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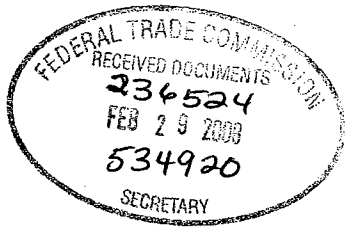
PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of	)	Docket No. 9320
REALCOMP II LTD.	)	

ANSWERING BRIEF OF RESPONDENT

Steven H. Lasher
Scott L. Mandel
FOSTER, SWIFT, COLLINS & SMITH, P.C.
313 S. Washington Square
Lansing, Michigan 48933
(517) 371-8100

Robert W. McCann
DRINKER BIDDLE & REATH, L.L.P.
1500 K Street, N.W.
Washington, D.C. 20005
(202) 842-8800

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Introduction

This case asks a straightforward question. Did Realcomp's establishment of the Website Policy and the Search Function Policy (the "Realcomp Policies") – different rules for different types of real estate listing "products" – create cognizable adverse competitive effects in a specific market (four counties of Southeast Michigan)? The evidence in this case demonstrated that there were no such effects. The case was properly dismissed.

Complaint Counsel implies that this case may be about other things, but those implications are inaccurate. This case is not about the wisdom or effects of similar rules in other markets investigated by the FTC. Nor can the issue in this case be decided by analogy to altogether different conduct undertaken by real estate brokers in other markets that came before courts in 1950 or 1971 or 1980. This case is not about determining public policy for the real estate industry. The complaint in this case concerns Southeast Michigan. The Initial Decision was properly based on the evidence from Southeast Michigan.

This case is not about competition between so-called traditional brokers and non-traditional (limited service or discount) brokers. The Realcomp Policies concern types of listings, not types of brokers. All participants in the Realcomp MLS are equally subject to the Realcomp Policies, and the evidence shows that both traditional and non-traditional brokers use both types of listings.

Having failed to persuade Chief Administrative Law Judge McGuire ("ALJ") that the Realcomp Policies diminished competition in Southeast Michigan, this appeal finds Complaint Counsel challenging the credibility of its own witnesses, and backpedaling to find

a viable legal argument – purporting to reveal the Realcomp Policies as disguised price restraints. These arguments cannot obscure the fact that Complaint Counsel failed to meet its burden. The ALJ's opinion should be sustained, and the complaint should be dismissed.

Factual Background

A. Respondent and Its Environment.

The fundamental facts concerning Respondent, types of listing agreements, the operation of the Realcomp MLS, and the Southeast Michigan real estate market are largely undisputed and reflected in the ALJ's findings of fact. *See* IDF 50-78; 132-281.

B. The Realcomp Policies

1. The Website Policy

As a service to its members, Realcomp transmits Realcomp MLS listing information to certain public websites. These include Realcomp's MoveInMichigan.com, 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 containing various information concerning the Detroit metropolitan area. (IDF 211; RPF ¶89(b)). Realcomp is under no legal obligation to transmit any listing information to any public website at any time.

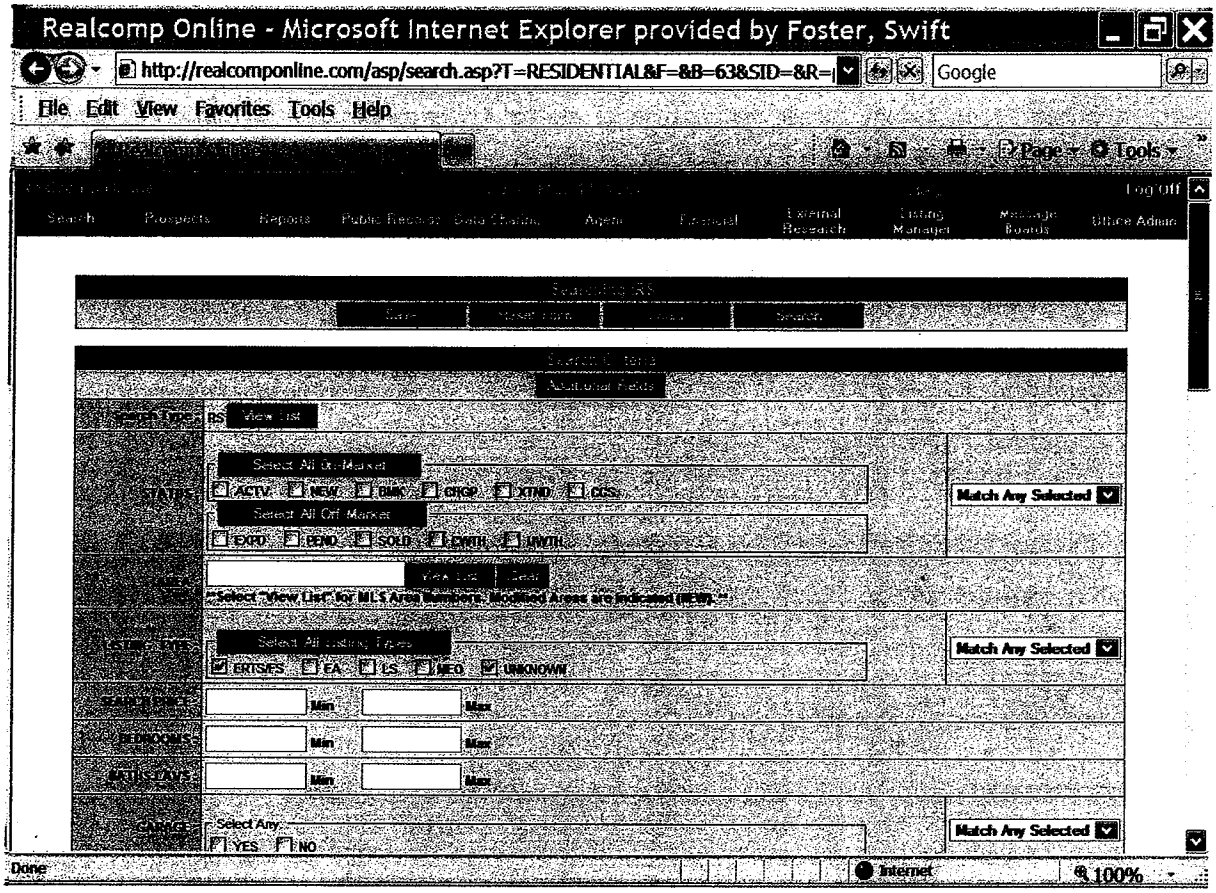
Realcomp also feeds listings to the individual websites of its member brokers. To receive those listing feeds, a broker must agree to permit his or her own listings to be transmitted to other member-broker websites. (RPF ¶89). This is referred to as the Internet Data Exchange ("IDX"). (Kage, Tr. 947-48).

In 2001, Realcomp adopted the "Website Policy," which prevents Exclusive Agency ("EA") listings from being sent to "Approved Websites", meaning Realtor.com, MoveInMichigan.com and the Internet Data Exchange ("IDX"). (IDF 349, 350, 355). Due to the fact that Realcomp did not require listing types to be disclosed by listing brokers until late in 2003, the Website 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 ("ERTS") and "Unknown" listings ("Search Function Policy"). (RPF ¶¶90-91, 124). Specifically, the search program allows a Realcomp member to search (by checking a box) any or all of the following listing types: ERTS, EA, MLS-Entry Only, and Unknown. Pursuant to the Search Function Policy, the ERTS and Unknown types were pre-selected for each search query. If a member wished to also search EA listings, for example, the member had to check the EA box on the search screen. Similarly, if the member did not want to search ERTS listings, the member had to de-select the ERTS box. In either event, the required action is a single click of the computer mouse. (RPF ¶¶125-126).[1] The ease of making that selection is shown from the screen seen by the user (RX 159) as depicted below:

[1] Members could individually change the initial defaults so that a different combination of listing types (or no listing type) would be pre-selected. (RPF ¶¶127-128).



In April, 2007, Realcomp repealed the Search Function Policy. (IDF 370). It also repealed the definitional requirement that ERTS listings be full-service brokerage agreements. (IDF 375; ID 92).

Argument

I. A wide range of evidence demonstrates that no adverse competitive effects are attributable to the Realcomp Policies.

A. The ALJ's assessments of credibility are entitled to deference.

The witnesses in this case were called predominantly by Complaint Counsel. As we discuss below, those witnesses provided some of the most compelling testimony *against* the position advanced by Complaint Counsel. Although Complaint Counsel protests that the ALJ did not give decisive weight to other testimony of the same witnesses favorable to its position,

the ALJ's observations of those witnesses and his assessment of their credibility is entitled to significant weight. *Universal Camera Corp* v *NLRB*, 340 U.S. 474, 496-97 (1951) (conclusions drawn by "an impartial, experienced examiner who has observed the witnesses and lived with the case" is given "significance" in assessing NLRB's contrary conclusions); *see also NLRB v. Michigan Conference of Teamsters Welfare Fund*, 13 F.3d 911, 917 (6th Cir. 1993) ("an ALJ's decision to discount a witness' testimony can rest solely on such considerations as the witness' affect or manner, rather than on the existence of contradictory testimony"); *Roadway Express, Inc. v NLRB*, 831 F.2d 1285, 1289 (6th Cir. 1987) ("this court ordinarily will not disturb credibility evaluations by an ALJ who observed the witnesses' demeanor"); *NLRB v. Horizons Hotel Corp*, 49 F.3d 795 (1st Cir. 1995) ("credibility determinations are disturbed only where it is apparent that the ALJ 'overstepped the bounds of reason'").

B. This case is not about competition between full service and discount brokers, and the evidence must be understood in its proper context.

Complaint Counsel's theory of impaired competition rests on the assumption that EA listings are synonymous with discount brokers and ERTS listings are synonymous with more costly traditional brokers. This premise is false.

"Discount" brokers in Southeast Michigan offer discounted (flat fee) ERTS listings (in addition to EA listings). (RPF ¶114). Flat fee ERTS listings appear as ERTS listings on the Realcomp MLS. (RPF ¶114). In the Realcomp service area, discount brokers use ERTS listing contracts with great frequency, and on average at twice the rate of EA contracts. This ratio is about four times higher than in nearby Washtenaw County. (RCCPF ¶190).

testimony of those discount brokers, as well as other record evidence, belies the theory that the Realcomp Policies have had a significant effect on competition. As the ALJ correctly observed, even in the face of a depressed housing market, the picture that finally emerges from their testimony is one of prosperity and growth. (IDF 464-468; ID 98-99).[3]

1. The Realcomp Policies have not eliminated consumer choice.

Complaint Counsel argues that the Realcomp Policies prevent brokers from providing a product that consumers want (defined as a bundle of an EA listing with "full exposure") and restrict competition by reducing the package of services available in the market, and further argues that this fact renders the Realcomp Policies anticompetitive on their face. (CCBr. at 26, 28-29). This asserted basis for labeling the Realcomp Policies facially anticompetitive is not supported by the facts or law.[4] First, there is no expert testimony in this case to support a finding that a bundle of services consisting of EA listings plus "exposure" is a product distinct from its components. Complaint Counsel's economic expert, Darrell Williams, Ph.D., testified to an input product market consisting (broadly) of multiple listings services provided to real estate brokers, but he did not testify that some or any of those services only had value to either brokers or consumers as a package, or that they had more value as a full package.

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[3] Although Complaint Counsel's brief argues in the broadest of generalizations, we are compelled to assume that Complaint Counsel selected its witnesses carefully and that, if other brokers had better stories, their stories would be in evidence.

[4] Complaint Counsel reads *FTC v. Indiana Federation of Dentists*, 476 U.S. 459 as facially condemning any agreement to withhold a service that consumers desire. (CCBr. at 28-29, 35). *Indiana Federation* is a well-known exposition of the truncated rule of reason, but it provides an extremely poor analogy to the facts of this case. Central to every element of *Indiana Federation* was the naked character of the restraint. The Indiana Federation of Dentists had no other purpose than to organize and enforce the boycott of dental insurance companies. *See* 476 U.S. at 449-51, 454. In contrast, multiple listing services like Realcomp are joint ventures that are considered procompetitive, *e.g.*, *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1356 (5th Cir. 1980), and may impose restrictions related to the efficient functioning of the venture, *e.g.*, *Reifert v. South Central Wisconsin MLS*, 450 F.3d 312, 321 (7th Cir. 2006).

Moreover, as the ALJ observed (ID 96) even if one were to assume that this "package" of services is distinctive and valued by consumers, there is substantial evidence in this case that consumers are able to acquire the package if they choose to do so. Specifically:

- Brokers can, and do, sell services "a al carte." (RPF ¶114).
- Brokers obtain "exposure" for their clients on significant Internet sites by dual-listing and unbundling publication to major websites. (RPF ¶106).
- Brokers can obtain "exposure" for their clients by joining Realcomp's data sharing partners. (RPF ¶¶102, 119-120).
- Discount brokers in the Realcomp service area sell fixed fee ERTS listings that provide all of the benefits (including "exposure") of traditional, more expensive, ERTS listings for as little as $200 additional to the cost of purchasing an EA listing. (RPF ¶¶114(a), 115).

a. Complaint Counsel's argument affirms the existence of a free-rider problem.

By arguing that home sellers using EA contracts, who by definition compete with Realcomp cooperating brokers to find a buyer for their homes (IDF 608-611; ID 121), want the same advertising services ("exposure") from Realcomp afforded to ERTS listings (CCBr. at 28), Complaint Counsel validates the free-riding concern that motivated the Realcomp Policies. *See* §III.A, below.

b. Flat-fee ERTS listings are prevalent in Southeast Michigan.

Flat fee ERTS listings are available in the Realcomp Service Area. (RCCPF ¶1242) and in fact appear to be more prevalent in the Realcomp Service Area than elsewhere (RPF ¶115). A flat fee ERTS listing requires an additional payment of as little as $200 to the listing broker over and above the price of an EA listing purchased from the same discount broker. ((RPF ¶114; RCCPF ¶¶613, 1146, 1200, 1228). For example, Mr. Kermath, a discount broker

who testified for Complaint Counsel, advertises that for a flat-fee of $699, a seller can have an ERTS listing that reaches the Approved Websites at issue here: the IDX, Realtor.com and MoveInMichigan.com. (RCCPF ¶1146). For comparison, Mr. Kermath offers EA listings for $499. (RPF ¶114(a); RX 1).

Further, Realcomp has eliminated its "minimum service requirement" for ERTS listings. (RCCPF ¶¶36, 829, 836). As a result, brokers can offer limited service ERTS listings and receive all the promotional benefits of full-service ERTS listings on the Realcomp MLS. (*Id.*).

c. Nonetheless, the Realcomp Policies have not excluded EA listings from public exposure.

Based on record evidence, the ALJ concluded that, by placing their EA listings into the MLS, which Realcomp has always permitted. (RPF ¶99), limited service brokers reach 80% of all buyers. (IDF 431; ID100; RPF ¶101). If one combines that with also placing those EA Listings onto Realtor.com, which can be done by dual listing the property in another MLS for a nominal charge, (RPF ¶102) the combination reaches 90% of all buyers. (IDF 435; ID 100; RPF ¶101).

Complaint Counsel disputes the ALJ's reliance on these statistics (CCBr. at 30-31), notwithstanding that they come from Complaint Counsel's own witnesses. Those witnesses are market participants whom Complaint Counsel presented to the court as the parties most directly affected by the Realcomp Policies.

(i) The MLS is by far the most important means of disseminating listing information.

The estimates of the significance of the MLS accepted by the ALJ are fully consistent with the entirety of the testimony of Complaint Counsel's witnesses. Mr. Hepp 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 any other home selling tool. (RPF ¶98 (a)-(c)). Similarly, Wayne Aronson testified that the MLS is a "considerably more effective" means of promoting residential real estate in Michigan than other websites, including Realtor.com. (RPF ¶98 (d)). Mr. Mincy testified that the MLS reaches 80 percent of all buyers. (Mincy, Tr. 449-450). His website states that the MLS and Realtor.com in combination reach up to 90% of all buyers. (RX 109). Likewise, Mr. Kermath acknowledged that his website tells prospective customers that the MLS and Realtor.com in combination are responsible for 85% to 90% of home sales. (Kermath, Tr. 795; RX 4; RX 5). Mr. Kermath represents to the public that while he has better success with ERTS listings, he nonetheless has "great success" with limited service listings. (RCCPF ¶636).

This testimony is significant because only brokers have access to the MLS. A prospective buyer, sitting at a home computer, does not. The Realcomp MLS is open to discount brokers and traditional brokers alike. (RPF ¶35). Discount 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 Website Policy.

(ii) Realcomp does not control access to Realtor.com.

To the extent discount brokers wish to place their listings on Realtor.com, they can do so (and they in fact do so) by "dual-listing" the property with another MLS. (IDF 436). The costs of dual-listing are nominal, and the ALJ so found. (IDF 442-443).

Dual-listing is a common practice among discount brokerage firms. (IDF 436). 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 discount broker witnesses in this case use the Ann Arbor, Shiawassee and Flint MLSs to get their Exclusive Agency Listings on Realtor.com. (RPF ¶107). Brokers 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).

The costs of dual listing are not significant. The MLSs used by discount brokers to bypass Realcomp charge membership fees (dues) that are comparable to those charged by Realcomp. (RPF ¶109). Even those modest dues payments are avoidable, because brokers can join one of the seven MLSs that have data sharing arrangements with Realcomp, and thereby have their listings posted on the Realcomp MLS without joining Realcomp. (RPF ¶¶102-104).

Any labor cost associated with dual listing is nominal and recoverable. (IDF 443-444). For example, Mr. Mincy dual-lists on the Shiawassee MLS. (RPF ¶107) He charges his clients an 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 discount brokers to charge these additional fees. (RPF ¶113).

Mr. Mincy pays his assistant $10 per hour to input the dual listings.[5] (RPF ¶110). 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 actually makes a profit from dual listing his properties.[6]

(iii) Other public websites offer an expanding avenue for "exposure."

Websites other than the "Approved Websites" are growing in significance. Complaint Counsel attempts to discredit this testimony (CCBr. at 33-34) without acknowledging that it comes from Complaint Counsel's own witnesses.

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). 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). In light of their growing popularity, those other websites are an economically viable and effective channel for reaching prospective buyers. (RPF ¶119).

Complaint Counsel's discount brokers testified that other publicly available websites for Exclusive Agents, such as Google and Trulia are gaining momentum. (RPF ¶121). Complaint Counsel's expert, Mr. Murray, testified that Google presently has a site that is open

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[5] The testimony indicated that exclusive agents pay anywhere from $7.00 to $20.00 per hour for data entry. (RPF ¶110). In fact, 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)).

[6] This belies Mr. Mincy's testimony that dual-listing on another MLS (in addition to Realcomp) is an inconvenience and an additional cost. (RPF ¶110 (b)).

to Exclusive Agency Listings, and there is no charge for putting a listing into Google. He acknowledged that Google has publicly announced that it intends to build as large and robust a real estate site as possible. (Murray, Tr. 259-260). Mr. 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)).[7]

Mr. Moody believes Google Base will be more important than the IDX in the near future, as the ALJ observed. (IDF 451). (Complaint Counsel calls this statement the "admitted speculation of a non-broker," (CCBr. at 34), notwithstanding that Mr. Moody is Complaint Counsel's own witness, whose testimony Complaint Counsel cites affirmatively in the same paragraph.)[8] Mr. Moody further testified that MLSs across Michigan are beginning to put their data on to Google Base and Trulia. (RPF ¶121 (d)-(e)).

2. Realcomp Policies have not impeded the ability of discount brokers to compete.

Complaint Counsel argues in the broadest of generalizations that the Realcomp Policies forced discount brokers from the market, deterred the entry of other brokers, and generally impaired their ability to compete. (CCBr. at 19). But the thin testimony on these points provides no credible support for such generalizations.

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[7] The testimony of Complaint Counsel's witnesses undercuts Complaint Counsel's contention that there is no evidence of consumer demand for these services. (CCBr. at 33).

[8] Mr. Moody's opinion has weight in this regard because 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)).

a. There is no credible evidence that discount brokers were forced to exit the market.

No discount broker testified that he or she was forced from the market by the Realcomp Policies, except Wayne Aronson of YourIgloo, Inc., an EA real estate company located in Florida.[9] 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 actually continues to do a substantial referral business in Michigan, and receives compensation for each referral. (RPF ¶166(e)(6)).

More significantly, Mr. Aronson and his Michigan-based broker, Anita Groggins, testified that material problems, having nothing to do with Realcomp, plagued YourIgloo's operations. 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." (RPF ¶166(e)(2)). YourIgloo's operations also were impaired by bad working relations between the company's management and Ms. Groggins, its on-site broker in Michigan. (RPF ¶166 (e)).

Further, contrary to Mr. Aronson's statements concerning Realcomp, YourIgloo told MiRealSource (a different MLS 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,

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[9] Thus there is categorically no support for Complaint Counsel's persistent hyperbolic characterization of, *e.g.*, the "few discount brokers who have remained in Southeast Michigan." (CCBr. at 18). Complaint Counsel offered **no** evidence at trial concerning the market shares of discount brokers. To the contrary, the discount brokers who testified in this case admit that their businesses are growing. (RPF ¶163).

YourIgloo has withdrawn from local operations in other states besides Michigan due to similar business problems. (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, unlike Mr. Aronson's competitors who testified that their businesses are thriving, YourIgloo suffered from management problems that made it an ineffective competitor. (ID 99).

b. There is no credible evidence that the Realcomp Policies deterred market entry.

The only discount broker claiming to have been deterred from entering Southeastern Michigan due to Realcomp's Policies, and the only witness so cited by Complaint Counsel, was Albert Hepp. (CCPF ¶ 972). Yet, Mr. Hepp has done business in Southeast Michigan since 2004 (when the Realcomp Policies became effective) and acknowledges that his Exclusive Agency business in that area has grown 10% to 35% since 2004. (RPF ¶163(a)).

c. Discount brokers compete successfully in Southeast Michigan.

All of the discount brokers who testified for Complaint Counsel admitted that their businesses are growing in the face of a difficult housing market. Illustrative is Mr. Mincy, who testified that his business has grown since it began in 2004, grew 30% between 2005 and 2006, 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 his business has grown 10% to 35% in Southeastern Michigan since 2004. (RPF ¶163 (a)). Mr. Kermath testified that AmeriSell has grown substantially since 2003, with over $46 million in listings – more listings statewide than any

other company. (RPF ¶163 (b)). Mr. Moody testified that Greater Michigan Realty has done very well and is growing. (RPF ¶163(d)). Ms. Moody confirmed that Greater Michigan had approximately 600 listings in 2006, (D. Moody, Tr. 560), compared to an industry average of 25, and generated $23,275,000 in homes sales in its first year of operation. (RPF ¶163(d)).

This testimony is contrary to Complaint Counsel's theory that discount brokers have been competitively impaired by the Realcomp Policies. If the Realcomp Policies had hindered the ability of discount brokers to offer EA and limited service brokerage contracts in the manner portrayed by Complaint Counsel, one would expect brokers in the market to testify that their revenues and profits have declined, but they did not. 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).

Complaint Counsel would marginalize this testimony by arguing that even if some brokers are doing well, it does not mean that all brokers are doing well. (CCBr. at 46). Certainly, the adverse economy of Southeast Michigan has had an effect on the livelihoods of ***all*** real estate brokers, and Realcomp's membership indeed has declined in recent years. (RPF ¶¶82-83). However, no trial witness presented by Complaint Counsel was able, based on first hand knowledge, to relate the Realcomp Policies to any decline in the prospects of his or her business. Indeed, all of the testimony was to the contrary.

Complaint Counsel further avers that the contrary testimony of its own witnesses should be ignored because much of the growth they have experienced is due to business outside of Southeast Michigan. (CCBr. at 46). Again, the record does not support this assertion. No broker testified specifically to this effect. Moreover, the brokers who testified

that they are doing well predominantly conduct their businesses in Southeast Michigan. Mr. Hepp expressly testified as to his company's growth in Southeast Michigan. (Hepp, Tr. 699). Sixty-five percent of Mr. Kermath's listings are in Realcomp, and he is the #2 listing agent in Oakland County (Kermath, Tr. 741, 794; RX 5). Ms. Moody confirmed that 50 to 60 percent of Greater Michigan Realty's listings in 2006 were in Oakland, Wayne, Macomb and Livingston Counties (D. Moody, Tr. 560). Mr. Mincy testified that he is expanding his business in Southeast Michigan and is increasing his advertising in that part of the state. (Mincy, Tr. 429-30).

d. The record shows that many factors affect the use of discount brokers and EA listings.

The evidence shows that discount brokers continue to do business successfully within the Realcomp Service Area, even though sellers (and all types of brokers) of Michigan real estate are enduring a difficult period due to the distressed economy of Southeast Michigan. To the extent discount brokers face challenges, it is not from the Realcomp Policies, but from promoting a business model based on a reduced level of services in a faltering housing market.

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 at present for *any* broker 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 leaving the business because of these conditions. (RPF ¶¶82-83).

Discount brokers sell a different "product" than traditional brokers. To that point, discount brokers testified that agents who offer EA listings in Southeastern Michigan compete

with other agents offering EA listings. (RPF ¶165). Mr. Sweeney, a traditional broker, agreed, stating that traditional agents in Southeastern Michigan do not perceive discount brokers to be a threat. (RPF ¶179). Mr. Sweeney explained that EA brokers are not considered as competitors to ERTS brokers as they appeal to a different market segment altogether. (Sweeney, Tr. 1326).

In the face of a difficult economy, EA listings have not made significant inroads in Southeastern Michigan. (RPF ¶179). But Complaint Counsel's expert, Mr. Murray, testified that brokers offering EA listings are not growing nationally either. (RPF ¶180). He noted that brokers 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. (IDF 89). 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 lower, flat-fee compensation prevalent for alternative brokerages, this statistic speaks volumes about the inability of discount brokers to meet seller expectations generally, let alone to meet expectations in a depressed real estate market.

The testifying discount brokers confirmed that they do not provide a significant level of personal service. Mr. Hepp does not meet any Michigan customers face-to-face. (IDF 89; RPF ¶181 (a)). Mr. Kermath likewise testified that he "rarely" meets customers face-to-face. (IDF 89; RPF ¶181(b)). Ms. Moody testified that, generally, she does not meet with her customers on a daily basis or have personal contact with them. (IDF 89; RPF ¶181(c)).

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.)

Mr. Murray (Complaint Counsel's expert) described national statistics that are consistent with these observations. Nationally, EA listings grew significantly between 2002 and 2005, from 2% to 15% of listings, which Mr. Murray attributed in considerable part to a "hot" real estate market. (RPF ¶168). However, between 2005 and 2006, the percentage of EA listings fell from 15% to 8%, which Mr. Murray attributed to a cooling of the housing market marked by a decrease in sales and increase in inventory. (RPF ¶169). (Complaint Counsel attempts to obscure this cogent observation as the testimony of "one witness" – not acknowledging that Mr. Murray is Complaint Counsel's chosen expert.) Mr. Murray concluded that alternative brokerage models are not getting the "traction" that the "industry buzz" would suggest. (RPF ¶171).

Mr. 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. Respondent's economic expert, David Eisenstadt, Ph.D., reviewed those 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).

e. "Contrary" evidence cited by Complaint Counsel is not persuasive.

Complaint Counsel argues that no full service broker or Realcomp Governor testified that they use EA listings, which supposedly demonstrates that the Realcomp Policies were effective in restricting competition from discount brokers. (CCBr. at 29). That syllogism is inconsistent with the record, which shows one full service broker declining to sell EA listings for business reasons (Sweeney, Tr. 1322), discount brokers stating that they compete in Southeastern Michigan with other discount brokers, not full service brokers (RPF ¶165), and Dr. Eisenstadt's finding that traditional brokers account for as much as 60% of the EA listings on the Realcomp MLS. (RCCPF ¶190). Thus, no adverse inference can be drawn from the fact that some brokers cited by Complaint Counsel prefer one business model over another.

Complaint Counsel also argues that cooperating brokers viewed and e-mailed EA listings with less frequency than ERTS listings. From this, Complaint Counsel infers that the Realcomp Search Function Policy was effective in limiting "exposure" of EA listings. (CCBr. at 15, 34). Although the statistics cited by Complaint Counsel are correct, the inference is not. The limited service business model is, by definition, one of providing less than full services to home sellers. Some limited service brokers provide no assistance with marketing or negotiation. EA listings involve the inherent possibility that the home seller will elect to find a buyer without the services of a cooperating broker. The record contains ample testimony showing that such factors can discourage brokers from pursuing EA listings. (Kage, Tr. 1038 (home sellers impose on cooperating agents to provide services that their limited service listing broker does not provide); CX 43 (Hardy, Dep. at 127-28) (EA listings impose " a significant amount of work" on the cooperating broker); CX 421 (Whitehouse,

Dep. at 114-15) (risk of non-compensation); Sweeney, Tr. 1358 (EA listings burdensome to cooperating broker)). These observations indicate that one cannot confidently attribute cooperating brokers' lack of enthusiasm for EA listings to the Search Function Policy.

3. The expert evidence on which Complaint Counsel seeks to rely is critically flawed.

The ALJ correctly gave little weight to the analyses of Complaint Counsel's expert, Dr. Williams, finding them methodologically flawed and unreliable. (IDF 511; ID 105). Respondent's economic expert, Dr. Eisenstadt presented contradictory findings and testified specifically to the deficiencies in Dr. Williams' analysis. Dr. Williams failed to rebut Dr. Eisenstadt's testimony.

a. Dr. Williams' time series analysis is unsound.

Judge McGuire was not mistaken in rejecting Dr. Williams' time series analysis. Dr. Williams claimed he 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 from approximately 1.5% to approximately 0.7%, between January, 2004 and September, 2006. (RPF ¶196). He claimed that using 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 an incorrect assumption.

Dr. Williams admitted that he is not a real estate expert. (RPF ¶197). Respondent's witness, Kelly Sweeney, an experienced broker in Southeast Michigan since 1975 (Sweeney, Tr. 1302-1304), testified that in a buyers' market, 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). This is consistent with testimony offered by Mr. Murray concerning the declining use of EA listings nationally. (RPF ¶169).

Thus, in a distressed market such as Southeast Michigan, one *indeed* would expect the relative percentage of EA listings to decline over time. (ID 106). Because Dr. Williams failed to take into account the likely impact of market conditions, his time series analysis is not reliable evidence that the Realcomp Policies had any effect on the percentage of EA listings.

b. Dr. Williams' benchmark comparisons are likewise flawed.

Two of Dr. Williams' analyses relied 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").

(i) Dr. Williams' methodology for selecting the Control MSAs was unsound.

Dr. Williams selected six Control MLSs (Charlotte, Dayton, Denver, Memphis, Toledo, and Wichita) on the basis of seven economic and demographic characteristics that he believes are "likely to affect the level of non-ERTS listings". (RPF ¶199). He selected the Control MLSs by ranking his possible choices according to their respective "closeness" to the Detroit MSA across 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 explained, the problems with this methodology are significant. Dr. Williams never explained why any of his criteria (*i.e.*, the economic and demographic characteristics) would 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 potential effect on the share of EA listings, a condition which is both implausible and counter to the facts. (RPF ¶201).

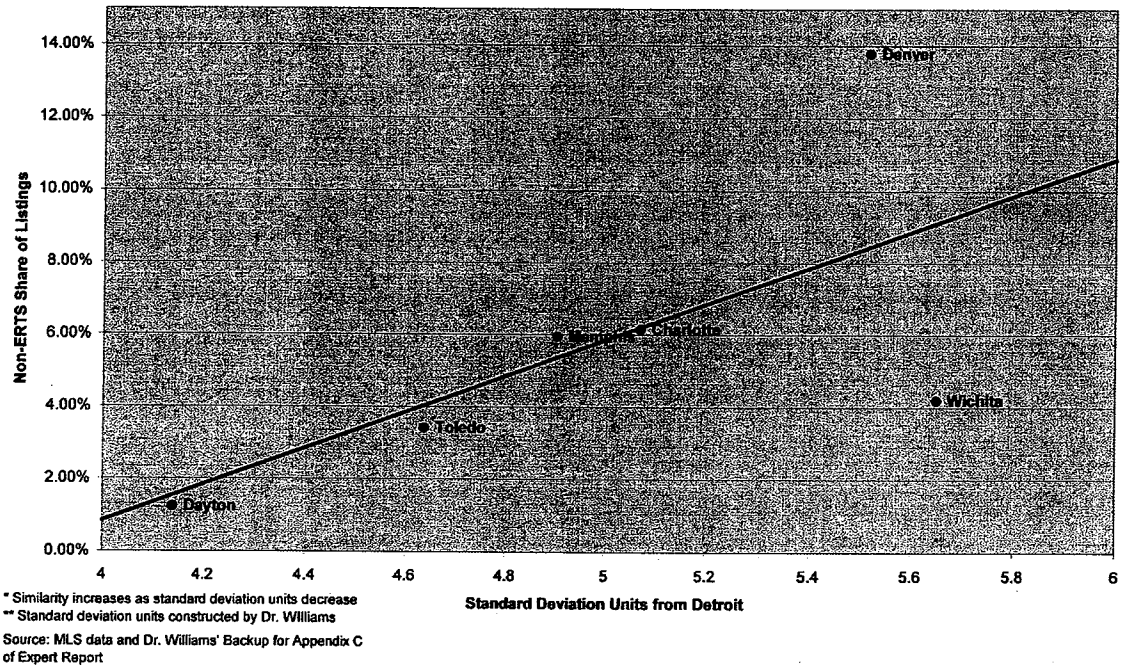
The list of potential choices from which Dr. Williams selected his Control MSAs omits cities (*e.g.*, Pittsburgh) that intuitively might be more similar to Detroit in terms of being Midwestern industrial areas than, for example Charlotte or Memphis. (RPF ¶202).

The flaws of Dr. Williams' comparisons are 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, (RPF ¶ 148(b)) 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 to be very similar. Instead, the wide variation demonstrates that

Dr. Williams did not account for the factors that actually determine EA shares in the Control MSAs. (RPF ¶204).[10]

This conclusion is dramatically illustrated by RX 161-Page 36, which depicts the strong positive association between a Control MSA's similarity to Detroit and its EA share. MSAs that are statistically "closest" to the Detroit MSA (by Dr. Williams' criteria) have lower EA shares than control MSAs that are statistically more distant. (RPF ¶206).

Figure I
Non-ERTS Shares of Control MLSs and Similarity to Detroit



RX 161-Page 36

[10] Significant differences exist among the six control MSAs even with respect to the different economic and demographic characteristics that Dr. Williams used. (RPF ¶205).

(ii) The selection of the Restriction MSAs was arbitrary.

In addition to Realcomp, Dr. Williams' group of Restriction MLSs included Green Bay, Williamsburg, and Boulder, all of which are much smaller urban areas than Detroit.[11] Significantly, the selection of this grouping was not made by Dr. Williams, but by FTC staff, and Dr. Williams could not describe any criteria for their selection other than the availability of data. (RPF ¶207). But 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 would need to be comparable as well. Dr. Williams' failure to do so means that he attributed differences in EA shares between Control MSAs and Restriction MSAs to the restrictions when those differences could instead be due to variations in his economic and demographic factors. (RPF ¶208).

c. Dr. Williams' resulting "benchmark" comparisons are not probative.

Dr. Williams attempted to compare the prevalence of EA listings in Control MSAs and Restriction MSAs over time. The purported difference in EA shares between the two types of MLSs ranged between 5 and 6 percentage points. (RPF ¶¶209-210). The ALJ correctly found this evidence had no probative value. (ID109).

As Dr. Williams explained, his calculations of the average EA percentages for the Control MSAs and the Restriction MSAs were weighted based on the number of listings. This means that 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

[11] Dr. Williams' 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. Green Bay-Appleton and Boulder 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).

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).

As the ALJ found, the outcome of Dr. Williams' analysis was pre-ordained. (ID 109). 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 to Detroit but having the smallest EA share among the Control MSAs. (RPF ¶213).

Thus, as the ALJ observed, "It is wholly unsurprising that Dr. Williams was able to conclude that the Control Group MSAs had a higher percentage of EA listings." (ID 109). Dr. Williams' analysis says nothing 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 was not a scientific method.

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. 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).

Complaint Counsel attempts to argue (CCBr. at 52) that Dr. Williams' comparisons are nonetheless valid for two reasons. One is that the unweighted average EA share of the

Control MLSs is also higher than that of Realcomp. But as noted above and as illustrated by RX 161-Page 36 (reproduced above), the Control MLSs vary widely in terms of "closeness" to the Detroit MSA using Dr. Williams' criteria. Thus, whether weighted or unweighted, the comparison of averages to Realcomp (the Detroit MSA) has no informative value.

Complaint Counsel also argues (CCBr. at 52) that low EA listing shares of the Restriction MLSs confirms that the Realcomp Policies accounted for the small EA share on the Realcomp MLS, and argues that the fact that the Restriction MLS cities are dissimilar from Detroit bolsters the conclusion. This is nothing more than Complaint Counsel's speculation. Dr. Williams did not perform an econometric analysis of the Restriction MLSs, and did not testify to this point. Moreover, if the "closeness" factors relied upon by Dr. Williams mattered for purposes of comparing Realcomp to the Control MLSs (as Dr. Williams testified), then they must also matter for purposes of drawing a comparison among the Restriction MLSs, and Complaint Counsel is now contradicting its own expert. Further, the only Restriction MSA (Williamsburg) that appears in Dr. Williams' "closeness" rankings was not only dissimilar to Detroit but was also dissimilar to the Control MSAs.[12] This more logically suggests, consistent with the ALJ's criticism of Dr. Williams' methodology, that economic and demographic characteristics explain low EA listing shares in the Restriction MLSs, rather than the existence of restrictions.

[12] The six Control MLSs ranked 2nd, 3rd, 6th, 7th, 9th, and 10th in Dr. Williams' array. Williamsburg ranked 28th.

d. Dr. Williams' regression analyses were methodologically unsound.

Dr. Williams also relied on statistical regression analyses in an attempt to estimate the effects of the Realcomp Policies. Dr. Williams believed that his results showed that, all else equal, 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 predicted 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 were appropriately discredited by the ALJ. (ID 110-112).

As discussed above, in evaluating and selecting the Control MSAs, Dr. Williams identified eight economic and demographic factors that he believed are likely to affect home sellers' choice listing contract type (*i.e.*, EA or ERTS) (RPF ¶219), although he never revealed the bases for his beliefs. Nonetheless, Dr. Williams did not actually use any of those eight factors as independent variables in his regression 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 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 found that the eight factors varied dramatically from MSA to MSA. (RPF ¶221). Consequently, Dr. Williams' analysis attributed to the existence of MLS restrictions (what he calls the "RULE" variable) outcomes that are affected by – and could be attributable to – economic and demographic

variables. (RPF ¶222). In light of this omission, Dr. Williams' regression results were not reliable and did not establish that the Realcomp Policies adversely affected the use of EA contracts in the Realcomp service area.[13]

e. Dr. Eisenstadt demonstrated no adverse effect when he corrected Dr. Williams' errors.

Dr. Eisenstadt re-estimated Dr. Williams' analysis, using the same regression model but adding separate independent variables for each of the eight economic and demographic factors that Dr. Williams identified as relevant to the prevalence of EA listings (but which he omitted from his analysis), as well as several other economic and demographic factors that Dr. Eisenstadt identified as likely to affect contract choice both across and within the MSAs. (RPF ¶¶226-227). Dr. Eisenstadt's re-estimation demonstrated that additional economic and demographic characteristics should be included as independent variables in the regression, because a high number of them (thirteen) proved to be statistically significant at the generally accepted level of confidence. (RPF ¶228).

When the other relevant variables 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 the difference between the percentage of EA listings in the Realcomp service area, and the

[13] Dr. Williams' analysis did include some housing characteristics as independent variables in one equation. 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 purported to measure from his analysis were incorrectly attributed to the existence of MLS restrictions. As Dr. Eisenstadt explained, Dr. Williams' regression analysis was 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 results were simply a more convoluted restatement of his "benchmark" analysis. (RPF ¶225).

average EA share for Control MSAs was more likely due to economic and demographic differences than to the Realcomp Policies. (RPF ¶229).

Dr. Eisenstadt then estimated the same 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 contracts 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 demonstrated beyond doubt that Dr. Williams' analyses were unreliable and could not support Complaint Counsel's burden of proving anticompetitive effects from the Realcomp Policies. (ID 113).

f. Dr. Williams' analysis, even if it were valid, did not directly estimate harm to consumers.

Dr. Williams attempted to measure only the purported effect of the Realcomp Policies on the prevalence of EA listings. As Dr. Eisenstadt explained, and the ALJ found, Dr. Williams' analysis thus provided only an indirect test for anticompetitive effect. (IDF 572). That is, Dr. Williams surmised from his (unreliable) estimate of a reduced prevalence of EA listings that consumers would pay higher prices for brokerage services, but Dr. Williams did not specifically attempt to estimate (statistically) any such price effects. 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 the 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 would be 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).

Further, as discussed above, the testimony of the discount brokers in this case was inconsistent with the inferences that Dr. Williams sought to draw from his flawed regression analyses.

g. Dr. Williams' efforts to rehabilitate his work were unsuccessful.

In rebuttal to Dr. Eisenstadt's critique, Dr. Williams re-ran his statistical analyses adding some – but not all – of the economic and demographic variables that Dr. Eisenstadt believed were significant. Dr. Williams testified that those results also showed adverse effects on EA listings. (D. Williams, Tr. 1678-79). The fact that Dr. Williams used some – but not all – of Dr. Eisenstadt's additional variables accounted for the different result. Dr. Eisenstadt testified as to Dr. Williams' omissions and explained the reasons for including all of the additional variables in the analysis. (RCCPF ¶1101).[14]

More specifically, Dr. Williams did not think it necessary to include certain economic and demographic variables at both the MSA and zip code levels, which he deemed "double-counting." (Williams, Tr. 1702-03). However, Dr. Eisenstadt explained that those factors should be measured at both the county or zip code level, as well as at the MSA level, "because

[14] Complaint Counsel argues that there is no evidence in the record that buyers actually consider any of these variables. (CCBr. at 54 n. 20). But these characteristics were first identified by Complaint Counsel's own expert, Dr. Williams as "likely to affect the level of non-ERTS listings." (RPF ¶199).

there could be metropolitan-wide effects that would affect a seller's decision as to what type of listing contract to choose, and there could be more localized effects that you would want to also control for in the analysis." (RCCPF ¶1101). He went on to explain that controlling for the same factor at both the MSA and zip code level is not "double counting" (as Dr. Williams opined): "You are not measuring the same variable twice as I just explained. There are both neighborhood characteristics of buyers and sellers that you want to control for, and there may be metropolitan-wide characteristics of buyers and sellers that you want to control for in the analysis. It's not completely duplicative." (RCCPF ¶1101).[15] The ALJ found this testimony credible in discounting Dr. Williams' attempted rehabilitation of his regression results. (ID 113).

h. The ALJ properly ignored Dr. Williams' testimony regarding "multicollinearity."

Complaint Counsel, far from extolling the validity of its expert's regression analyses, primarily asserts that Judge McGuire erred in failing to accept Dr. Williams' effort to discredit Dr. Eisenstadt on the basis of a statistical issue called "multicollinearity." Complaint Counsel even suggests that Judge McGuire was "mindless" in this regard. (CCBr. at 54-55). However, Judge McGuire correctly found this concern to be inapplicable in light of Dr. Eisenstadt's explanation, as described in the preceding section. (ID 113). Moreover, Dr. Williams' testimony on this point was confused, inconsistent, unreliable, and emblematic of his overall credibility.

[15] Dr. Williams also measured some variables at two levels, e.g., the percentage change in one-year and five-year housing price index, as well as house size measured by the number of bedrooms and square footage. (RCCPF ¶1100).

During his direct examination, Dr. Williams testified as to demonstrative exhibits DX 12-3 and 12-4, taken from his Surrebuttal Report, CX 560, asserting that the table graphs in those demonstrative exhibits directly indicated a high degree of collinearity among several variables in Dr. Eisenstadt's statistical analysis because a "high correlation" existed between a "large number of *variables* and the rule variable."[16] In this regard, Dr. Williams identified Dr. Peter Kennedy's *A Guide to Econometrics* as an "authoritative text" discussing the concept of collinearity and the principles upon which he based his opinion regarding the purported multicollinearity.[17]

Dr. Williams' direct testimony concerning the problems associated with "collinearity" was premised on the proposition that the table graph in DX 12-3, as Dr. Williams' labeled heading of it indicated,[18] depicted correlation (and collinearity) among *variables*.[19] He reiterated this proposition during cross-examination, stating, "Each of these correlations is between the rule variable and the *variable* that is represented by the bar."[20]

Subsequently, however, Dr. Williams admitted that DX 12-3 (CX 560) was not in fact what he had represented it to be. During redirect, Dr. Williams testified that the title of the

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[16] D. Williams, Tr. at 1674-76, June 28, 2007 ("[W]hat we're concerned about is whether or not there is a high correlation between two *variables* that are being used in the statistical analysis, because if that occurs, you cannot disentangle the separate effects of those two variables. . . . [W]hat [DX 12-3] shows us is that there is a large number of *variables* depicted by the red bars there which have a very high correlation with the rule variable.") (emphasis added).

[17] D. Williams, Tr. at 1670-73; *see also* CX 560 at 9-10, nn.15, 17. The Kennedy text was the only authoritative text on the issue of multicollinearity offered by Dr. Williams, and the portions of that text read into evidence by Dr. Williams concerned acceptable thresholds for collinearity among *variables*, not – as we discuss herein – collinearity among regression coefficients.

[18] "Correlation Between Rule Variable and Other Explanatory Variables." CX 560, Exhibits 1(a), 1(b).

[19] D. Williams, Tr. at 1673-78; *see also, e.g.,* CX 560 at 9 & n.15 ("The problem of high correlation between the independent variables is referred to as multicollinearity.") (citing Peter Kennedy, *A Guide to Econometrics* (3rd. ed.), p. 177.

[20] D. Williams, Tr. at 1720 (emphasis added).

table graph in DX 12-3 should be changed from "Correlation Between Rule Variable and Other Explanatory Variables" to "The Correlation Between *the Coefficient Estimates* for the Rule Variable and *Coefficients for* Other Explanatory Variables."[21] Significantly, Dr. Williams failed to either explain or retract his earlier testimony that the significance of any correlation between *coefficients* was either none at all, or, alternatively, beyond his ken:

> Q. And if I told you just simply to assume that that's not what this is, that what was run here, probably inadvertently, was a correlation matrix of the coefficients, not of the rule variable versus other explanatory variables but only of the coefficients ...?
>
> A. Well, I'm not sure what it means to run a correlation of the coefficients. There's only one coefficient for every variable.
>
> Q. So I just want to make sure I understand your testimony. Are you familiar with the concept of running a correlation matrix of the coefficients in a context like this where you've got a number of explanatory variables and you're comparing it with something like the rule? ...
>
> A. I would generally run a correlation between the underlying data or explanatory variables, so no, I wouldn't do it that way. But I'm not -- yeah. I really don't know what you're referring to.
>
> Q. Okay. You don't know what I'm referring to. If I told you that what this is a correlation of the coefficients, not of the rule versus the explanatory variables, would that ... affect your opinions as it relates to the multicollinearity issue?
>
> A. Again, I'm not clear what that concept means, so I'd have to be more familiar with what exactly you're talking about.

D. Williams, Tr. at 1741-42 (emphasis added).

Although Dr. Williams initially indicated uncertainty as to what software program had been used to generate the matrices underlying DX 12-3 and DX 12-4, he eventually conceded

[21] D. Williams, Tr. at 1756-57 (emphasis added).

that they had been created by a program called STATA.[22] Dr. Williams could not independently identify a portion the STATA technical help manual.[23] He acknowledged that he had not personally run the software to generate the table in question and that he does not use STATA.[24]

Despite his previous unfamiliarity with STATA or its technical help manual, Dr. Williams during redirect and re-cross explicitly referenced the manual, relying on it as a brand-new and exclusive basis for his substantially revised opinion on the data depicted in DX 12-3.[25] That revised and never-before-disclosed opinion, based on the STATA manual that Dr. Williams had perused over the lunch break, expounded that a "correlation between *coefficient estimate*s for the rule variable and other explanatory variables" is "an indicator of multicollinearity."[26] Dr. Williams failed to cite any reliable authority for this new opinion, basing it solely on his own interpretation of what he believed to have been the STATA manual's depiction of the test run to create the matrix for DX 12-3.[27]

Significantly, Dr. Williams offered no testimony concerning the statistical threshold at which any correlation between *coefficients* would be significant (*i.e.*, in contrast to his testimony, based on the Kennedy text, that correlations among *variables* of 0.8 or higher

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[22] D. Williams, Tr. at 1724-28, 1757-60.

[23] *Compare* D. Williams, Tr. at 1727-28 ("I mean it looks like there are some instructions on STATA, but I have no idea what the source for this is. . . ."), *with* D. Williams, Tr. at 1757 ("I went back and I took a look at the STATA manual to see what the procedure -- it's a diagnostic procedure within STATA to look at how you interpret that procedure . . . ")

[24] D. Williams, Tr. at 1728. ("In this case somebody did it under my supervision. . . . I don't use STATA, I use SAS.")

[25] D. Williams, Tr. at 1757-60.

[26] D. Williams, Tr. at 1757 (emphasis added).

[27] D. Williams, Tr. at 1760.

would be indicative of "high" correlation in this context, *see* D. Williams, Tr. 1676-78). Dr. Williams thus relied on inferences unsupported by his new source, or any source, in attempting to resurrect DX 12-3 and CX 560.

The ALJ did not credit this testimony, and rightly so. (ID 113). The December 4, 2006 Scheduling Order in this case that stated that a witness "shall not testify to a matter unless . . . the witness has personal knowledge of the matter." Dr. Williams's testified without personal knowledge of the software program used or the test that was run to create the data behind DX 12-3 and 12-4. He admitted under oath that he had not run the test himself. He stated that he did not use STATA. He failed to disclose by name the person who had run the test. When it came to light that DX 12-3 reflected the correlation between coefficients of explanatory variables and the coefficient of the rule variable, rather than correlation between the variables themselves and the rule variable, Dr. Williams belatedly attempted to educate himself about the STATA test that had been run. Dr. Williams' newly minted opinion was unreliable and speculative.

Expert testimony must be relevant and rest on a reliable foundation.[28] Opinion evidence is not rendered admissible by being "connected to existing data only by the *ipse dixit* of the expert;"[29] rather, to be reliable, it must "be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have

[28] Fed. R. Evid. 702; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 589 (1993).

[29] *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997).

'good grounds' for his on her belief."[30] What matters is "not what the experts say, but what basis they have for saying it."[31]

The definition of "collinearity" is in the record: it concerns the correlation between variables, not their coefficients.[32] Prior to learning that DX 12-3 failed to reflect collinearity among variables, Dr. Williams testified unequivocally that the correlation between variables was the relevant inquiry to determine whether a collinearity issue existed with a statistical analysis. Correlation between coefficients was a concept that in his mind had no significance. It was only after DX 12-3 was revealed not to reflect a correlation among variables but among coefficients that Dr. Williams purported to attach any significance to the latter. Dr. Williams' uninformed testimony provided no basis to refute Dr. Eisenstadt's careful analyses.

Finally, it bears noting that Dr. Williams admitted that the authority on which he relied– the Kennedy text – warns that eliminating "collinear" variables (unless they are perfectly collinear) may introduce another type of error into the regression, and that he (Dr. Williams) omitted Kennedy's *caveat* from his report and direct testimony. (D. Williams, Tr. 1710-1719). None of Dr. Eisenstadt's variables questioned by Dr. Williams were perfectly collinear. (D. Williams, Tr. 1713-1714). Thus, even if Dr. Williams had correctly identified a multi-collinearity problem, it did not follow that Dr. Eisenstadt's inclusion of the variables was erroneous.

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[30] *E.g.*, *Bailey v. Allgas, Inc.*, 148 F. Supp. 2d 1222, 1233-47 (N.D. Ala. 2000) (striking expert opinion as "unreliable," "contain[ing] multiple inconsistencies, inaccuracies, and baseless assertions" and based on flawed methodology).

[31] *Daubert*, 43 F.3d at 1316.

[32] *See also Craik v. The Minn. State Univ. Bd*, 731 F.2d 465, 509-523 (8th Cir. 1984) (Swygert, J., dissenting) (discussing concept of collinearity); *Vuyanich v. Republic Nat'l Bank of Dallas*, 505 F. Supp. 224, 274-77, 311-14 (N.D. Texas 1980) (same).

4. There is no basis to infer that a low relative share of EA listings equates to competitive harm.

Complaint Counsel argues that "a reduction in EA listing share demonstrates harm to consumers ...", citing *Toys "R" Us, Inc.*, 126 F.T.C. 415 (1998), aff'd, 221 F.3d 928 (7th Cir. 2000).[33] (CCBr. at 49). Complaint Counsel hypothesizes that EA listings put price pressure on traditional broker commissions and that the reduced prevalence "forces" consumers to substitute more expensive ERTS listings. There are multiple problems with this argument.[34]

a. The putative reduction in EA share is speculative.

Complaint Counsel asserts that the Realcomp Polices effected at least a one percentage point reduction in the percentage of EA listings on the Realcomp MLS, based on the testimony of Respondent's expert, Dr. Eisenstadt. (CCBr. at 48-49). However, Dr. Eisenstadt's actual testimony was that his analysis indicated at most a one percentage point reduction (Eisenstadt, Tr. 1408), and that his regression analyses showed that the likely effect of the Realcomp Policies was none at all (Eisenstadt, Tr. 1429-1433). The ALJ credited this testimony. (ID 113).

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[33] *Toys "R" Us* provides a poor analogy in any event. The conduct at issue in that case was a secondary boycott of the type classically condemned as a *per se* violation of Section 1. *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). The Commission in fact found the boycott unlawful *per* se. *See* 221 F.3d at 933. There is no *de minimis* defense to a *per se* violation.

[34] Complaint Counsel here and elsewhere attempts to inflate the significance of the putative decline in EA share by portraying the alleged one percentage point to five percentage point decline in EA listings as a 52% to 82% effect (*e.g.*, CCBr. at 48). As Dr. Eisenstadt testified, using such percentages cannot increase the competitive consequence of EA listings. "This is a little like saying, if the entire wealth that I have to my name is $2, and I lose $1 of my wealth, because I gambled it away, it's true I've lost 50 percent of my wealth, it's also true I wasn't a very rich man to begin with." (Eisenstadt, Tr. 1462).

Moreover, there is no evidence that any putative reduction in EA share resulted in higher prices for consumers, or a loss of business for discount brokers. Indeed, it is clear that consumers have alternatives.[35]

b. There is no evidence of price effects.

Complaint Counsel argues, in effect, that a 2% share of EA listings would create price pressures on the other 98% of listings that are ERTS, but that a 1% share would not. There is no foundation in the record for this argument. If the Realcomp Policies acted as a price restraint, one would have expected Complaint Counsel to offer at least some evidence of price effects – for example, that ERTS listing prices increased or were stabilized following the adoption of the Realcomp Policies. But there is no such evidence. To the contrary, Complaint Counsel's economic expert, Dr. Williams, did not analyze whether ERTS commission rates are lower in areas served by MLSs without restrictions. (RCCPF ¶1207). Realcomp's expert, Dr. Eisenstadt, stated that he is not aware of any evidence in the record indicating that traditional broker fees are lower in non-restriction MLS areas than in restriction MLS areas. (RCCPF ¶1207).

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[35] *See United States v. Visa USA, Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) ("We have held that competition is not adversely affected if ... competitors can reach the ultimate consumer by employing existing or potential alternative channels of distribution.") (citations omitted).

Complaint Counsel also cites *Cantor v. MLS of Dutchess* County, 568 F. Supp. 424 (S.D.N.Y. 1983) for the proposition that the Realcomp Policies should be condemned regardless of the extent to which they limit EA listing exposure. (CCBr. at 35). *Cantor* concerned a rule that required all brokers who were members of the MLS to use only MLS-branded yard signs, to the exclusion of signs branded by the specific brokerage (*e.g.*, "Century 21"). As the Court observed, the MLS "virtually conceded" that the intent and purpose of this rule was to remove the competitive brand name advantage that some MLS members might have over other MLS members. 568 F. Supp. at 430. Such are not the facts of the instant case. And in any event, the *Cantor* court applied a full rule of reason analysis and condemned the restriction based on actual testimony of competitive injury. 568 F. Supp. at 430. Such are not the facts of this case either.

Further, there is evidence in the record that traditional brokers do not view discount brokers as competing for the same customers (home sellers). *See* §I.C.2. Thus, Complaint Counsel's argument lacks support.

c. The evidence shows that any reduction in EA listings is not due to a lack of competition.

The statistical evidence in this case (§I.C.3, *supra*) strongly suggested that lower EA shares in the Realcomp MLS are attributable to the economic and demographic characteristics of the Southeast Michigan market. That evidence in turn suggests that consumer preferences are driving the result. However, even if the market were not perfectly reflecting consumer preferences, such imperfections are not attributable to a lack of competition and therefore are not "consumer harm" cognizable under the antitrust laws.

Additionally, there is ample evidence from which one could also conclude that any observed or measured decline in the prevalence of EA listings is due to the Southeast Michigan economy, and/or problems in the business model of particular discount brokers.

d. Southeast Michigan consumers who want low-cost alternatives to traditional brokers and traditional ERTS listings have such alternatives.

Complaint Counsel asserts that the Realcomp Policies, by favoring ERTS listings, force consumers to purchase unwanted services and pay cooperating broker commissions even when those brokers are not involved in the transaction. (CCBr. at 47). The evidence shows, however, that limited service brokers can and do offer alternatives to consumers that provide exposure to their listings, either through (1) an EA listing in combination with a separate (*i.e.*, "unbundled") listing on Realtor.com, (2) an EA listing that is dual-listed on

another MLS that provides public website exposure, or (3) a flat fee ERTS listing that is only nominally more expensive ($200)[36], does not require payment of an offer of compensation to a cooperating broker when no such broker participates in the transaction, and which receives the full benefit of the Realcomp public website distribution. (RPF ¶114; RCCPF ¶¶1146, 1200, 1228).

This is a very different picture than that painted by Complaint Counsel. For a $300,000 home, for instance, as detailed in RCCPF ¶178:

	Cooperating Broker	**No Cooperating Broker**
Flat Fee ERTS (AmeriSell Realty)	Commission or fee to listing broker ($699) 3% offer of compensation to cooperating broker (***total: $9,699***)	Commission or fee to listing broker ($699) No offer of compensation paid (***total: $699***)
EA + Realtor.com	Commission or fee to listing broker ($499) Fee for placing on Realtor.com ($100) 3% offer of compensation to cooperating broker (***total: $9,599***)	Commission or fee to listing broker ($499) Fee for placing on Realtor.com ($100) No offer of compensation paid (***total: $599***)
EA	Commission or fee to listing broker ($499) 3% offer of compensation to cooperating broker (***total: $9,499***)	Commission or fee to listing broker ($499) No offer of compensation paid (***total: $499***)

Compare CCBr. at 7-9; 17-20; 47-49.[37]

Nonetheless, Complaint Counsel argues that the availability of alternatives does not eliminate consumer harm because consumers pay more for flat-fee ERTS listings than for EA listings and, in any event, Realcomp could take action against such listings in the future.

[36] $200 is approximately 0.067% of the price of a $300,000 home.

[37] As Dr. Eisenstadt testified, a consumer who wishes to purchase a low-cost automobile, but who has no Kia dealer, would not be thereby "forced" to buy a Cadillac. A rational consumer will look for another low-cost alternative, *e.g.*, a Hyundai. (Eisenstadt, Tr. 1513-14).

However, the example above is wholly consistent with Complaint Counsel's argument that limited service brokers compete by unbundling services. (CCBr. at 49). If consumers pay more, they get more. This is not consumer injury. The three options above – all presently available in the Realcomp service area – offer home sellers the option to pay modest additional fees for additional services received.

Further, the suggestion that Realcomp might engage in a purposeful violation of the law in the future is a tawdry straw man argument. It is a fact in this case that flat-fee ERTS listings are and have been permitted in the Realcomp MLS and are treated identically to traditional ERTS listings. (IDF 375, 479). The rationale for the Realcomp Policies holds no basis to insinuate adverse treatment of flat-fee ERTS listings in the future. *See* §III, *infra.*

e. The evidence shows that "Days on Market" for EA listings has not been adversely affected by the Realcomp Policies.

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).

Complaint Counsel's expert, Mr. 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, 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). Complaint Counsel's own witness, Mr. Mincy, an Exclusive Agent, 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 discount broker offered testimony to contradict the conclusion that the Realcomp Policies have not disadvantaged EA listed properties in terms of Days on Market.

f. EA listings are in fact more prevalent in the Detroit MSA than Complaint Counsel's statistical evidence would predict.

Respondent's expert, Dr. Eisenstadt, estimated a regression using only data from the six "Control MSAs" (MSAs where the MLS did not have policies similar to the Realcomp Policies) as selected by Complaint Counsel's expert, 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 was 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). Dr. Eisenstadt's analysis further demonstrated that factors other than the Realcomp Policies (*i.e.*, the economic and demographic characteristics of the Realcomp service area) more likely explain the relatively low percentage of EA listings on the Realcomp MLS. The ALJ correctly recognized that Dr.

Eisenstadt's evidence on this point and rejected Complaint Counsel's unfounded effort to disparage it. (ID 114).[38]

II. Complaint Counsel's legal arguments are flawed.

Complaint Counsel argues that the ALJ erred in subjecting the Complaint to a rule of reason inquiry, asserting instead that the anticompetitive nature of the Realcomp Policies is "obvious" and that Complaint Counsel should be relieved of the burden of proving anticompetitive effects. (CCBr. at 43). Because Judge McGuire did not accept this argument, Complaint Counsel now asserts, for the first time, that the Realcomp Policies are in the nature of a *per se* unlawful price-fixing agreement. (CCBr. at 26, 35). This argument appears to be based solely on the proposition that any conduct, *if* it has an adverse effect on competition, ultimately may have an effect on price. This is another tautology. It provides no foundation for Complaint Counsel's argument concerning the legal standard for this case.

Complaint Counsel similarly, but without legal foundation, seeks to analogize the Realcomp Policies to a group boycott.

Beyond that, Complaint Counsel's purported explanation of the law concerning the applicable legal standard is muddled and, ultimately, wrong. Judge McGuire did not, as Complaint Counsel alleges, misunderstand Complaint Counsel's burden. This matter is governed by the rule of reason, and Judge McGuire applied the rule correctly.

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[38] Complaint Counsel mischaracterizes this evidence again here, stating that Dr. Eisenstadt *attributed* a 300% increase in the EA share to the Realcomp Policies. (CCBr. at 55). The point of Dr. Eisenstadt's regression was to show that Realcomp's predicted EA share (if it had no restrictions) was not higher, on a point estimate basis, than its actual EA share. This result demonstrates that the Realcomp Policies have *not reduced* Realcomp's EA share. This is a critical distinction that Complaint Counsel does not comprehend.

A. This is not a price-fixing case.

Prior to trial, Complaint Counsel stipulated without qualification that the Realcomp Policies are non-price restraints. Complaint Counsel acknowledged this in argument before the ALJ. Tr. 1898-1899. Complaint Counsel now backpedals, arguing that the Realcomp Policies are "close to a form of price-fixing". (CCBr. at 3, 4, 35).

The ALJ correctly observed that Complaint Counsel's arguments for (variously) a "quick look" or "truncated" analysis, under which Complaint Counsel might avoid the burden of proving adverse competitive effects, primarily rested on cases such as *Polygram Holding*[39] and *Indiana Federation of Dentists* involving concerted conduct that was presumptively in the category of *per se* unlawful restraints – notably price-fixing cases. (ID 89, 96). It appears that Complaint Counsel now believes that it is possible to avoid this problem by arguing that the non-price restraints here are price restraints after all.

The Realcomp Policies do not regulate a broker's decision to discount, or not to discount, his or her fees. (JX 1, ¶¶27-28 (Realcomp has no knowledge of the terms of compensation); IDF 29 (home sellers & brokers are free to negotiate compensation), 189 (Realcomp does not require brokers on its MLS to be compensated). Brokers "negotiate everything." (CX 418 (Smith, Dep. at 36, 38)). Realcomp does not otherwise regulate or determine the fees charged by brokers. (JX 1, ¶¶27-28; IDF 29, 189). Membership in Realcomp is open to both traditional and discount brokers. (IDF 163-164). Complaint Counsel's discount broker witnesses are members of Realcomp. (Mincy, Tr. 308; D. Moody, Tr. 474; Kermath, Tr. 717). Discounted ERTS listings are prevalent in the market and are

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[39] *PolyGram Holding, Inc. v. FTC*, 416 F.3d 329 (D.C. Cir. 2005).

treated the same as non-discounted ERTS listings on the Realcomp MLS. EA listing are treated the same on the Realcomp MLS whether offered by discount brokers or traditional brokers.

Complaint Counsel nonetheless argues (with continued generalization) that, "Courts have recognized that the denial of 'wide exposure' of listings available through an MLS can penalize discounting." (CCBr. at 27). However, Complaint Counsel's authorities neither stand for that proposition nor are particularly apposite to the facts of this case. Complaint Counsel cites *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991) to argue that "exclusion reduces the competition among brokers and could result in less competition for brokerage fees." (CCBr. at 27). The plaintiffs in *Thompson* challenged a tying arrangement that required MLS users to become members of the parent Board of Realtors, and which – in that particular case – had the alleged (but not adjudicated) effect of impairing competition from members of another Real Estate Board that historically served African-American home buyers. *See* 934 F.2d at 1570. Apart from the racial overtones that concerned the court, the discussion cited by Complaint Counsel is the court's observation that other courts have found, in various fact situations, that exclusion from MLS participation "could" reduce competition – solely in the context of ruling that material issues of fact precluded summary judgment for the defendants, and remanding to the trial court for further proceedings. *Id.* at 1580.

Complaint Counsel also quotes *Realty Multi-List,* 629 F.2d at 1371, for the generalized proposition that exclusion from an MLS would tend to reduce the amount of price competition in the market. (CCBr. at 27). But this citation, like the citation to *Thompson*, is

out of context. The quoted passage is taken from the court's discussion of how MLS policies *might* have either anticompetitive *or* procompetitive effects – to explain why the court would not apply the *per se* rule to the question at hand. For example, the court also stated:

> [R]estraints of the general types imposed by [Realty Multi-List] are not subject to out-of-hand condemnation. ... [I]t may well be necessary to the success of a multiple listing service to establish some standards of competence, professionalism, and mode of operation for admission to membership.[40]

629 F.2d at 1368-69 (citations and footnotes omitted). In any event, the Realcomp Policies are not pretextual and do not exclude any broker from participating in the Realcomp MLS.[41]

Complaint Counsel further seeks to argue that the Realcomp Policies are analogous to the secondary boycotts held to constitute *per se* unlawful price-fixing in *United States v. General Motors Corp.*, 384 U.S. 127 (1966) and *Denny's Marina, Inc. v. Renfro Products, Inc.*, 8 F.3d 1271 (7th Cir. 1993) (which relies on *General Motors*). If those cases stand for anything, it is that conduct in the nature of price fixing is price fixing and is subject to *per se* condemnation. "Complaint Counsel has never contended that Realcomp Policies are *per se*

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[40] *Realty Multi-List* concerned what were essentially subjective membership criteria (that overlapped, but added nothing to, existing state regulation of real estate agents) as well as an excessive membership fee imposed by the MLS. *See* 629 F.2d at 1376 ("a multiple listing service may not validly assert a generalized concern with the competency and professionalism of real estate brokers as a rationale for exclusion"), and at 1386 ("A sizeable membership fee which bears no relation to [the MLS's costs] may ... create a significant barrier to new entry ...") These rules were alleged to arbitrarily exclude competitors from the local real estate market. *Id.* at 1369. These facts are nothing like the case at hand.

[41] Complaint Counsel's other citations are even less relevant.. *Marin County Board of Board of Realtors, Inc. v. Palsson*, 549 P.2d 833 (Cal. 1976) concerned the complete exclusion of part-time brokers from the MLS under a rule that also precluded the plaintiff from being employed by any MLS broker in Marin County. The court's view of the exclusionary nature of the part-time broker rule was amplified by this fact. *See* 449 P.2d at 835, 843. It is difficult to see what this case has to do with "wide exposure" of listings. Likewise, *Oates v. Eastern Bergen County Multiple Listing Service, Inc.*, 273 A.2d 795 (N.J. Super. Ch. 1971) concerned an MLS that permitted new members only by approved succession to an existing member. *See* 273 A.2d at 797-98. Thus, the restriction at issue in *Oates* precluded new entry into the market altogether, which the court treated as a *per se* violation of New Jersey's antitrust law. No discounting was at issue. These facts bear no analogy to Realcomp.

illegal." (CCRB at 12). Beyond that statement, and beyond Complaint Counsel's stipulation to the non-price nature of the restraints at issue here, the Realcomp Policies neither are imposed only on discounters nor exclude any broker from the MLS.

B. The Realcomp Policies are not a concerted refusal to deal.

Complaint Counsel argues (CCBr. at 28-29) that the Realcomp Policies restrict competition by reducing the "packages of services" available to home sellers, and thus are facially anticompetitive. However, the authorities relied upon by Complaint Counsel provide no support for this broad generalization.[42]

In the main, Complaint Counsel's cited cases involve express agreements not to compete. For example, *United States v. Gasoline Retailers Association, Inc.*[43] involved a *criminal* indictment of an overt *per se* unlawful agreement not to discount the price of gasoline that was enforced through "threats of picketing and cutting off non-cooperating dealers from their sources of supply, and occasionally making good on these threats." 285 F.2d at 690. Complaint Counsel can point to nothing in the record that suggests that Realcomp has engaged in anything like this conduct. Similarly, *National Macaroni Mfrs. Assn. v. FTC*[44] concerned an express and *per se* unlawful agreement among association members not to compete for the purchase of durum wheat in the face of a market shortage. The specific issue before the Seventh Circuit was whether there was sufficient evidence for

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[42] Complaint Counsel cites *Kreuzer v. American Acad. of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984) for the proposition that competitive harm can be defined as a refusal to deal with competitors on substantially equal terms. This is incorrect. The appellate court speculated as to both the potential harms and the potential benefits that might flow from such a rule, but it made no findings in either respect, and remanded to the trial court to apply the rule of reason "anew." 735 F.2d at 1493-94, 1496.

[43] 285 F.2d 688 (7th Cir. 1961).

[44] 325 F.2d 421 (7th Cir. 1965).

the Commission to find an agreement in fact, 325 F.2d at 427, and the decision accordingly offers no broader principles for interpreting the facts of this case.

Also curious is Complaint Counsel's reliance on *Sullivan v. NFL*,[45] which concerned the NFL's prohibition on public ownership of NFL franchises. The Court observed, as Complaint Counsel notes, that the rule completely eliminated this type of ownership option. Nonetheless, it is clear that the case was tried under a full rule of reason analysis, because the issue before the appellate court was the sufficiency of the evidence of competitive effects. *See* 34 F.3d at 1099-1000 ("Although we agree that the evidence of [a decrease in output, an increase in price, a detrimental effect on efficiency, or other incidents of harm to competition] is rather thin, we disagree that the evidence is too thin to support a jury verdict in Sullivan's favor.") The decision in *Sullivan* has been strongly criticized for " overemphasiz[ing] trivial competition between teams and ignor[ing] the number of common interests shared in the league.[46] That criticism rings true with respect to Complaint Counsel's argument here.

Visa also involved another type of direct foreclosure – rules that prohibited any bank issuing Visa or MasterCards from doing business with, *e.g.*, American Express. The trial court applied the rule of reason and, the court of appeals noted, "Defendants are certainly correct that the proper inquiry is whether there as been an '*actual* adverse effect on competition as a whole in the relevant market." 344 F.3d at 242 (emphasis in original, citations omitted). This case has no analogy here. Realcomp does not prohibit any MLS member from using EA listings or discounting fees. And, as the *Visa* court noted, the

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[45] 34 F.3d 091 (1st Cir. 1994).

[46] *See* Note, There Is No "I" in "League": Professional Sports Leagues and the Single Entity Defense, 105 U. Mich. L.R. 183, 197 (2006).

existence of alternative channels of distribution negates the antitrust claim. *See* note 35, *supra.*

C. The ALJ did not misunderstand the burden of proof

Having failed to prove adverse competitive effects flowing the Realcomp Policies, Complaint Counsel now argues that it was error for the ALJ to engage in a full rule of reason analysis. (CCBr. at 43-44). To this end, Complaint Counsel offers an interpretation of the law that confuses and conflates courts' observations in cases applying a truncated rule of reason analysis with those in cases where a truncated analysis was not deemed appropriate.

The Supreme Court has spoken to the question of when the abbreviated review sought by Complaint Counsel is appropriate. In *California Dental Assn. v. FTC*, 526 U.S. 756 (1999), the Court differentiated between a "naked restraint on price and output requir[ing] some competitive justification even in the absence of a detailed market analysis," *Id.* at 770 (citing *NCAA v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 110 (1984) ("*NCAA*"), and cases in which the likelihood of anticompetitive effects is not "comparably obvious." *Id.* at 771. The Court disapproved the Ninth Circuit's failure to differentiate between classically condemned prohibitions on the advertising of objectively verifiable price and quality information and CDA's restrictions on potentially false and misleading advertising which "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Id.* at 771-72.

The Court emphasized that differences in fact patterns must be taken into account when determining the potential for antitrust liability, and criticized the Ninth Circuit for not recognizing that CDA's policies could affect competition differently than similar policies in

other markets, 526 U.S. at 773-74 (a principle that is borne out by the evidence from Southeast Michigan in this case). The Court stressed that the quick look analysis should not be applied incautiously – rather, there must be a solid theoretical foundation for concluding that challenged practices have anticompetitive consequences. 526 U.S. at 775 n.12 (when the facts and circumstances "are somewhat complex, assumption alone will not do").[47]

Thus, as the Court went on to explain, a truncated analysis is appropriate only when a "great likelihood of anticompetitive effects" can easily be ascertained. *Id.* at 770.[48] As Professors Areeda and Hovenkamp state, such cases are those in which the restraint is sufficiently threatening to place it presumptively in the *per se* category. Areeda & Hovenkamp at ¶ 1911a.[49] Only *if* that condition is satisfied must the defendant proffer a "plausible" efficiency justification for the restraint. But if the defendant does so, the *plaintiff* retains the burden to prove by empirical evidence that the restraint is anticompetitive. 526 U.S. at 774-776.

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[47] Complaint Counsel appears to argue that there is a distinction in law between a "quick look" rule of reason analysis and a "truncated" rule of reason analysis, and seems to disclaim the former in favor of the latter here. (CCBr. at 43 n. 18). *California Dental* makes clear that there is no such distinction, as the opinion uses the terms "truncated," "abbreviated," and "quick look" interchangeably. *See, e.g.*, 526 U.S. at 764-65 (describing issue upon which certiorari was granted as "abbreviated" rule of reason), 763 (describing Court of Appeals decision as holding that "truncated" analysis was appropriate), 770 (using "abbreviated and "quick look" to mean the same standard), and 779 (describing the full spectrum of Section 1 analysis as *per se*, "quick look," and rule of reason).

[48] Virtually every case cited by Complaint Counsel is included by the Court within this discussion. This is because cases such as *Indiana Federation* and *National Society of Professional Engineers v. U.S.*, 435 U.S. 679 (1978) involved overt horizontal boycotts or price agreements.

[49] As Judge McGuire correctly observed (ID 89), this admonition has been well-heeded by the federal courts following *California Dental*. *See, e.g., Brookins v. International Motor Contest Assn.*, 219 F.3d 849, 854 (8th Cir. 2000) (auto racing body rules that allegedly precluded use of plaintiff's transmission were "not the kind of 'naked restraint' on competition that justify foregoing the market analysis normally required in Section 1 rule-of-reason cases"); *see also Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004); *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, (4th Cir. 2002). *Compare PolyGram Holding,* (quick look held to suffice where restraint at issue was express agreement not to compete on the basis of price). Even *PolyGram Holding* has been criticized for a too-abbreviated analysis. *See, e.g.*, W. Kolasky and R. Elliott, "The Federal Trade Commission's *Three Tenors* Decision:" 19 *Antitrust* 50 (Spring, 2004).

At this point, the traditional rule of reason framework applies: Complaint Counsel must prove that, "within the relevant market, the defendants' actions have had substantial adverse effects on competition, such as increases in price, or decreases in output or quality. *See, e.g.*, *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). Once that initial burden is met, the burden of production shifts to the defendants, who must provide a procompetitive justification for the challenged restraint. If the defendants do so, the government must prove either that the challenged restraint is not reasonably necessary to achieve the defendants' procompetitive justifications, or that those objectives may be achieved in a manner less restrictive of free competition." *Visa*, 344 F.3d at 238 (footnote and additional citations omitted).

Complaint Counsel nonetheless seems to argue that it has no obligation to prove anticompetitive effects unless Realcomp first demonstrates that the Realcomp Policies are in fact procompetitive. (CCBr. at 41-43). This argument is incorrect, and confuses the initial inquiry under a truncated analysis with a defendant's obligation after the plaintiff's rule of reason burden proof has been met.[50] As stated in *California Dental*, when determining in the first instance whether to apply rule of reason analysis to challenged restrictions, the issue is not whether the restrictions *were* procompetitive, but whether they *could be*. 526 U.S. at 778 ("The point is not that the CDA's restrictions necessarily have the procompetitive effect claimed by the CDA; ... The point, rather, is that the plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated."). Indeed, it is sufficient for purposes

[50] Thus, all of the cases cited by Complaint Counsel on page 42 of its brief are discussing the defendant's burden under the assumption that the existence of anticompetitive effects has been proven.

of avoiding a truncated review that the challenged restrictions might plausibly have "no effect at all." *Id.*

The Realcomp Policies are not facially anticompetitive. They are not naked restraints that might otherwise call for *per se* treatment. There is no price-related restraint at issue here, no allocation of geographic markets, and no concerted refusal to deal with disfavored suppliers or customers. Likewise, this case does not involve the type of complete and naked exclusion from an essential element of competition held to implicate *per se* liability by longstanding judicial precedent.[51] Truncated analysis is not appropriate here. And even if this conclusion were not clear, Realcomp established plausible justifications for its Policies. (§III, *infra*). Thus, it was, and remains, Complaint Counsel's burden to prove that the Realcomp Policies produce material adverse competitive effects in Southeast Michigan. Complaint Counsel failed to meet this burden.

Complaint Counsel further asserts that even if a truncated rule of reason analysis is unavailable, it is sufficient for Complaint Counsel to show that "the challenged conduct is anticompetitive in nature and [that] the plaintiff has ... market power," in which case "evidence of actual anticompetitive effects is unnecessary." (CCBr. at 43). But in reality, Complaint Counsel is again confusing a form of truncated analysis with the traditional rule of reason.

The mere possession of market power is not, and never has been, a violation of the antitrust laws. *Indiana Federation* holds that the requirement for proof of market power can be obviated by evidence of actual anticompetitive effects, not the other way around. *See* 476

[51] *See, e.g., Associated Press v. United States*, 326 U.S. 1 (1945). This case, like others cited by Complaint Counsel in this context, dealt with a complete exclusion from competition.

U.S. at 462; *see also Visa*, 344 F.3d at 238 n.4. *Indiana Federation* does not hold, and the Supreme Court has never held, that the requirement for evidence of substantial anticompetitive effects – whether actual or predictive – can be eliminated under a traditional rule of reason analysis if the defendant has market power. To maintain otherwise would subject a wide range of lawful conduct to antitrust liability. Thus, even under the "quick look," a plaintiff must additionally present credible evidence that "the 'arrangement has the potential for genuine adverse effects on competition,' for example, substantial market foreclosure" in order to rely on inferences of anticompetitive effects drawn from market power (*i.e.*, in lieu of evidence of actual adverse effects). *Capital Imaging Assocs. v. Mohawk Valley Assoc.*, 996 F.2d 537, 546 (2d Cir. 1993) (quoting *Indiana Federation*, 476 U.S. at 460-61).

The case law on which Complaint Counsel relies for this argument is inapposite and unpersuasive. For example, *Law* and *Brown University* are *not* in fact applications of a traditional rule of reason, but "quick look" decisions.[52] Their observations regarding the significance of market power are reliant on other "quick look" authorities.[53] The decisions in *Gordon* and *Flegel* likewise are of little value in terms of the broad generalization drawn by Complaint Counsel. The portion of *Flegel* relied upon by Complaint Counsel is drawn entirely from *Indiana Federation.* Similarly, *Gordon* (insofar as relied upon by Complaint Counsel) relies on *Brown University* and *Indiana Federation*, but ultimately explains the rule

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[52] *Law v. NCAA*, 134 F.3d 1010, 1019-20 (10th Cir. 1998) ("A naked, effective restraint on market price or volume can establish anticompetitive effect under a truncated rule of reason analysis. ... We find it appropriate to adopt such a quick look rule of reason in this case."); *United States v. Brown University*, 5 F.3d 658, 673 (3rd Cir. 1993) ("As the [Antitrust] Division points out, ... if an abbreviated rule of reason analysis always required a clear evidentiary showing of a detrimental effect on price, output, or quality, it would no longer be abbreviated.")

[53] *Law*, 134 F.3d at 1020 (citing *NCAA*, 468 U.S. at 109 (in turn citing *National Society of Professional Engineers)*; *Brown University*, 5 F.3d at 672-72 (citing *Indiana Federation* and *NCAA*).

of reason under the test of *Chicago Board of Trade*, which is most assuredly a full-blown rule of reason analysis:[54]

> To determine [whether a restraint suppresses competition], the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint; and its effect actual or probable.

A truncated rule of reason analysis is not based on a different legal standard than the rule of reason. Rather, it is designed to short-cut the traditional analysis in cases where the competitive implications of conduct are obvious and an extensive inquiry into effects would be judicially uneconomical. However, no federal court of appeals has ever reversed a trial court for engaging in "too much" analysis under the rule of reason. Judge McGuire correctly concluded that, notwithstanding the conclusion that Realcomp has market power, the effects of the Realcomp Policies are not intuitively obvious, and that a detailed inquiry into the evidence of competitive effects was appropriate.[55] It would be illogical and erroneous to now ignore the evidence on the ultimate question in this case.

III. Credible evidence established that the Realcomp Policies promote efficiency.

Judge McGuire found that Respondent's explanations of the Realcomp Policies were credible and not, as Complaint Counsel argued, pretextual. (IDF 601-632; ID 128). There is ample basis in the record for these conclusions.

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[54] *Gordon v. Lewiston Hospital*, 423 F.2d 184, 210 (quoting *Board of Trade of the City of Chicago v. U.S.*, 246 U.S. 231, 238-39 (1918).

[55] This distinguishes Complaint Counsel's reliance on *Realty Multi-List* and *Toys R Us* for the proposition that a full analysis is "unnecessary." (CCBr. at 44). *Realty Multi-List*, although pre-dating *Indiana Federation* is unquestionably a quick-look analysis, see 629 F.2d at 1369 (characterizing question as "facial unreasonableness") based on the court's conclusion that the membership criteria at issue effected a complete exclusion of brokers from the MLS. *See* 629 F.2d at 1375 (criteria gave RML the "power to exclude brokers"). *Toys R Us*, as previously noted, involved a secondary boycott that the Commission held to be unlawful *per* se. *See* 221 F.3d at 933. Its facts offer no analogy here.

A. The Realcomp Policies address a free-riding problem.

1. EA home sellers compete with Realcomp members to act as the cooperating broker.

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, 674-75 (1992). 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).

Realcomp was not created to help property owners who wish to procure their own buyers. As Judge McGuire correctly observed, home sellers who sign EA listing agreements (by definition) do not pay a cooperating broker commission if they find their own buyer – and therefore have an incentive to do so (*i.e.*, to act as their own cooperating broker). (IDF 608-611; ID 121). In this sense, EA home sellers compete directly with Realcomp members on the cooperating broker side of the sale equation. They have 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).

An EA home seller pays no dues to Realcomp. Thus, even though the listing broker in an EA transaction may pay dues to Realcomp, Realcomp receives no payment for any services it provides to the EA seller who is acting as his/her own cooperating broker.

Thus, to the extent EA home sellers obtain the benefits of being a full-fledged Realcomp "member," including the benefits derived from Realcomp's advertising of properties on the Approved Websites, they do not pay for them. By excluding EA listings from the Approved Websites, the Realcomp Policies (specifically, the Website Policy) protects Realcomp-member cooperating brokers from having to subsidize the cost that

property owners otherwise would incur to procure buyers who do not use cooperating brokers. Realcomp members should not have to subsidize or otherwise facilitate transactions that directly conflict with Realcomp members' business purposes.

Dr. Williams testified that 80% of EA properties are sold to buyers represented by cooperating agents. (D. Williams, Tr. 1651). Accordingly, **twenty** percent of the time, EA properties are sold without the involvement of a Realcomp cooperating agent. This testimony establishes the presence of a free-rider problem. Further, Dr. Eisenstadt explained that the Realcomp Policies also benefit 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).

This is a cognizable and plausible business justification, as the ALJ found. (ID 121).

2. Complaint Counsel mischaracterizes the free rider issue.

Complaint Counsel asserts that there is no free-riding problem (CCBr. at 37-40), arguing, first, that a seller using an EA listing who finds a buyer for his home is self-supplying a service normally provided by the listing (not cooperating) broker, and the EA broker agrees to "discount the commission" if the seller performs this service. The argument is based on the premise that, "Listing brokers seek buyers for their sellers' homes. Cooperating brokers seek homes for their buyers." (CCBr. at 40). This is semantic obfuscation. Both listing and cooperating brokers are trying to match a buyer with a seller. In an EA transaction, the listing broker receives the listing broker's fee or commission regardless of whether or not a buyer is procured. If another broker brings the buyer to the transaction, that broker receives a cooperating broker payment (from the seller, but paid through the

listing broker) based on the offer of compensation attached to the listing. If the seller finds the buyer on his or her own, no cooperating broker commission is paid. Although the seller may, semantically, "find a buyer," the seller is in fact matching a buyer and seller in substitution for – and to the exclusion of – a cooperating broker. The listing broker is not "discounting" the listing fee; rather, the seller is avoiding the cooperating broker commission. Word games do not change the fact that an EA seller has an economic incentive to compete with cooperating brokers to match a buyer with the seller.

Complaint Counsel further argues against the free rider problem on the basis that sellers pay fees to listing brokers, who in turn pay dues to Realcomp, and thereby Realcomp is compensated for the marketing services it provides to the seller. This argument fares no better. Realcomp is supported by membership dues paid by both listing and cooperating brokers. Home sellers pay no dues to Realcomp. When an EA seller receives the benefit of Realcomp's promotional services to find his or her own buyer in competition with cooperating brokers, the seller receives a benefit that is supported by cooperating brokers. That listing brokers also paid for part of that benefit does not negate the free-riding result.[56]

B. The Realcomp Policies eliminate a bidding disadvantage.

The ALJ also correctly found that the Realcomp Policies increase the probability that the client of a Realcomp member who is acting as a cooperating broker will make a successful offer for an EA property. (IDF 629-632; ID 124-125). Dr. Eisenstadt explained that buyers

[56] Complaint Counsel also cites a statement taken from the Commission's own analysis of a consent settlement entered in an unrelated case as authority for the proposition that website policies do not address free riding. CCBr. at 37-38, citing Analysis of Agreements Containing Consent Orders to Aid Public Comment, *Information and Real Estate Services, LLC*, File No. 061-0087 (Oct. 12, 2006). Regardless of the interests served by that settlement, it cannot serve as authority here. The views expressed in that document are *ex parte* and are not informed by the evidence in this case. The statement itself disclaims any use as an authoritative interpretation. The ALJ appropriately disregarded Complaint Counsel's similar use of such claimed authority below, ID 123, citing *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 331 n.12 (1961).

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, as explained above, 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).

Complaint Counsel argues that the ALJ's conclusion was irrational because Realcomp's position penalizes buyers who have lower costs and suggests that buyers receive no value from cooperating brokers. (CCBr. at 40-41). Those arguments miss the point. The buyer who prefers to use a Realcomp member as a cooperating broker (and obtain the benefit of that broker's services) is the party who is penalized under Complaint Counsel's approach as they are placed at a bidding disadvantage. The EA seller still has every incentive to find his or her own, lower-cost buyer, but there is no rational reason for Realcomp members to facilitate that result.[57]

C. The reasons underlying the Realcomp Policies are not *post hoc* rationalizations.

Complaint Counsel asserts that the ALJ should have disregarded the foregoing explanations as *post-hoc* reasoning. (CCBr. at 36). To this end, Complaint Counsel argues

[57] Complaint Counsel also argues that the bidding disadvantage argument is wrong because seller's buyers may not know whether a given property is under an EA listing or an ERTS listing. (CCBr. at 40 n. 16). Again, this misses the point. The prospective buyer who is using a cooperative broker in an attempt to buy an EA property is disadvantaged whether or not the buyer knows the listing type. The seller knows which type of listing he or she has, and that is the fact that creates the bidding disadvantage.

that there is no contemporaneous documentation of the rationale. At trial, the Executive Director of Realcomp testified specifically as to the basis for the decision of Realcomp board to adopt the Website Policy:

> Q. ... And can you explain why the board took that action, ... the website policy?
>
> A. With exclusive agency listings, the ... seller has the option of selling a property themselves, without paying a commission, and the board felt very strongly that by posting those listings to public websites, conceivably what we could be doing is advertising on behalf of a seller where a buyer could knock on their door and buy the property by virtue of seeing that through one of the websites that we provide, buy the home and there's no commission paid to any realtor.
>
> The MLS, of course, operates on the fees it collects from realtors, and they pay for Realtor.com, they pay for MoveInMichigan, it's their money that keeps those websites up and running.
>
> So, again, the board felt if a seller says I want the option to sell it themselves, they have an incentive, actually, to sell it themselves, because they won't be paying that commission. So, by putting that on the public website, if I said, Scott, go find, you know, go look around on MoveInMichigan, see what you like, and you saw a property that you liked, and you drove by it and there's a for-sale-by-owner sign in the front yard, or you've just decided you would knock on the door and see what was happening, the seller could say, come on in, I'll sell it to you, don't use a realtor, I can sell it to you for less money, because I'll knock that commission off the price of the home.
>
> ... And the board felt very strongly that that was not in the best interest of the realtors and Realcomp.

(Kage, Tr. 1050-51).

The ALJ found documentation of Realcomp's organizational reasoning in the "Call to Action Regarding Public Website Policies" (CX 89) which "speaks implicitly to the central theme of the free rider justification." (ID 122). Judge McGuire found that the document "no doubt encompass[es] the clear, but broadly stated intent of the Realcomp Website Policy not

to authorize EA home sellers access to Realcomp Internet services in order to compete with member agents for buyers without compensation to the cooperative."

Complaint Counsel relies on *Image Technical Services v. Eastman Kodak Co.*, 125 F.3d 1195 (9th Cir. 1997) for the proposition that Realcomp's *post-hoc* statements deserve "great skepticism," (CCBr. at 36) but fails to acknowledge that the court's rejection of the proffered rationale in that case was based on inconsistent testimony and documentary evidence. 125 F.3d at 1219. Likewise, in *United States v. Dentsply International, Inc.*, 399 F.3d 181 (3d Cir. 2005), the court observed that "the asserted justifications for [Dentsply's] exclusionary policies are inconsistent with its announced reason for the exclusionary policies..." *Id.* at 196-97. In other words, the defendant in that case said two different things at different times. As Complaint Counsel's authorities show, the question is not one of timing, but of credibility. Realcomp's reasoning is consistent, and Judge McGuire found the evidence to be supported and credible.

D. The Realcomp Policies are not over-broad.

The ALJ correctly found that the Realcomp Website Policy is narrowly tailored to address its purposes. (ID 125-126). The Website Policy limits the distribution of EA listings to certain Internet cites 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.

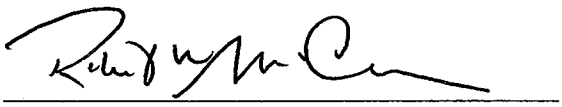
Conclusion

The Initial Decision should be affirmed. Complaint Counsel failed to meet its burden of demonstrating Realcomp's Policies unreasonably restrained or substantially lessened competition. (ID 129). That failure is perhaps best illustrated by the testimony of Complaint Counsel's own witnesses, who acknowledge that their EA businesses are growing and doing well in the face of Realcomp's Policies.

The Realcomp Policies promote the cooperative objectives of the MLS, and are specifically tailored to serve it. Complaint Counsel's position is unsupported, detrimental to the cooperative objectives of the MLS, and therefore ultimately detrimental to the public. Respondent respectfully submits that the Commission should decline to enjoin a practice for which competitive harm has not been proven, enter judgment in Respondent's favor, and dismiss the Complaint.

Respectfully submitted,

February 29, 2008



Steven H. Lasher
Scott L. Mandel
FOSTER, SWIFT, COLLINS & SMITH, P.C.
313 S. Washington Square
Lansing, Michigan 48933
(517) 371-8100

Robert W. McCann
DRINKER BIDDLE & REATH, L.L.P.
1500 K Street, N.W.
Washington, D.C. 20005
(202) 842-8800

Attorneys for Respondent

Certificate of Service

I hereby certify that on this 29th day of February 2008, I caused an original and twelve paper copies of the foregoing Answering Brief of Respondent to be served by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
Via Office of the Secretary, Room H-135
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

and one copy of the foregoing Answering Brief of Respondent to be served by electronic transmission and overnight courier to:

Peggy Bayer Femenalla
Federal Trade Commission
601 New Jersey Ave., N.W.
Rm. NJ-6219
Washington, DC 20001