the outcome of Dr. Williams' analysis was pre-ordained. Denver, the largest of the Control MSAs, is both (a) the second most *dis*-similar Control MSA to Detroit and (b) the MSA with the highest EA share. (RPF ¶212.) Dr. Williams method of analysis gave Denver significantly more weight in this comparison of Control MSAs to Restriction MSAs than, for example, Dayton – the Control MSA most similar (in Dr. Williams' analysis) to Detroit but having the smallest EA share among the Control MSAs. (RPF ¶213.)

Thus, it is wholly unsurprising that Dr. Williams was able to conclude that the Control Group MSAs had a higher percentage of EA listings. This analysis says nothing probative about the competitive effects of the Realcomp Policies. Dr. Williams offered no opinion as to why Denver should have more influence in this analysis than Dayton or any of the other Control MSAs. This is not a scientific method, it does not support Complaint Counsel's case, and it should be accorded no weight by the Court.

Respondent's expert, Dr. Eisenstadt, also performed direct comparisons of Realcomp (*i.e.*, the Detroit MSA) to Dr. Williams' Control MSAs. Dr. Eisenstadt testified that, using Dr. Williams' rankings of the Control MSAs, it would be most logical to compare Realcomp to Dayton, the MSA most statistically similar to Detroit in terms of demographic and economic traits. As noted, Dayton's percentage of EA listings (1.24%) was not significantly different from Realcomp's EA share during the same period (1.01%). (RPF ¶214.) Dr. Eisenstadt also observed that the only MLS utilized by Dr. Williams in his study that had a period of time both without restrictions and with restrictions was the Boulder, Colorado. Dr. Williams' data showed that Boulder had a pre-restriction average EA share of 2.03% compared an average EA share during the restriction period of 0.98%. He also noted that there appeared to be a downward trend in the share of EA listings on the Boulder MLS during the last three months of the pre-restriction period, presumably for reasons unrelated to the restrictions, which had not yet taken effect. Dr. Eisenstadt concluded that if those last three months were used as a benchmark, rather than the entirety of the pre-restriction period, the reduction in EA listings would be even smaller than one percentage point. (RPF ¶214.)

Based in part on these comparisons, and on his additional analyses described in the following sections, Dr. Eisenstadt concluded that Dr. Williams had significantly overstated the effect of the Realcomp Policies on the prevalence of EA listings in the Realcomp MLS.

4. Dr Williams' "Probit" Analyses Are Methodologically Flawed

Dr. Williams also relied on statistical regression ("probit") analyses in an attempt to predict the effects of the Realcomp Policies. In the probit analyses contained in his initial report, Dr. Williams attempted to hold constant (control for) a few selected individual housing characteristics between and among the Restriction MSAs and the Control MSAs that may

account for the choice of listing type (*i.e.*, EA or ERTS).²⁴ (RPF ¶216.) Dr. Williams believed that his results predict that the prevalence of EA listings in the Restriction MLSs is 5.5 percentage points lower than in the Control MLSs. (RPF ¶140.) From this, Dr. Williams predicts that the percentage of EA listings in Realcomp would be higher, and the use of ERTS listings would be lower, in the absence of the Realcomp Policies. (RPF ¶217.)

However, Dr. Williams' predictions are not enlightening, and should be given no weight. Dr. Williams again did not consider the economic and demographic differences between and among the MSAs he selected for his study (that is, the economic characteristics of each local housing market and the demographic characteristics of buyers and sellers in each market). Dr. Eisenstadt described the manner in which such factors ordinarily would be addressed in economic analysis, and the errors introduced into Dr. Williams' Probit analyses by his failure to do so. Further, as discussed below,²⁵ when Dr. Eisenstadt corrected Dr. Williams' errors, he found that the same data revealed no predictable difference in the percentage of EA listings due to the existence or absence of MLS restrictions in the MSAs. (RPF ¶218.)

a. *Dr. Williams Failed to Control for Economic and Demographic Factors Likely to Affect the Prevalence of EA Listings*

Statistical regression analysis (such as probit analysis) is a tool to measure the effects of different factors (called independent variables) on a particular outcome (called the dependent variable). In designing a regression analysis, the analyst should attempt to identify independent variables likely to have a significant effect on the dependent variable and include them in the analysis. If important independent variables are omitted from the analysis, their effects on the

²⁴ Among the characteristics he included, the number of bedrooms proved to be the only explanatory variable in his regression other than the "RULE" variable (*i.e.*, the MLS restrictions) that affected the likelihood of choosing an EA listing. (RPF ¶224.)

²⁵ See Section C.5.

dependent variable may end up being attributed to those independent variables that are included, which may overstate the causal relationship between the included independent variables and the dependent variable. Here, the dependent variable of interest is the likelihood that a home seller will choose an EA listing contract. The independent variables are the economic and demographic variables that affect the choice of an EA contract versus an ERTS contract. Because Dr. Williams excluded numerous relevant independent variables from his analysis, he overstated the relationship between the presence of restrictions and the choice of listing contract type.

As discussed above, in evaluating and selecting the MSAs to be used as comparators for his analysis (*i.e.*, the Control MSAs), Dr. Williams identified eight economic and demographic factors that he believed are “likely to affect the level of [EA] listings.” (RPF ¶219.) In other words, Dr. Williams believed (although in fact he never revealed the bases for his beliefs) that each of the eight factors affected home sellers' choice of listing contract type (*i.e.*, EA or ERTS).

Nonetheless, Dr. Williams did not actually use any of these eight factors as independent variables in his probit analysis. (RPF ¶220.) That means that – even though Dr. Williams believed that the eight factors affected the choice of listing contract type – he did not isolate the effects of those eight factors from the existence or absence of MLS restrictions in trying to decide whether MLS restrictions affected the use of EA contracts in the MSAs.

As Dr. Eisenstadt explained, Dr. Williams' omission would not be a problem if the eight factors did not vary much from MSA to MSA. But Dr. Eisenstadt looked at the data and found that the eight factors varied dramatically from MSA to MSA. (RPF ¶221.) Consequently, Dr. Williams' analysis attributes to the existence of MLS restrictions (what he calls the “RULE” variable) outcomes that are affected by – and may well be attributable to – economic and

demographic variables.²⁶ (RPF ¶222.) In light of this significant omission, Dr. Williams' probit results are not reliable and do not establish that the Realcomp Policies adversely affected the use of EA contracts in the Realcomp service area.

b. *The Housing Variables Included in Dr. Williams' Probit Analysis Do Not Compensate for the Omission of the Economic and Demographic Variables*

As noted, Dr. Williams' original probit analysis did include a few housing characteristics as independent variables in one of his equations. However, only one of those variables (number of bedrooms) was statistically significant to the analysis. (RPF ¶¶223-224.) Accordingly, all of the effects Dr. Williams purports to measure from his analysis end up being attributed to the RULE variable (*i.e.*, the MLS restrictions). Hence, as Dr. Eisenstadt has explained, this means that Dr. Williams' regression analysis is nothing more than a simple test for the difference between the weighted average EA share in the six Control MSAs versus the weighted average EA share in the four Restriction MSAs. In other words, his probit results are simply a more convoluted restatement of his first comparative analysis. (RPF ¶225.) As described above (in Section C.3), a comparison of the two means is meaningless due to the fact that Dr. Williams did not account for the (statistical) proximity (or lack thereof) of any Control MSA to the Detroit MSA, nor more specifically for the economic and demographic factors that affect a home seller's choice of listing type. Because this same problem plagues his probit analysis, that analysis does not establish that the Realcomp Policies have adversely affected the use of EA contracts in the Realcomp service area.

²⁶ As discussed at Section C.5, *infra*, Dr. Eisenstadt showed that the choice of listing contract is indeed affected by these omitted variables.

5. Dr. Eisenstadt Demonstrated No Adverse Effect on EA Shares When He Corrected Dr. Williams' Methodological Errors

The deficiencies arising from Dr. Williams' failure to consider the effect of economic and demographic variables were confirmed by Dr. Eisenstadt's re-estimation of Dr. Williams' analysis. Dr. Eisenstadt used the same basic probit regression model that Dr. Williams used, but Dr. Eisenstadt added separate independent variables for each of the eight economic and demographic factors that Dr. Williams identified as relevant to the prevalence of EA listings (but which he omitted from his analysis), as well as several other economic and demographic factors which Dr. Eisenstadt identified as likely to affect contract choice both across and within the MSAs.²⁷ (RPF ¶226.)

Dr. Eisenstadt's re-estimation of Dr. Williams' work shows that additional economic and demographic characteristics in fact should be included as independent variables in a proper regression analysis, because a high number of them (thirteen) proved to be statistically significant at the generally accepted level of confidence. (RPF ¶228.)

Thus, when other variables that in fact are relevant to the choice of an EA listing were included in the analysis, Dr. Eisenstadt found that the effect of the Realcomp Policies on the share of EA contracts was less than one-quarter of one percentage point and that this effect was not statistically significant (*i.e.*, it was not predictably different from zero). (RPF ¶229.) Dr. Eisenstadt's results demonstrated that all or virtually all of the difference between the percentage

²⁷ Specifically, Dr. Eisenstadt took into account the following variables which were not considered by Dr. Williams: the MSA-wide one-year change, by quarter, in the median housing price index, the MSA-wide five-year change, by quarter, in the median housing price index, county-level median household income, MSA-wide median household income, MSA-wide median household price, percent black population at the MSA and zip code level, percent Hispanic population at the MSA and zip code level, new housing permits per household at the MSA and county level, number of bedrooms, age of the home, median person age, percent change in the number of listings over the prior year at the MSA and county level, percent change in days on market over the prior year at the MSA and county level. (RPF ¶227.)

of EA listings in the Realcomp service area, and the average EA share for Control MSAs is due to local economic and demographic factors not to the Realcomp Policies. (RPF ¶229.)

Dr. Eisenstadt then went one step further. He estimated the same basic regression equation with the inclusion of a separate "RULE" variable for each of the Restriction MSAs. This step isolated the effects (on choice of listing contract type) of the Realcomp Policies from the effects of the restrictions in the other Restriction MSAs. (RPF ¶230.) This analysis found that the adverse effect of the Realcomp Policies on the percentage share of EA contract in the Detroit MSA was less than one ten-thousandth of a percentage point and was not statistically significant. (RPF ¶230.)

Dr. Eisenstadt's work demonstrates beyond doubt that Dr. Williams' evidence is unreliable and that it cannot support Complaint Counsel's burden of proving anticompetitive effects from the Realcomp Policies.

6. Dr. Eisenstadt Offered Unrebutted Testimony That the Detroit MSA Has More EA Listings Than Would be Expected Based On Its Economic and Demographic Characteristics

Going yet one more step further, Dr. Eisenstadt estimated a regression using only the data from the six Control MSAs selected by Dr. Williams. (RPF ¶231.) He used the output from this regression to predict the EA share for the Realcomp service area under the assumption that it also had no restrictions. Given the economic and demographic characteristics of the Realcomp service area, the predicted percentage of EA listings in the Realcomp service area in the absence of the Realcomp Policies is about 0.25 percent. The actual percentage of EA listings in the Realcomp was approximately four times larger (1.01%) for the corresponding time period. (RPF ¶231.) From Dr. Eisenstadt's analysis, it is clear that factors other than the Realcomp Policies

(i.e., the economic and demographic characteristics of the Realcomp service area) are the real reason that the percentage of EA listings on the Realcomp MLS is so low.

Dr. Eisenstadt's additional evidence, which is un rebutted, is a further basis to reject Dr. Williams' evidence and to conclude that Complaint Counsel has failed to meet its burden.

7. Dr. Williams' Analyses In Any Event Are Not Probative Because They Measure the Effects of Policies No Longer In Effect and as to Which Complaint Counsel Has Not Requested Relief

Dr. Williams testified that his analyses purport to measure the effects of three Realcomp policies on the prevalence of EA listings. Specifically, he stated that it is the combination of the Web Site Policy, Search Function Policy, and Realcomp's minimum service requirements that limits competition rather than any one policy by itself. (RPF ¶¶141-142.) He stated that he could not analyze the effect of the Search Function Policy separately from the other restrictions. (RPF ¶143.) He also stated that he could not predict the effect that Realcomp's elimination of the Search Function Policy or the minimum service requirements would have on the prevalence of EA listings. (RPF ¶¶144-145.)

In this case, Complaint Counsel has requested no relief as to Realcomp's minimum service requirement. Thus, Dr. Williams' analyses, which by his own testimony purports to include – inseparably – the effects of the minimum service requirements, cannot support Complaint Counsel's requested relief as to the Web Site Policy and Search Function Policy, as there is a risk that the effects Dr. Williams purports to find relate predominantly to the minimum service requirements which are not challenged here.²⁸

²⁸ Dr. Williams testified, for example, that he did not know if a 2.75 percentage point decrease, as opposed to his predicted 5.5 percentage point decrease, in EA listings would be economically significant. (RPF ¶149.)

Further, Realcomp has repealed the Search Function Policy and the minimum service requirement. (RPF ¶141.) Dr. Williams, by his own testimony, cannot state whether all or a significant proportion of the effects he purports to observe are due to those policies and thus he cannot say whether the repeal of those policies alters the significance of his testimony.

IV.

REALCOMP'S POLICIES HAVE NOT RESULTED IN INCREASED ECONOMIC COSTS FOR CONSUMERS.

A. Dr. Williams' Analysis, Even If Valid, Would Not Directly Estimate Harm to Consumers

Dr. Williams attempted to measure only the effect of the Realcomp Policies (plus the minimum service requirements) on the prevalence of EA listings. As Dr. Eisenstadt explained, Dr. Williams' analysis thus provides only an indirect test for anticompetitive effect. That is, Dr. Williams surmises from his prediction of reduced EA output that consumers pay higher prices for brokerage services, but Dr. Williams did not attempt to measure any higher brokerage costs incurred by consumers who, as a consequence of the Realcomp Policies, substitute ERTS contracts for EA contracts. He also did not investigate whether sellers of residential properties who used EA listings on the Realcomp MLS received higher or lower sale prices for their properties. (RPF ¶232.) Additionally, Dr. Williams specifically testified that he did not analyze effect of Realcomp's restrictions on the number of days that homes remain on the market before sale, or whether commission rates on ERTS listings are higher when MLSs impose restrictions in the nature of the Realcomp Policies. (RPF ¶232.) Thus, even if Dr. Williams' test and statistical results were valid, they are insufficient to demonstrate that the Realcomp Policies caused measurable harm to price competition between traditional and non-traditional brokers, or to consumers (home buyers and sellers). (RPF ¶232.)

In his initial report, Dr. Eisenstadt identified published studies that describe statistical regression tests to estimate the effects of housing characteristics on the sale price of residential properties. (RPF ¶233.)²⁹ Relying on this published work, Dr. Eisenstadt examined whether home sellers in the Realcomp service area have experienced adverse economic effects as a consequence of the Realcomp Policies.

B. Dr. Eisenstadt's Estimations Demonstrate the Absence of Consumer Harm

Dr. Eisenstadt conducted two studies to directly estimate the effects of the Realcomp Policies on the sale price of homes sold under EA listings. The two studies provide consistent evidence that home sellers in the Realcomp service area have not experienced adverse sale price effects from the Realcomp Policies.

1. EA Sellers in the Realcomp Service Area Fare Better Than EA Sellers in Ann Arbor

In his April report (CX 133), Dr. Eisenstadt compared the home sale prices for residential properties in the Realcomp service area for the years 2005 and 2006 against those for homes in the Ann Arbor MLS (an MLS without policies comparable to the Realcomp Policies) during the same period. Dr. Eisenstadt accounted for differences in home characteristics and location characteristics that might also affect sales prices, as well as the use of EA versus ERTS listing types, by means of statistical regression. This methodology permitted Dr. Eisenstadt to measure the effects of the Realcomp Policies on sales prices of EA-listed properties in the Realcomp service area relative to Ann Arbor, by holding constant differences in the sale prices of ERTS-listed properties in the two areas. (RPF ¶235.) In other words, all else equal, if sellers in the

²⁹ These studies are G. Stacy Sirmans and David A. Macpherson, *The Value of Housing Characteristics*, National Association of Realtors, December 2003, and Paul E. Carrillo, *An Empirical Two-sided Equilibrium Search Model of the Real Estate Market*, October 2005.

Realcomp service area using EA listings were harmed by the Realcomp Policies, then, after controlling for differences between the sale prices of ERTS properties in the two areas, they should realize lower sale prices for their homes than sellers of EA-listed properties in Ann Arbor.

But Dr. Eisenstadt found not just that there were no negative effects from the Realcomp Policies on price, but rather that the estimated effects on sale price were *positive* (and the result was statistically significant). In other words, sellers of EA properties listed on Realcomp realized higher sale prices than sellers of EA properties listed on the Ann Arbor MLS, after controlling for housing characteristics, location, and differences in the average sale prices of ERTS properties in the two areas. (RPF ¶236.)

Further, the estimated magnitude of the difference (approximately 14%) was far greater than any increased brokerage costs for home sellers, even if one assumed (improbably) that sellers of EA properties in Realcomp's service area *never* procured their own buyers and *always* paid the traditional 3% selling commissions to cooperating brokers. (RPF ¶237.)

2. The Same Result Was Observed In a Comparison of Home Sale Prices in the Realcomp Service Area Versus Dr. Williams' Control MSAs.

In his May report (CX 458), Dr. Eisenstadt described the results of a further direct test of the potential anticompetitive effect of the Realcomp Policies on sellers who use EA contracts in Realcomp's service area, in which he compared the sale prices those EA sellers receive to the sale prices realized by sellers in five of Dr. Williams' Control MSAs who also use EA contracts.³⁰ This analysis, in terms of methodology, was highly similar to the sale price analysis in Dr. Eisenstadt's April report. (RPF ¶238.) In this case, Dr. Eisenstadt compared properties

³⁰ One of Dr. Williams' six Control MSAs was not used in this analysis because that MLS did not provide sale price data.

listed and sold in Realcomp to those listed and sold in five of the Control MSAs used by Dr. Williams. (RPF ¶238.)

Dr. Eisenstadt was again able to show that, after accounting for home characteristics, locational effects, and differences in the sale prices of ERTS properties, the Realcomp Policies did not depress the expected sale prices received by home sellers using EA contracts. To the contrary, on average, residential sellers in Realcomp's service area using EA contracts realized approximately 6% higher sale prices for their homes versus sellers in the Control MSAs who used EA contracts. (RPF ¶239.)

Dr. Eisenstadt went on to estimate whether the beneficial effect of higher sales prices for EA-listed properties predicted by his analyses would be offset by higher brokerage fees caused by an artificial substitution of ERTS contracts for EA contracts. For purpose of this estimate, Dr. Eisenstadt assumed (contrary to the results of his probit regression analyses, which showed no statistically significant effect of the Realcomp Policies on the prevalence of EA contracts) that the Realcomp Policies reduced the share of EA listings on the Realcomp MLS over the relevant time period by one percentage point. He further assumed, conservatively, that every affected home seller would choose an ERTS listing, instead of selling the property without a listing broker (*i.e.*, for-sale-by-owner), and that all affected home sellers would be required to pay a 3% commission to a cooperating broker. He further assumed that the Realcomp Policies had no offsetting benefits to home buyers, contrary to the evidence discussed Section V, below. (RPF ¶240.)

Dr. Eisenstadt's calculation demonstrated that, under the foregoing assumptions, the aggregate increased brokerage fees would be approximately \$280,000, which would be more than offset by the expected higher home sale prices realized by EA sellers in the same area,

which Dr. Eisenstadt estimated to be approximately \$1,700,000. (RPF ¶241.) Thus, even under highly conservative assumptions, the analysis presented by Dr. Eisenstadt in his second report shows, consistent with that of his first report, that, taken as a whole, the consumer welfare of home sellers in the Realcomp service area actually improved during the relevant period when the Realcomp Policies were in effect.

3. An Analysis of Days on Market Likewise Supports the Conclusion That No Injury Has Occurred

Complaint Counsel's expert, Dr. Williams, testified that when one looks at the justifications for the Realcomp Policies and is attempting to determine the effect of these restrictions from the consumer's standpoint, home sellers would be concerned about selling their houses in a timely fashion and at a fair price. (RPF ¶154.) "Days on Market" is a measure of the time it takes for a listing, once it is on a Multiple Listing Service, to be sold. (RPF ¶155.)

Dr. Murray testified that he has seen no data or information concerning Days on Market distinguishing between Exclusive Agency listings and Exclusive Right to Sell listings. (RPF ¶156.) Likewise, Dr. Williams performed no analysis of Days on Market. (RPF ¶157.)

However, Respondent's expert, Dr. Eisenstadt, examined this question and found that in the Realcomp MLS, the average Days on Market for EA-listed homes was 17% less than comparable ERTS homes. (RPF ¶158.) Specifically, the average Days on Market for Realcomp EA properties was 118, compared to approximately 142 Days on Market for ERTS properties based upon data analyzed from January 2005 through October 2006. (RPF ¶159.) Dr. Eisenstadt's findings were consistent with the testimony of Mr. Mincy, an Exclusive Agent, who stated that he knew of no difference in the Days on Market between Exclusive Agency listings and Exclusive Right to Sell Listings. (RPF ¶160.) No EA broker offered testimony to contradict

the conclusion that the Realcomp Policies have not disadvantaged EA listed properties in terms of Days on Market.

V.

THE REALCOMP POLICIES ARE PRO-COMPETITIVE AND BENEFIT CONSUMERS

A. **The Realcomp Policies Correct a Free Rider Problem**

1. **Elimination of Free Riding Is A Recognized Procompetitive Purpose**

Free-riding is the diversion of value from a business rival's efforts without payment. *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 675 (1992). As Judge Easterbrook there explained, "It costs money to make a product attractive against other contenders for consumers' favor. Firms that take advantage of costly efforts without paying for them, that reap what they have not sown, reduce the payoff that the firms making the investment receive." *Id.* at 674. Control of free riding is an accepted justification for cooperation in antitrust jurisprudence. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984).

A frequently-used example of free riding (also provided in substance by Complaint Counsel's expert, Dr. Williams) is that of two retailers that sell the same consumer product. Retailer #1 invests in staff and facilities to demonstrate the product and provide product information to consumers. It cannot charge consumers separately for this information because consumers are unwilling to pay separately for it. Instead, Retailer #1 must recover the costs of its information services through the price of the product. Retailer #2 does not provide information to consumers, incurs lower costs as a result, and therefore can sell the product for less. To the extent consumers obtain information from Retailer #1 and then purchase the product from Retailer #2, Retailer #2 is free-riding on Retailer #1's investment in customer service.

Manufacturers often address this free-riding problem by allocating customers or sales territories.
See 961 F.2d at 675.

The critical fact of the instant case is that, in terms of the foregoing example, Retailer #2 and the consumer are one and the same where EA listings are concerned. (RPF ¶187.) As we explain below, Complaint Counsel and its expert never confront this fact.

2. Complaint Counsel's Expert Misunderstood, and Therefore Did Not Refute, the Free Rider Issue

Dr. Williams claimed that there is no free-riding problem that justifies the Realcomp Policies. He testified that an EA listing agent does not “free-ride” because he/she participates in the transaction and is paid. He further testified that cooperating agents do not free ride because (1) they benefit by having the opportunity to participate in the transaction; (2) most brokers are both cooperating and listing brokers; and (3) 80% of the time a cooperating broker participates in a non-ERTS transaction. (RPF ¶242.)

Dr. Williams therefore opined that any benefit from the Realcomp Policies inures to cooperating brokers, not consumers. He further stated that, even if a free-rider problem exists, the Realcomp Policies do not eliminate the problem because a cooperating broker who belongs to an MLS other than Realcomp (*e.g.*, MiRealSource) can find out about a property on a public website and represent a (successful) buyer for the property. He also noted that Realcomp participates in data sharing arrangements with other MLS's that permit brokers who are not Realcomp members to present Realcomp-listed properties. Therefore, in Dr. Williams' view, the access restrictions do not assure that a Realcomp cooperating broker will participate in a given transaction. (RPF ¶243.)

Dr. Williams is wrong on all points. Dr. Williams' characterization of the free-riding problem is inaccurate and therefore misleading. The free-riding problem that is relevant and of concern here is free-riding by EA *home sellers* on Realcomp cooperating agents. (RPF ¶¶56-57, 186, 190.) Those home sellers have an incentive to act as their own cooperating agent. By definition, they retain (and want) the ability to find their own buyer directly *and* to receive the compensation payable to a cooperating agent (*i.e.*, by keeping the cooperating agent's commission for themselves). In other words, EA home sellers want the benefits of being a full-fledged Realcomp "member," including the benefits derived from Realcomp's advertising of properties on the Internet and through the IDX. However, those home sellers do not pay membership dues (or any other compensation) to Realcomp for the right to be their own cooperating agent. Indeed, because Realcomp is an association of licensed brokers, those sellers cannot be members. (RPF ¶23.) Thus, it is not the Realcomp listing agent who is free-riding, and it is not the Realcomp cooperating agents who are free-riding, but, instead, it is the EA home seller who is free riding. Dr. Williams never addressed this point.

Further, Dr. Williams' assertion that there can be no free-rider problem because 80% of EA properties are sold to buyers represented by cooperating agents misses the point. Even if Dr. Williams' 80% estimate is correct, at least **twenty** percent of the time, an EA property will be sold without the involvement of a Realcomp cooperating agent. This compares to **zero** percent of the time that a cooperating broker's commission will not be paid in an ERTS transaction. This fact, based on Dr. Williams' own testimony, establishes the presence of a free-rider problem.

Dr. Williams' assertion that the Realcomp Policies benefit only cooperating brokers, and do not benefit consumers, also is wrong. Dr. Eisenstadt explained that the Realcomp Policies also benefit those home buyers who wish to work with a cooperating broker to purchase an EA

property by enhancing the incentives of these brokers to show and promote EA properties to their buyer-clients. (RPF ¶¶183, 244.) Moreover, Dr. Eisenstadt's analysis of home sale prices, discussed in detail above, shows that, on balance, home sellers of EA properties in Realcomp's service area realize higher expected sale prices for their properties than do home sellers of EA properties in MLSs without comparable policies. (RPF ¶185.) This empirical result is wholly inconsistent with Dr. Williams' subjective opinion.

Finally, Dr. Williams' assertion that the Realcomp Policies do not eliminate the free-rider problem because non-Realcomp brokers may bring buyers to transactions again reflects his misunderstanding of the issue. The free-riding addressed by the Realcomp Policies is free-riding by EA home sellers, not by other brokers. But even so, Dr. Williams' logic is flimsy. He fails to recognize that Realcomp's data-sharing arrangements are *reciprocal*, so that Realcomp brokers get the same benefit that they give to brokers in other MLSs by participating in data sharing. (RPF ¶245.) No such benefits are received by Realcomp cooperating brokers from those EA home sellers who find their own buyers. Of no greater persuasion is Dr. Williams' suggestion that the benefits of the Realcomp Policies can be negated by the fact that in some indeterminate, and presumably infrequent, number of cases, a broker who is not a Realcomp member might use the Internet to find a Realcomp-listed property for a client. This amounts to nothing more than an argument that the theoretical inability of the Realcomp Policies to curtail or mitigate all possible occurrences of free-riding negates their legitimacy. But there is no law (or logic) supporting this view. The Realcomp Policies in fact address a significant, and indeed the primary, source of free-riding.

B. The Realcomp Policies Create Additional Efficiencies

Dr. Eisenstadt explained that an important characteristic of an MLS relevant to efficiency is the fact that an MLS is a “platform” that serves a “two-sided” market, similar to newspapers, credit card systems, and shopping malls. These “platforms” connect (*i.e.*, bring together) two distinct groups of users (in this case, real estate listing brokers and cooperating brokers). An important characteristic of a two-sided market is that demand for the platform among users on one side increases as the number of participants on the other side increases. In the case of an MLS, all else equal, listing agents will have a higher demand for an MLS platform that also attracts more cooperating agents. (RPF ¶246.)

Importantly, the customers on one side of a platform are not necessarily equal to one another in terms of creating indirect network effects for the customers on the other side of a platform. As Dr. Eisenstadt explained, an “anchor” department store in a shopping mall may be charged a lower rental rate than a boutique in the same mall because the anchor store can be expected to attract more customers to the mall. In the case of an MLS, different rules for promoting ERTS listings versus EA listings could be expected to increase the participation of cooperating brokers. This is because cooperating brokers would be expected to place more value on the number of traditional, full-service ERTS brokers who belong to the MLS than on the number of EA brokers, even if EA and ERTS contracts each offer cooperating brokers identical commission rates. This difference in value stems from the fact that EA contracts can impose higher transaction costs (*e.g.*, scheduling on-site visits and completing paper work at closings) on cooperating brokers who must deal directly with owners rather than with listing brokers. (RPF ¶¶ 28, 172, 247.) Additionally, potential buyers who view a property on a public website could be expected to be less likely to use a cooperating agent when that property is offered under an EA

contract because (as described in the next paragraph) they will be at a bidding disadvantage by doing so. These factors support the conclusion that cooperating agents would prefer a platform that favors ERTS listing contracts. The Realcomp Policies promote this result and thereby the efficiency of the cooperative MLS "platform." (RPF ¶247.)

The Realcomp Policies also promote efficiency by reducing the bidding disadvantage for buyers who are represented by a cooperating broker. Buyers who use cooperating brokers are disadvantaged relative to buyers who do not use a cooperating broker when both bid for properties listed under EA contracts. Because the seller must pay a commission when a buyer uses a cooperating broker, the rational seller will subtract the value of that commission when comparing offers made by prospective buyers who use cooperating brokers against offers from buyers who are unrepresented. The, Realcomp Policies, by not promoting EA properties to the same extent as ERTS properties, increase the probability that the client of a Realcomp member who is acting as a cooperating broker will make a successful offer for that property. (RPF ¶¶188, 248.)

C. The Realcomp Policies Are Not Over-Broad

The Realcomp Policies are narrow in their scope. The Web Site Policy limits the distribution of EA listings to certain Internet sites and the IDX. The Search Function Policy merely created a search default in favor of ERTS listings that could be easily overridden by any broker in search of EA listings. These Policies directly addressed the free-rider issue described above – *i.e.*, that EA home sellers, who are in competition with cooperating brokers, otherwise can obtain promotional services that they do not pay for – and promoted the efficiency of the platform for selling and cooperating brokers. Realcomp has no other policies that limit the benefits of the MLS to EA brokers or, indirectly, their clients. Realcomp does not deny

membership in the MLS to EA brokers. Nor does Realcomp prevent brokers from placing EA listings on the MLS. The Realcomp Policies are appropriately tailored to their objective and are lawful.

VI.
COMPLAINT COUNSEL'S PROPOSED REMEDIES WOULD HARM, NOT BENEFIT,
THE PUBLIC

"Markets slowly but surely undermine practices that injure consumers. Competition does not undermine judicial decisions, so the costs of wrongly condemning a beneficial practice may exceed the costs of wrongly tolerating a harmful one." *Chicago Prof. Sports Ltd. Partnership*, 961 F.2d at 676. Thus, in considering the appropriateness of a remedy, the court must take into account the costs that the remedy would entail. As the Commission itself has recognized, such include not only the costs to the parties, but also the impact of proposed relief on consumers generally. *See Policy Statement on Unfairness* (FTC Dec. 17, 1980).

Complaint Counsel seeks to enjoin Respondent's Web Site Policy and the Search Function Policy. There is no reason to believe that this relief, if granted, would improve consumer welfare.

A. The Proposed Relief Would Require Realcomp Agents and Their Clients to Subsidize EA Home Sellers

As described above, the Realcomp Policies, by limiting distribution of EA listings to public websites, prevent free-riding on the MLS by EA home sellers who are not real estate agents and who compete with Realcomp members to procure buyers for the listed property. Complaint Counsel's requested relief instead would force cooperating agents to subsidize the marketing expenses that sellers using EA contracts otherwise would incur to procure buyers themselves.

Listing brokers and selling (cooperating) brokers each pay Realcomp the same membership fees. (RPF ¶33.) Given this fee structure, under the proposed relief, cooperating agents would pay part of the cost of distributing information (via the public websites) to buyers who do not intend to use their services. (RPF ¶190.) In other words, Realcomp cooperating agents would be required to give free advertising services to those property owners who, through their use of EA contracts, compete with them to procure or produce buyers. (RPF ¶189.)

Complaint counsel has provided no explanation as to why it would be economically efficient to require cooperating agents (or the MLS that provides services to them) to distribute, *gratis*, information to buyers who do not intend to use their services, especially when (as described below) the practice also would disadvantage those buyers who **do** intend to use cooperating brokers.

B. The Proposed Relief Would Disadvantage Buyers Who Choose to Use Cooperating Brokers

Complaint counsel expects its proposed relief to increase information about EA properties available to prospective buyers who do *not* use selling agents, and to increase the number of offers those buyers make for such properties. However, the empirical evidence described in Section IV, above (*i.e.*, that sellers who use EA contracts in Realcomp's service area realize higher prices) suggests that the Realcomp Policies have increased cooperating brokers' incentives to promote and show EA properties to their clients, and this effect has outweighed any reduction in offers from those buyers who do not use selling agents. Complaint Counsel's proposed relief would eliminate or reduce cooperating brokers' incentives to render their services in conjunction with the purchase of EA properties, and therefore also would adversely affect the choices available to home buyers who elect to use the services of a real estate broker when

looking for properties to purchase, and reduce the value of cooperating brokers' services to those home buyers.

The purposes of the antitrust laws are not served by creating artificial advantages and disadvantages for different groups of buyers. The proposed relief, however, would disadvantage prospective home buyers who contract with selling agents to show them properties, including those marketed under EA listings.

C. **There Is No Evidence That The Requested Relief Will Produce A Net Gain In Consumer Welfare**

Even if one assumes that Complaint Counsel is correct – that its proposed relief will increase the visibility of EA properties to prospective buyers who do *not* use a cooperating broker, and therefore increase the number of offers those buyers make for such properties – that relief also would be expected (as described above) to *reduce* the number of offers for EA properties made by buyers who *do* use the services of a cooperating broker. The former effect may represent a gain in consumer welfare, but the latter effect would be a reduction in consumer welfare. Complaint Counsel did not meet its burden of proving that the net effect of its proposed relief would be an increase in the total number of prospective buyers who make offers on EA properties, and in the net price (*i.e.*, the gross sale price less commissions) that the owners of those properties receive. Complaint Counsel's expert offered no empirical evidence on this point. Further, Dr. Eisenstadt's analysis, which demonstrates that EA sellers in the Realcomp service area have realized higher expected prices for their homes, provides good reason to believe that Complaint Counsel's requested relief would in fact reduce net consumer welfare.

VII.
CONCLUSION

Multiple listing services are broker cooperatives designed to promote efficiency in broker transactions. That is, the primary objective of an MLS is the facilitation of a sub-agency relationship between the listing broker and a cooperating broker. As such, the consumer benefits flowing from cooperation in the form of an MLS have been judicially recognized. *Derish v San Mateo-Burlington Bd. Of Realtors*, 136 Cal. App. 3d 534, 538-39; 186 Cal. Rptr. 390 (1982). An MLS is not a public utility and it is not a free information service for home sellers and buyers who choose to pursue transactions without a cooperating broker.

The Realcomp Policies promote the cooperative objective of the MLS, and are specifically tailored to serve it. Complaint Counsel's position is unsupported and detrimental to that cooperation, and therefore ultimately is detrimental to the public. Respondent respectfully submits that judgment should be entered in its favor and the Complaint should be dismissed.

Respectfully submitted,

July 31, 2007



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Certificate of Service

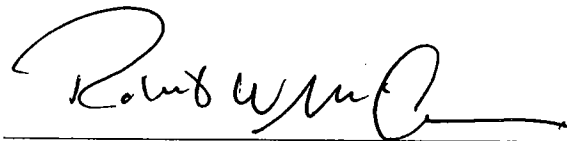
I hereby certify that on this 31st day of July, 2007, I caused an original and two paper copies of the foregoing Post-Trial Brief of Respondent to be filed with the Secretary of the Commission.

I also certify that on this same date I served a copy of the foregoing document by electronic mail and first class mail upon:

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

I also certify that I caused two paper copies of the foregoing document to be hand delivered to:

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



Robert W. McCann