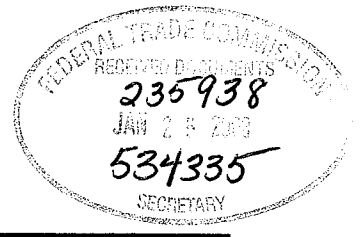


ORIGINAL



PUBLIC

---

**UNITED STATES FEDERAL TRADE COMMISSION**

**Docket No. 9320**

*In the Matter of*

*Realcomp II LTD.*

*A CORPORATION*

**Motion of  
THE AMERICAN HOMEOWNERS GRASSROOTS ALLIANCE  
FOR LEAVE TO FILE RESPONDING AMICUS CURIAE BRIEF ON ISSUES OF  
REMEDY**

**In support of the position of complaint counsel as to reversal of the Initial Decision**

Bruce N. Hahn  
President  
American Homeowners Grassroots Alliance  
6776 Little Falls Road  
Arlington, VA 22213  
703-536-7776

January 25, 2008

## Argument

Pursuant to 16 C.F.R. 3.52(j), the American Homeowners Grassroots Alliance (“AHGA”) respectfully moves for an Order granting it leave to file the accompanying *amicus curiae* responding brief on the issue of remedy in support of the position of complaint counsel as to reversal of the Initial Decision, and in support thereof states as follows:

### Interest of Amicus

The American Homeowners Grassroots Alliance (AHGA) is a grassroots advocacy organization serving the nation’s homeowners. Established in 2000, the Alliance addresses issues that have, or would have, a significant economic impact on the over 70 million U.S. homeowners. AHGA advocates on issues before the federal and state executive, legislative and judicial branches, and participates in the policy formulation process of other consumer advocacy organizations that AHGA belongs to, such as the Consumer Federation of America. One of the areas of AHGA’s policy interest is the body of laws and regulations, including federal and state laws and voluntary industry regulations that affect the process of selling and buying homes.

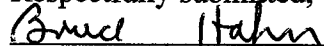
AHGA’s brief presents an independent homeowner’s perspective of the process of buying and selling homes in the Internet era that should help the Commission in fashioning a remedy. It is respectfully submitted that the AHGA’s independent status and concern for the vitality of competition in real estate services can provide a useful perspective for determining the appropriate remedy to be ordered in this case.

AHGA believes that this issue is particularly pressing given the current economic situation. Millions of homeowners owe more than their home is worth because of the subprime mortgage crisis. Many of them do not have sufficient savings to both make up the difference and pay the traditional 5-6% commission to a full service real estate broker. To the extent that this ruling limits the ability of home sellers to use discount real estate brokers, it will increase foreclosures, drive down real estate values, and increase the likelihood of a recession.

### Conclusion

BASED ON THE FOREGOING, the AHGA respectfully requests an Order for leave to file the accompanying *amicus curiae* brief on the issue of remedy in support of the position of complaint counsel as to reversal of the Initial Decision. A proposed Order is attached.

Respectfully submitted,



Bruce Hahn

President

American Homeowners Grassroots Alliance  
6776 Little Falls Road  
Arlington, Virginia 22213

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

\_\_\_\_\_  
In the matter of            )  
  )  
Realcomp II, LTD.         )  
\_\_\_\_\_)

Docket No. 9320

Public Record

**ORDER**

Upon consideration of the Motion of the American Homeowners Grassroots Alliance for Leave to Brief *Amicus Curiae* in support of the position of complaint counsel as to reversal of the Initial Decision, the Commission finds that the proposed brief amicus curiae may assist in the determination of the matters presented by this appeal.

Accordingly, IT IS ORDERED that the American Homeowners Grassroots Alliance is hereby granted leave to file the proposed amicus curiae brief.

By the Commission

\_\_\_\_\_

**PUBLIC**

---

**UNITED STATES FEDERAL TRADE COMMISSION**

\_\_\_\_\_  
**Docket No. 9320**  
\_\_\_\_\_

*In the Matter of*  
  
*Realcomp II LTD.*

---

***AMICUS CURIAE BRIEF OF***  
**THE AMERICAN HOMEOWNERS GRASSROOTS ALLIANCE**  
**In support of the position of complaint counsel as to reversal of the Initial Decision**

Bruce N. Hahn  
President  
American Homeowners Grassroots Alliance  
6776 Little Falls Road  
Arlington, VA 22213  
703-536-7776

January 25, 2008

**TABLE OF CONTENTS**

INTEREST OF *AMICUS CURIAE*.....5

STATEMENT OF THE CASE.....5

I THE NATURE OF BUYING AND SELLING HOMES IN THE INTERNET ERA.....5

    A Brokerage Sectors have all been dramatically changed by Internet  
    Commerce.....6

    B The real estate brokerage sector is deriving great efficiencies and savings from  
    Internet Commerce.....6

        1 Real estate consumers are now doing much of the transactional work online. ....6

        2 MLSs have evolved into important business to consumer organizations through their  
        feeds to public websites.....7

        3 Unlike other brokerage sectors the substantial savings and efficiencies of  
        Internet commerce aren't being passed on to real estate consumers.....7

        4 Government agency and consumer organization websites are increasingly assuming  
        the education function, saving real estate brokers and agents time and money.....7

        5 The many public websites of MLS member brokers and agents have become the  
        main buyers source of homes for sale.....8

    C Many home buyers today are in financial trouble and can't afford a full commission..9

    D Today 80%+ of home buyers search for homes online and the engagement and  
    relevance of real estate agents to the process continues to diminish.....9

    E Home sellers want their listings exposed on public websites to all buyers; home buyers  
    want to see all appropriate listings on public websites (duh).....11

    F History of Exclusive Right to Sell (ERTS), and Exclusive Agency (EA) listings and  
    free riding in pre and post Internet era.....11

    G Real estate brokers and agents frequently receive unearned commissions from reverse  
    free riding, but are rarely injured by free riding according to the data.....12

H The EA boycott will require all home sellers to give brokers and agents the opportunity for reverse free rides and will undermine their incentive to try to sell our homes.....	13
I The high cost of traditional commissions makes home sellers even more inclined to use discount brokers.....	14
J Realcomp EA boycott is protectionist and denies consumers the benefits of Internet commerce.....	14

**II THE IMPACT OF THE INITIAL FINDING ON AMERICAN HOMEOWNERS AND RESIDENTIAL REAL ESTATE COMMERCE.....14**

A An affirmation of the Initial Decision would create a government-sanctioned group boycott of new Internet-centric real estate brokerage models by Realcomp.....	14
B The effectiveness of that boycott will only increase over time as Realcomp continues to absorb competing local MLS's. The precedent set by this case will spread nationally, leading to the eventual end of EA listings in real estate. ....	15
C How the boycott will prevent many home buyers from finding homes for sale that best suit their needs while denying many home sellers the higher prices and reduced selling costs they might have achieved through EA/discount broker listings.....	15
D Why the national public websites are less important than the many MLS-supplied local public websites of local agents and brokers.....	16

**III DEFICIENCIES IN THE FINDINGS IN THIS CASE**

A. There is no harm whatsoever to Realcomp or its members (except their discount/EA members).....	16
B The evidence on record demonstrates obvious and manifestly anticompetitive effects and actionable consumer harm.....	17
C Initial Decision reflects the misleading and inaccurate information about how consumers do real estate searches and the extent of consumer injury provided the ALJ by Realcomp.....	17
D The EA boycott would injure home buyers who don't know that they are prevented from seeing all the homes that meet their search criteria.....	17
E Rule of reason leads to the conclusion that there are obvious anticompetitive effects and actionable consumer harm .....	17
F There is strong evidence of anticompetitive barriers.....	18

G Realcomp members get most of the free rides and their free riding argument is bogus.....	18
H Realcomp has the tools to prevent free riding.....	19
I The logical business purpose of boycott is to reduce competitive pressures on commission rates, eliminate discount brokers, and assure that Realcomp members always have the potential for a reverse free ride.....	19
I ALJ's rule of reason conclusions re minimal public exposure limitations caused by Realcomp are flawed. ....	20
J Realcomp arguments re competitive/consumer benefits of ERTS listings are flawed.....	21
K Realcomp subsidy arguments do not a justify "standard" commission.....	21
L Realcomp policy conflicts with article 1 of National Association of Realtors code of ethics and other NAR policies.....	21
M Realcomp EA policy ignores NAR code of ethics and agents' and brokers fiduciary duties, and disrespects real estate consumers.....	21
N There is no data to suggest that Realcomp members are denied fees or commissions for representing either buyers or sellers.....	21
O Multiple Listing Services have evolved into business-to-consumer intermediaries with substantial market power.....	22
P MLS's are discriminating directly against their member's clients.....	23
Q \$300,000 investment in this case by NAR suggests that the case will be used to justify EA listing boycotts by MLSs across the country.....	23
R Other national real estate trade associations join consumer organizations and FTC in opposing Realcomp EA policy.....	23
IV PROPOSED FORM OF ORDER.....	24
V CONCLUSION.....	24
VI CERTIFICATE OF SERVICE.....	25

## **Interest of Amicus Curiae**

The American Homeowners Grassroots Alliance (AHGA) is a consumer advocacy organization serving the nation's homeowners. Established in 2000, the Alliance addresses issues that have, or would have, a significant economic impact on the over 70 million U.S. homeowners. AHGA advocates on issues before the federal and state executive, legislative and judicial branches, and participates in the policy formulation process of other consumer advocacy organizations that AHGA belongs to, such as the Consumer Federation of America. One of the areas of AHGA's policy interest is the body of laws and regulations, including federal and state laws and voluntary industry regulations that affect the process of selling and buying homes.

### **STATEMENT OF THE CASE**

This case is about whether a Detroit-area multiple listing service (MLS), Realcomp II, is illegally restricting competition by failing to share information about a category of properties with public real estate web sites of its 14,000 member brokers and agents and through its own public web site. Public web sites are used in home searches by over 80% of home buyers today. Prospective home sellers also often search local public websites in order to get a sense of pricing of homes for sale in their neighborhood and to identify brokers with significant market presence in that neighborhood that they might consider as their listing broker. At issue is whether the Initial Decision contained errors in assessing the record and in analysis by the administrative law judge.

The Realcomp and six related FTC investigations have focused on MLS restrictions that discriminate against a long established form of listing agreement known as exclusive agency (EA), under which a seller is not obligated to pay a commission to a broker in the sale of a property if the seller finds a buyer without the assistance of the broker. Under the alternative type of listing agreement, Exclusive Right to Sell (ERTSs), a commission is owed in all cases if the house is sold, even if the real estate broker and/or agent had nothing to do with the sale. Efforts of real estate organizations to prohibit EA listings prior to the Internet era were found to be in violation of the nation's antitrust laws. EA listing agreements are most frequently used by and favored by companies that offer alternatives to traditional full-service real estate brokerage business models. Among these new "discount" business models are flat-fee, limited-service, low-cost and/or unbundled real estate services.

### **I. THE NATURE OF BUYING AND SELLING HOMES IN THE INTERNET ERA**

Homeowners and other consumers have benefited greatly from the emergence of Internet commerce, and its influence continues to grow rapidly. Despite a flat season of holiday sales overall, Internet sales were up 20% in the 2007 holiday season over the same period last year. One of the areas most transformed by Internet commerce is the brokerage industry. Many brokerage companies in sectors have embraced the changes in the marketplace caused by Internet commerce. In the course of adapting to Internet commerce, other brokerage sectors have achieved great cost savings and have also found it necessary to alter their business models to succeed the new Internet economy. In real estate brokerage, changes that improve the efficiency of brokerage businesses have also been embraced, but market driven modifications to traditional



business models that should or could result in any of those savings from being passed on to consumers have been thwarted and/or undermined in many instances by a variety of protectionist tools.

In addition to real estate, other brokerage sectors where a consumer's decision factors are very complex and financially significant have been substantially altered by Internet commerce. Investments in securities, like the purchase of a home, have a very significant impact on the economic future of consumers, and the factors involved in evaluating stocks, mutual funds, and other investments are extremely complex. This explains why financial services professional certifications/designations require many hours of study and high minimum educational background qualifications. These standards are much higher than real estate license standards, which require as little as 30 hours of classroom study and only a GED (high school equivalency degree) in some states.

Despite the complexities and the unquestioned and substantial value of the advice and counsel of financial service professionals, discount Internet-based stock brokers quickly drove substantial costs out of securities trades. Much of the information only financial service professionals could provide until several decades ago is available free today on the Internet, as is the case in real estate as well. Today a consumer can trade securities of virtually unlimited size over the Internet for as little as \$10 in a brokerage sector where the standard selling commission had previously been 1%. Because there was little market restriction on Internet commerce in the securities brokerage sector, nimble Internet stockbrokers quickly garnered 30% of the market before many of the large, traditional securities brokerages decided that it was better to join them than fight them. Today, many of the nation's largest stockbrokers provide their clients the choice of full service, full commission trading and discounted Internet trading, and as a result large full service stockbrokers have regained much of the business lost to the pure discounters. Despite the many similarities of the two sectors, none of the major real estate companies has as of yet adopted the type of business models that are at issue in this case as an alternative for their clients. If these alternative business models are successful, as Realcomp argues, why aren't their large members making them available to their clients, along with full service alternatives?

In the real estate brokerage sector, Internet commerce is saving real estate brokers and agents large amounts of time and money. By voluntarily permitting MLS members to share much of the content of the actual MLS listings on their own public websites and the public websites of other MLS member brokers and agents, the MLS dramatically increases the dissemination of those listings in this age of Internet commerce, and accordingly benefits buyers and sellers as well as MLS members. Because of the ease of Internet searches and plethora of local public websites with information and pictures of homes for sale, far fewer home buyers today trudge to real estate broker offices in order to wait while an agent prints out a list of all the complete MLS listings from the MLS database, which is accessible only through real estate agents and brokers. Instead, today's typical home buyer has already done home searches on the public websites of local brokers and agents and completed many of the other steps in the process before the buyer contacts a real estate agent, thanks to all the free information on the Internet.

In the process, MLSs have evolved from a database accessible directly only by MLS members into an important business-to-consumer tool, and the MLS's historic business-to-business function is diminishing rapidly in relevance compared to the public websites in terms of generating home purchase offers. While MLSs may continue to provide useful services to real estate professionals, it is the local public real estate web sites that have become the most powerful sales tool today. Those local web sites get their information on homes for sale from the MLS listings. The diminution in importance of MLS's traditional non public business-to-business functions on real estate transactions is akin to the decline in importance of the buggy whip on transportation as the public moved from horse and carriage to the automobile. Their main relevance is their ability to prevent the buying public from seeing their members' homes listed for sale should they choose to ignore that fiduciary responsibility.

Unlike other brokerage sectors, few of the Internet commerce savings in real estate transactions are being passed on to home buyers and sellers. Large sums of money are involved, yet as AHGA noted in the testimony submitted to the December 25, 2005 Federal Trade Commission (FTC) hearing on competition in real estate services (available at <http://www.americanhomeowners.org/AHGA/DoJ-FTC10-25-05.htm>) real estate commission rates are about 1.5% higher in the U.S. than in other developed countries. The gap between real estate commission rates and those in other countries continues despite a substantial increase in actual U.S. real estate commissions in constant (inflation adjusted) dollars as a result of dramatic home appreciation in the first half of this decade (even after adjusting for inflation and accounting for declines in home values over the last two years). This evidences the miniscule penetration of EA discount real estate brokerage models in the real estate brokerage marketplace as compared to discount models in other brokerage sectors.

Although real estate commission rates have not changed significantly, other aspects of real estate brokerage have changed dramatically as a result of the Internet. Before they first contact a real estate agent, many home sellers and buyers (80%) go online and do much of the work attendant to home purchase and selling that formerly were provided by the real estate agent. For example websites of the American Homeowners Foundation and many other nonprofit education organizations and the websites of the FTC, DoJ, HUD, and many other federal state and local governments provide home sellers objective and independent information about the home purchase and selling process. These web sites help consumers understand all the pros and cons of various business models to sell their home. Much of this information, such as the positive benefits of using discount brokers, exclusive buyer's agents, etc. is not provided on the web sites of traditional real estate brokerage organizations or volunteered by most real estate agents. The consumer and government web sites often include information about policy debates that could affect the options of sellers. For example, the American Homeowners family of websites followed the efforts to pass a Michigan state law that would require home sellers to pay for services that they neither want nor need. The legislation was opposed by the FTC and consumer organizations such as AHGA and the Consumer Federation of America. According to the July 12, 2006 edition of USA Today, "... the (Michigan) association of Realtors has gotten a bill through the state House and a Senate committee and is trying to convince the governor — who threatened to veto it — that the bill would "make sure everyone can compete," says Rob Campau

of the Realtors association.” The similarity between Michigan Association of Realtors and Realcomp is that the leadership both organizations appears to be heavily influenced by large full service real estate brokers, and the association’s proposed state law and Realcomp’s EA rule both hurt consumers and undermine discount brokers.

Home sellers also typically go to the many local public websites of the many recognizable MLS member local brokers and agents in their area in order to get a sense of the selling prices of homes in their neighborhood and a sense of which brokers and/or agents are most dominant in their local market. For this reason presence on each others local public websites is also an important prospecting tool for brokers and part of the process of cooperation that drives the real estate brokerage sector. Real estate brokers and agents have also recognized the critical importance of public websites, which explains why virtually all brokers and a large share of successful real estate agents have them.

Before the Internet a home seller would have to contact a real estate agent to get a sense of home values in their neighborhood, and there was no automated tool that would make it easy for home sellers to identify which brokers/agents were most active in their area. The agent, selected without the benefit of that tool, would spend a substantial amount of time on a potential home seller to convince them to list their home with the agent. Developing a competitive market valuation of the homes value was an arduous task for the agent. Today many home sellers have online access to county or city data on home selling prices in many locales and all have access to a growing number of Internet home valuation web sites that help in that process. The home seller can get an idea of asking prices in his/her neighborhood by going to a public website of a local agent or broker, which helps agents and brokers because it enables home sellers to make decisions to sell their home without any need for time and effort of the real estate agent or broker.

Home sellers save real estate agents and brokers much time and expense in other ways as well. A home seller can easily compose a description of the home and email it to the real estate agent, along with all the other information needed for an MLS listing and their attached digital pictures for the listing. The home seller in such cases provides all of the content for his or her listing, saving the real estate broker and agent much time and effort. The real estate agent can then simply copy-paste the content into the MLS listing which the two intermediaries (the agent/broker and the MLS) then forward the homeowner’s listing directly to the MLS’s powerful array of local public websites, which is where most buyers today go to find homes for sale in areas where they want to purchase a home. In effect, the MLSs, which were solely business-to-business mechanisms prior to the Internet, have today morphed into consumer-to-consumer intermediaries in such circumstances.

Selling prices are very important in today’s depressed market. Many homeowners today don’t have enough equity plus savings to afford the typical 5-6% commission demanded by a full service broker, so they may face foreclosure if they can’t keep up with their payments and can’t find more economical sales tools. Many new discount brokers, like those in the Realcomp case, are willing to reward home sellers who do so much of the work by charging very modest flat fees

for listing the property. Since the real estate market in many areas is slow, virtually all home sellers today offer the same 2.5-3.0% commission to cooperating real estate brokers who bring them a buyer whether they use a discount broker or not. The discount EA brokers who testified in this case stated that almost all of their listings offer cooperating commissions in the same 2.5% - 3% range as the typical full service/ERTS listing. However home sellers who use a discount broker can still save quite a bit by paying the discount listing broker only a few hundred dollars instead of the 2.5-3.0% seller's commission typically demanded by full service real estate brokers.

Real estate agents and brokers are also saving a great amount of time and money on the buyer side as a result of Internet commerce. Before the Internet a real estate agent would have to spend a lot of time with a buyer to find out if the buyer could afford to buy a home or afford to buy a home in the price range they had in mind. If the home buyer's goals were realistic, the real estate agent would then spend even more time searching the local MLS (at that time a business-to-business tool accessible only to MLS members) and deliver to the buyer the cryptic printouts of all MLS listings in a defined area that met the buyer's price, home configuration, and other criteria. The process was very cumbersome and time consuming, and even more so if the prospective buyers lived in a distant location.

Today over 80% of home buyers use the Internet in the home purchase process and the percentage is growing rapidly. According to research by the American Homeowners Foundation, the National Association of Realtors, and other organizations, many of today's buyers go to the Internet first and do much of the work attendant to buying a home that formerly required a real estate agent's assistance before buyers contact a real estate agent for the first time. According to NAR's Profile of Home Buyers and Sellers for 2007, 48 percent of all buyers go online before contacting a real estate agent either to view houses (32 percent) or to find information about the home-buying process (16 percent). The NAR report shows that there has been a steep drop in the number of buyers who found their property with a real estate agent vs. on the Internet. Only 2 percent of the buyers found their property online and 50 percent found their property through a real estate agent in 1997. In 2007, 29 percent of the buyers found their property online and 34 percent found the property through a real estate agent. NAR's report showed that the Internet was more useful than working with agents. The Web was "very useful" for 78 percent of buyers compared to 70 percent who reported agents were very useful according to NAR's report. A 2006 study by the California Association of Realtors revealed that Internet buyers spent an average of 5.8 weeks researching home purchases before contacting a real estate agent. The Internet is supplanting the traditional real estate agent as the point of consumer education, also saving time for real estate brokers and agents. For example, a home buyer will often visit websites of organizations such the American Homeowners Foundation and many other nonprofit education organizations, and the websites of the FTC, DoJ, HUD, and many other federal, state, and local government agencies that all contain free objective and independent information about the home purchase and selling process. Through the myriad of independent websites offering free information on home buying and selling, home buyers who have the time can potentially learn more about the process than most new real estate agents need to pass their state real estate licensing exam. Unfortunately the industry has not always welcomed the consumer education

efforts of government agency websites. Although we are unaware of any information provided by the organization provides consumers on the benefits of discount brokers and many other important issues relevant to real estate transactions, the NAR in its October 17, 2007 OPERATION TIP-OFF PUBLICITY ALERT to its state organizations (*Justice Web site: Few facts, much fiction*) stated that " We can't speculate on why the Department of Justice chose to put up a Web site in an unprecedented attack on an entire industry and favors one business model over all others. Speculating in the media will only give DoJ free publicity for its feeble attempt at fairness.

These educational web sites help home buyers understand other important subjects that they won't see on the websites of traditional real estate organizations or hear from traditional real estate brokers, such as the risks of dual agency (which are one of the greatest sources of consumer lawsuits against real estate brokers and agents) as well as very low compliance with required real estate disclosure laws. NAR's General Counsel Laurie Janik has reacted to declines in compliance with disclosure laws (only 30% at first meeting; 22% not at all), observing that "These statistics say that people are being sloppy. They need to take agency disclosure requirements seriously; it is a critical element of consumer protection. I don't think it is good for practitioners or consumers that the trend line is going down. We aren't going in the right direction -- compliance is worsening." Ms. Janik's views comport with those of former NAR Chief Economist and best-selling author Dr. John Tuccillo, who was quoted in RISMEDIA on June 22, 2007: "With the expansion of the number of Realtors, the level of competence has fallen to its lowest point ever".

Many of these government and consumer organization web sites also explain the pros and cons of various buyers' representation models, such as exclusive buyers' agency, which is not provided on the web sites of traditional real estate brokerage organizations or volunteered by most real estate agents. The web sites often include information about policy debates that could affect the options of buyers. For example, some of them keep track of state laws promoted by traditional full service real estate brokers that prohibit home buyers from receiving real estate commission rebates. Home buyers and sellers also benefit from learning the most frequent causes of legal disputes between homeowners and real estate professionals (In NAR's 2005 Legal Scan of thousands of lawsuits 20% of the thousands of consumer lawsuits related to home sales transactions were related to agency violations - primarily undisclosed dual agency and fiduciary duty violations - and 24% were related to other disclosure violations). All of these educational efforts not only help educate consumers but also save time for real estate agents and brokers as well.

The many local public websites of recognizable local brokers and real estates are essential to home buyers. That is where the home buyers go to look at homes offered for sale, and the hundreds of local public websites get their information from their local MLS. The home buyers go to them to get a feel for pricing of the kinds of homes in the neighborhoods they are interested in. The prospective buyer can then quickly go to any of hundreds of other public web sites where they can use free software tools to calculate how much they can afford in mortgage payments, and compare the interest rates of large numbers of mortgage providers, all in advance of

contacting a real estate agent. If things look good after that exercise, the prospective buyers can compile a list of promising properties and proceed to contact the listing agents or other agents they might want to ask to represent them. As a practical matter, the buyers have no reason to contact any of the sellers, since most are ERTS listings, so there are no savings for sellers to pass on should a buyer contact the seller directly. The status (ERTS vs. EA listings) isn't disclosed on public websites and the home seller's contact points aren't disclosed, so it would be hugely cumbersome and nearly impossible for a buyer to identify and contact the few EA sellers on public websites. In part because of all these time savings, real estate agents today spend much less of their time servicing clients. According to one recent study, many real estate agents spend as much as 90% of their time prospecting for new clients, which does not in any way benefit existing clients.

Most buyers stay in the same area where they currently live (The median moving distance for home buyers is 13 miles according to the National Association of Realtors). Typically a buyer will go online, do a Google search on a term like "homes for sale Mayberry, KY". Then the buyer will scroll down through the thousands of results until he/she sees a recognizable local real estate brokers or agent's website and click on that site. The buyer then determines their search criteria and views the listings that meet those criteria. In many cases a home buyer is able to prequalify themselves financially and narrow their interest to a small number of homes before they first contact the real estate agent. This saves those brokers and agents a substantial amount of time.

Obviously things are not always so easy for real estate agents and brokers. Many home buyers and sellers still do need, and benefit greatly from, the services of a skilled full service real estate agent. This is particularly true for the declining number of older home buyers and sellers who aren't as familiar with Internet commerce as their children and grandchildren. Nonetheless home buyers and sellers are unquestionably assuming more of the efforts and responsibilities in real estate transactions, thanks largely to the benefits of Internet commerce. This trend will only continue in the future. Despite these facts, American homeowners have yet to share the financial savings that are accruing to the real estate service profession as a result of Internet commerce.

One thing that has not changed pre and post Internet are the desires of home buyers and home sellers. With very few exceptions almost ALL home sellers want their listings exposed to as many home buyers as possible. It is reasonable for sellers to expect that their agents/brokers (and organizations that their agents/brokers control, such as Realcomp) will carry out their fiduciary duty to take all reasonable steps to assure that this happens. All home buyers want to see ALL listings, regardless of listing category, that meet their price, home configuration, and other criteria. Those listings include both Exclusive Right to Sell (ERTS) and Exclusive Agency (EA) listings. In an ERTS listing, the home seller is obligated to pay the listing broker the full commission even if the home seller finds the buyer. In an EA listing the home seller is only obligated to pay a commission (or an additional commission in cases where a non-contingent listing fee was prepaid to a flat fee broker) if the listing or cooperating broker or agent find the buyer. Home buyers searching on public websites can't tell the difference because the EA/ERTS

status isn't disclosed to the buyer, and the buyer doesn't care because his real estate agent is provided his/her commission by both types of listings anyway.

While real estate brokers and agents generally prefer ERTS listings because they will receive the full negotiated commission even if the home seller found a buyer by himself, EA listings have existed throughout the history of real estate brokerage as a result of market competition. There have been collaborative efforts by real estate organizations to boycott EA listings prior to this case, but the FTC interceded and the real estate organizations were forced to stop the boycott. Virtually all EA listings include an offer of compensation to cooperating brokers that is comparable in amount to the commissions offered to cooperating brokers under ERTS listings. EA listings are sold through the services of a real estate broker 80% of the time according to industry data, so the agreed commission is actually realized both by the broker and any cooperating brokers that the listing broker has provided for. Of the remaining 20% many of the homes are sold by the homeowner without broker assistance to family, neighbors and friends. Others are sold by the homeowner, also without broker assistance, through word of mouth, notices posted by the home seller on craigslist.com or on grocery store or church bulletin boards, etc. Of course some of those homes were never sold so no commission was due in those cases.

One of the conditions that occur in other brokerage sectors but only very rarely in real estate brokerage is a process called "free riding". An example is when a consumer might obtain useful information from a full service stockbroker or travel agent and subsequently purchase the services from a discount online stockbroker or travel web site such as Expedia or Travelocity, or alternatively obtain the service directly from the service provider. This often occurs because the consumer is dissatisfied with the quality of the broker's service, and consumers deserve the same right to decide when the quality of services is undeserving of a commission in real estate as well. In order to save money consumers will sometimes go to a discount securities broker or travel website after they've been provided information on securities or travel packages by full service brokers. In these other brokerage sectors, free riding is an ordinary and necessary cost of doing business. It has the positive benefit of allowing the consumer to deny compensation to brokers whose provided service was unsatisfactory and there not deserving of compensation. In addition, over the long term a competent broker or agent in other brokerage sectors is also likely to be both beneficiary as well as a victim of unfair free riding, so the net effect of free riding over the career of any broker or agent is negligible.

Rather than being a problem, it is the agents and brokers are the ones who most often benefit from free riding in the real estate brokerage sector. In other brokerage sectors the broker and agents are compensated only if they provide the service to the consumer. In real estate, under ERTS listings, the predominant form of listing, the real estate broker and agent receive a commission even when they had nothing to do with finding the buyer, which happens often. Home sellers with pre-existing ERTS listings often locate a buyer, such as a colleague, friend or neighbor, who decides to buy the home. The home seller is obligated by the listing agreement to pay the listing broker and agent the full commission, including the portion of the commission that had been reserved for a broker and agent who found the buyer, even though the listing broker and agent had nothing to do with finding a buyer. In those circumstances the real estate

brokers and agents get the free ride to a full commission, despite not having found the buyer. The only thing sweeter would be if they could eliminate all EA listings so they would have a chance of free ride in all of their listings, which the Realcomp EA boycott will effectively mandate in all cases. By eliminating EA listings from the marketplace Realcomp will assure that there will never be a case where a sale of their member's listing doesn't result in a commission. This will also assure that their members are never under any pressure to make any special effort to sell the home before the homeowner finds a buyer.

Unlike their clients, real estate brokers and agents are rarely victims of free riding themselves for a number of reasons. Real estate sales data proves that real estate brokers and agents almost always receive the compensation due them under the terms of their agreement, and other data and aspects of the practice of real estate brokerage lead to the same conclusion. In addition, the EA discount brokers in this particular case state that their listings almost invariably offer cooperating commissions and those commissions are almost invariably paid to real estate brokers and agents, so this also proves that free riding in real estate is virtually nonexistent.

Consumers are aware of discount Internet securities and national travel web sites and can use them to free ride on full service securities brokers and travel agencies without recourse. Home buyers rarely have the opportunity to do the same thing in real estate. The vast majority of real estate listings are ERTS listings, which means the agents will get their commission in all sales. In addition, it is impossible in most cases for buyers to identify the few EA listings because that status (EA vs. ERTS) is not disclosed on public websites. Not disclosing to a buyer whether a listing is EA or ERTS, cloaking the property address, and not disclosing the name of the seller or his/her contact points are all effective steps a real estate broker or agent can take to prevent free riding that are within the parameters of Supreme Court rulings regarding legitimate steps that may be taken to protect against free riding. Most home buyers wouldn't know what EA or ERTS listings stand for, even if they were disclosed in a public website listing. Another source of hard data about possible free riding in real estate is the National Association of Realtors' annual Legal Scan, which identifies the types of real estate lawsuits across the country. It is very easy for a real estate agent or broker to sue a home seller for violating the commitment to pay the broker their just commission. The standard real estate contracts in use by most real estate brokers are very clear in regard to that obligation, so brokers and agents should be able to win cases where they can produce hard evidence. Yet in the millions of home sales every year and many thousands of real estate lawsuits every year there are very few cases regarding free riding. In fact, the majority of the cases are by homeowners against real estate brokers and agents over such issues as failure to provide the legally required disclosures or to live up to their fiduciary responsibilities.

We are unaware of any reliable statistical data that contradicts the overwhelming evidence that free riding is of no consequence in the real estate brokerage sector. The real estate brokerage sector is indeed fortunate that it does not have a free riding problem. For that reason it is unfortunate that something that for practical purposes doesn't exist in real estate brokerage is being offered to the FTC as a justification for a boycott of the denial of choice to real estate service consumers.



In this decade the real estate market has changed dramatically. In the run-up in real estate prices in much of the U.S. in the first half of this decade, many home sellers received multiple purchase offers before their real estate agent even had time to run a newspaper ad or hold an open house. In effect, the listing real estate brokers and agent's workload was often reduced by the combination of market demand and technology to the ministerial functions necessary to assure that the home went to closing successfully. Based on a 5% commission rate and a median home selling price of \$500,000 in some of the higher priced market areas like Washington DC, a real estate commission cost the home seller is \$25,000 for services that, in a seller's market in an era of Internet commerce, may be almost purely ministerial and require only a limited investment of a real estate broker and agent's time. Understandably, many home sellers have begun to question whether the sales services in an effort that took only a few weeks and involved no open houses or ads was worth \$25,000.

Since 2005 the real estate market has crashed in many parts of the country. Many homeowners have little or no equity in their homes as a result of declining home values in recent years. While selling a home is clearly much more difficult in distressed states like Michigan, many home sellers today do not have the money to be able to pay the typical 5-6% commission demanded by a full service broker. The result is a growing interest by consumers in taking advantage of economies of Internet commerce. Undermining the ability of such homeowners to effectively sell their homes through EA listings on public websites with the assistance of discount brokers will sentence many to foreclosure at a time when there are growing signs that increased foreclosure rates are driving our country into a recession. Even if a home seller is not in a financially precarious position, there is an abundance of free information about every step of the home buying and selling process on the Internet. Many home sellers are quite competent and capable of marketing their home without assistance beyond getting their MLS listing on the hundreds of local public web sites through the local MLS.

For real estate consumers to be able to benefit from the economies of Internet commerce, protectionist barriers to changes in the marketplace must be removed. Unlike other brokerage sectors, which have accepted the changes that Internet commerce has brought to the marketplace, the real estate brokerage sector has consistently and effectively prevented most of the cost savings that have derived from Internet commerce from being passed on to consumers. The Realcomp case is but the latest in an ongoing pattern of protectionist efforts from real estate service provider organizations dominated by large full service real estate brokers, designed to assure that home buyers and sellers pay higher transactional costs than would be the case without Realcomp's intervention.

## **II Impact of the Initial Realcomp Decision on American Homeowners**

The initial decision under review in this case will have a very significant adverse impact on American homeowners and future homeowners if it is allowed to stand. By preventing the majority of home buyers (over 80%) who use public real estate websites from seeing EA listings due to the huge market power of MLS member public websites, EA listings will disappear as

more and more MLSs adopt Realcomp's policy. Real estate agents and brokers will have less incentive to work hard to sell homes because they know they will receive a commission even if the home seller finds the buyer through his/her own effort. As a result the vast majority of home sellers who use MLS member brokers and agents to sell their homes will be denied the opportunity to avoid paying an additional real estate commission if they are able to sell their home on their own. This boycott would likely extend to other MLSs across the country that would likely use a decision in favor of Realcomp case as a precedent. The impact of the boycott will be substantial. In many cases, it will prevent home buyers from finding homes for sale that best suit their needs while denying many home sellers the higher prices and reduced selling costs they might have achieved through EA/discount broker listings.

The effectiveness of the Realcomp boycott will only increase over time as Realcomp continues its stated ongoing efforts to absorb the overlapping and much smaller competing local MLS's that may currently still include EA listings in their feeds to public websites of their members, as Realcomp acknowledged in evidence in this case. The national trend towards consolidation of MLSs is well documented and proceeding rapidly across the rest of the country as well. Even if they remain independent, most competing MLS's will undoubtedly soon adopt the Realcomp policy of boycotting EA listings in their feeds to their own member's public websites, thus contributing to the objectives of this boycott effort. As a result, the share of public websites where discount broker listings are available will decline even further, to the further detriment of home sellers and buyers who use this business model. The final outcome will be that EA listings will disappear from the real estate marketplace and home sellers will be forced to pay 5-6% commissions to real estate brokers and agents who in some cases had nothing to do with the sale.

The way the boycott is achieved lies in the way the Internet has changed the way home buyers search for homes. Over 80% of buyers search for homes to buy on the Internet. The median moving distance for a home buyer is 13 miles according to data from the National Association of Realtors, so a home buyer is likely to be familiar with the local real estate brokers and agents in the area. A home buyer in southeastern Michigan will likely begin their effort by going online and entering a search term such as "Homes for sale (town) Michigan". For example a Google search of "Homes for sale Northville Michigan" (which is in the Realcomp market area) turned up 26,100 websites on January 23. With 14,000 Realcomp member brokers and agents there are a very large number of Realcomp member broker and member agent's public websites among those websites, each of which is fed condensed listing information from Realcomp, as is Realcomp's MoveInMichigan.com. The first page of the aforementioned search included many websites that were obviously public websites of local real estate agents and brokers from the brief description below each listed websites. Since most buyers in the Northville area are also local residents, many will no doubt recognize the familiar names of many of those agents and local brokerages. Those buyers correctly presume that the local brokers and agents (all most likely Realcomp members) will have the most complete list of local homes for sale, and will search those websites first rather than any of the obviously national public websites that also appeared on the first page of that search.

None of the aforementioned contains discount broker listings as a result of the Realcomp rule subject to this litigation, and it is the recognizable local broker and agent's websites that most home buyers will be most likely to click on. A 2006 study by the NAR confirms this. The three most heavily visited locations by buyers are the IDX (supplying MLS data to most of the local broker's public websites, most of the local agent's public websites), local MLS public websites, and Realtor.com. However it should be noted that Realtor.com is the website of the National Association of Realtors, and it is much more likely that a homeowner would instead click on to the website of recognizable local brokers who they would presume to be more likely to have a more comprehensive inventory of local homes for sale.

While a small number of the national public websites that turn up in the search may contain some EA listings from that town (Zillow, Yahoo, etc., but not Realtor.com, which does not receive EA listings from Realcomp), the number of those websites will be totally dwarfed by the vast number of Realcomp supplied public websites of Realcomp's 14,000 members that don't contain EA listings and don't disclose to buyers that EA listings which could have been supplied by Realcomp are not available. It should be noted that although the collective traffic of national websites like Zillow, Yahoo, etc. is smaller than the collective traffic to the hundreds of SE Michigan Realcomp member public websites.

The national websites, like Realtor.com, draw their traffic from across the entire country. Many of the home buyers that come to Zillow, Yahoo, Realtor.com, etc. from all over the nation come to those sites for their useful if sometimes incomplete educational content on home buying and selling rather than to see specific listings. Many of those national public website visitors are real estate agents seeking to find out if their listings are displayed and/or looking for for sale by owner (FSBO) prospects they might convert into listings. Very few of the buyers, sellers, and real estate agents looking on the national public web sites are interested in homes in of SE Michigan. A home buyer looking for a home in SE Michigan is far more likely to go to a familiar SE Michigan broker or agent's public website because they believe that the local broker or agent's website is far more likely to have the most comprehensive list of homes for sale.

The effect of the Initial Decision, if affirmed, will greatly reduce the competitive pressure of more cost effective real estate brokerage models on real estate commission rates. By maintaining unjustified and unnecessarily high real estate commissions it will cost American homeowners immense amounts of money in unnecessary transaction expenses. It would force many home sellers who would like the option of selling their home themselves to pay commissions even if they find the buyers. The effect will be to increase the iron grip of real estate brokers over the practice of Internet real estate commerce in an era where the marketplace, voter input, and regulatory oversight continue to expand competition and consumer choice in other areas of Internet commerce, telecommunications, and information technology.

### **III. Deficiencies in the Findings in this Case**

There was no convincing evidence presented that providing EA listings to public websites would cause any harm whatsoever to Realcomp or its members. All Realcomp members pay dues to

Realcomp, whether they be full service or discount business models or whether they use EA or ERTS listings. In their testimony in this case, the discount brokers stated that their clients invariably offered cooperating commissions at similar rates as full service brokers to buyer's brokers, and that the vast majority of the eventual buyers did use buyer's agents, a large share of who were no doubt Realcomp members, who also paid dues. Indeed there is no evidence that the ratios of EA listings sold by real estate agents versus the home seller without assistance are any different over public websites than before such websites existed, so EA listings are clearly no threat to Realcomp.

In the review of the evidence the administrative law judge concluded that a plenary market examination would be necessary allow the court to "confidently draw conclusions regarding the principal tendencies and competitive effects of the alleged restraints." We believe that the evidence on the record in this case demonstrates obvious and manifestly anticompetitive effects and actionable consumer harm to anyone aware of the impact of the Realcomp policy as presented in the evidence in this case, and also familiar with the process of Internet searches, which today includes the majority of the U.S. population.

The Initial Decision reflects a misunderstanding of the actual process of Internet real estate searches, which would have lead to the conclusion that the evidence on the record in this case demonstrates obvious and manifestly anticompetitive effects and actionable consumer harm without any need for additional information to confidently reach such a conclusion. Obviously, home buyers looking for a particular set of home features in a set of public listings provided to many of the hundreds of public websites by Realcomp would not see the Realcomp MLS listing that best suited their needs if that particular home was an EA listing.

The buyers are also not informed on those public websites nor on Realcomp's site, MoveinMichigan.com, that homes in their own MLS's database are not available on that website, so home buyers have no way of knowing that they would need to keep looking until they find another public website that does show EA listings. The effort would be fruitless anyway, because public real estate websites do not indicate whether their listings are EA or ERTS.

Because the median moving distance for a home buyer is 13 miles as previously noted, home buyers will be more likely to select the public website of a familiar local Realcomp member broker or agent for their search than a national public website such as Realtor.com, Yahoo, Zillow, etc. Even if the home buyer extends their search beyond the hundreds of Realcomp member public websites, a discount broker may not have paid the extra money and gone to the extra trouble to get their EA listing on that particular national public website.

Obviously, these barriers are pervasive and serious, and in such circumstances a home seller using a Realcomp member discount broker will often suffer as a result. Home buyers will also suffer, because even if they are using a Realcomp member buyer agent, the buyer may not realize they have not seen the entire Realcomp inventory in their Internet search, and they may not request that the buyer agent provide a full MLS list of the Realcomp MLS inventory. If their buyers agent isn't a Realcomp member neither the buyer or the buyer's agent will be aware of

the availability of Realcomp EA listings. Realcomp states that other MLS's are available in the market area for their member discount brokers, but in the record for this case Realcomp also concedes that it is seeking to merge with them, which would eliminate that alternative. It also ignores the likelihood that if the initial decision is affirmed that competing MLSs that currently feed EA listings to Realtor.com will likely soon adopt the Realcomp policy and discontinue the practice, further reducing the exposure of EA listings to home buyers who use the Internet in their home searches.

The application of a rule of reason analysis also leads to the conclusion that there are obvious anticompetitive effects and actionable consumer harm. The rule of reason standard defines violations as agreements that "unreasonably restrain trade when they have, or are likely to have, a substantial anticompetitive effect in the relevant market, such as increasing prices...or reducing consumer choice." Again, the record in this case clearly meets that standard.

The Initial Decision concluded that, because discount real estate brokers in the Realcomp market area have achieved a small market share, Realcomp has not erected any unfair and anticompetitive barriers to their business model. To the contrary, in the eyes of potential future clients looking on local public websites to see which local selling brokers are well represented in their neighborhood, the discount/EA brokers would not exist since their listings aren't on the local public websites. Further, given the rapid market penetration of Internet-centric business models in other brokerage sectors, the logical conclusion is that there are currently barriers to discount brokerage since Internet/discount based business models have substantially less penetration in the real estate brokerage sector, efficiencies of Internet commerce have clearly resulted in substantial efficiencies and/or cost savings to the U.S. real estate brokerage sector, home sellers and buyers are increasingly using Internet commerce tools to do more of the real estate transaction work, and none of those savings are currently being passed on to American homeowners. Clearly the multi-pronged strategy of denying discount brokers listings access to local public websites and forcing them to offer services their clients neither want nor need is intended to undermine the benefits and market presence of discount brokerage, and the strategy is working.

Realcomp has also argued that they should be allowed to discriminate against EA listings to avoid "free riding"; a circumstance where the real estate broker's efforts are responsible for finding the buyer, but the seller evades payment of the commission justly due the broker. The outcome of the decision would be to make reverse free riding universal, which occurs when a home seller is required to pay a commission in cases where the seller, not the agent or broker, found the buyer. Realcomp has presented no reliable data to suggest that the few cases of real estate free riding are any more common in Internet commerce than they were before Internet commerce. As pointed out in the prior section of this brief which described the current market environment, all the reliable available data and other information shows that free riding is virtually nonexistent in the real estate services arena. MLS data shows that 80% of EA MLS listings resulted in commissions paid to brokers/sub-brokers, and much of the remaining 20% of homes were either unsold or sold by directly to buyers by home sellers with no influence

whatsoever from the listing broker, and thus no obligation. Thus a very small portion of commissions are lost because of free riding.

The tiny amount of free riders was not enough to justify a boycott of EA listings prior to Internet commerce. MLS's such as Realcomp often use techniques to minimize free riders in Internet commerce, such as cloaking the actual property address of properties they feed to their many members' public websites. There is no obligation to pay a commission and thus no free rider problem if a buyer finds out about a home for sale solely through the efforts of a seller. Home buyers using public websites use buyer's agents the vast majority of the time. Real estate brokers and agents have a powerful tool to fight free riding. They write the listing contracts that make the seller's contractual obligations abundantly clear and they can sue a seller who doesn't pay a commission that is due. Yet there are few such lawsuits and even fewer where the real estate broker or agent had the hard evidence needed to prevail. Free riding is therefore mostly a legend in the minds of real estate brokers/agents and a transparently invalid justification for boycotting EA listings. There is no reliable data to suggest otherwise. This proves that the free rider issue is not relevant as an excuse to boycott EA listings in public websites.

While some reasonable steps, such as cloaking addresses may be a permissible action under the Supreme Court decision allowing reasonable steps to prevent free riding, allowing a boycott of an entire class of sellers to solve what is at most a very minor problem that has existed since the advent of MLS's is not legally justified, especially since no existing data suggests that the frequency of free riding is no higher in EA listings than in ERTS listings. This data clearly refutes the conclusion that there is plausible economic justification for limiting the dissemination of EA listings because they supposedly conflict with Realcomp's legitimate business purpose. For this reason permitting a boycott because of the free ridership phenomena that is a minor and normal cost of doing business in real estate and other brokerage sectors cannot be justified.

We believe there are two obvious and logical business purposes for the EA boycott regulation. The first is to eliminate EA listings from the marketplace by denying them presence on the vehicles most important to real estate sales in the Internet age – the most frequently visited public real estate websites, which are the local public websites of the 14,000 Realcomp members and MoveInMichigan.com. This consistent with the opinion of NAR itself, which concluded that including Exclusive Agency listings on [IDX] feeds “would not detract from the purposes of the MLS.” The second business purpose is the elimination of real estate brokers that use discount business models that undermine the higher commission rates of traditional full service brokers. According to the Justice Department, about 80 percent of MLSs in the country are owned by Realtor boards. The Realcomp Board is typical, consisting mostly of large traditional real estate brokers who do not currently offer home sellers the same discount real estate business models that Realcomp asserts are succeeding in the marketplace. Those large real estate brokers have an incentive to assure they receive commissions on all possible sales even if they had nothing to do with them, and also the incentive to eliminate or minimize the impact of real estate brokerage business models that undercut their full service commission rates. It should be noted that the Consumer Federation of America's 2007 study of the makeup of state real estate commissions,

many of which have attempted to achieve results similar to Realcomp's, are also dominated by large traditional real estate brokers who do not employ discount real estate business models.

We believe that the rule of reason was misapplied with respect to the limits of the Realcomp website policy's on public exposure on competition. The judge was no doubt well intended, but we believe he based his analysis on inadequate information on the way consumers actually conduct home searches today and misleading information from Realcomp about the influence of a small number of national public websites and the great influence of the many hundreds of Realcomp-affiliated local public websites that do not include EA listings. With this information in hand we believe that he would have concluded that the Realcomp policy does constitute an unreasonable limit on public exposure. Data from NAR's 2006 study that found that these local IDX public websites were the most popular with home buyers, along with regional websites like Realcomp's MoveinMichigan.com, which also does not currently display EA listings. Data on visits to a major site, Realtor.com, are somewhat questionable because the smaller number of Michigan home buyers are likely more interested in non-listing educational content than in local listings, which in the minds of SE Michigan home buyers are likely to be more complete on local public websites. It is much more likely that a homeowner interested in viewing local homes for sale will click on to the website of recognizable local brokers who they would presume to be more likely to have a more comprehensive inventory of local homes for sale than would a national public website. Further, the other MLSs with presence in SE Michigan are tiny in comparison to Realcomp, have far fewer member local public websites, and in addition are Realcomp's stated future merger targets.

Because of high likelihood of bias in methodology, studies by the real estate brokerage sector that suggest home sellers using ERTS listings receive more money from the sale of their home than other home sellers should be discounted. A major independent study of causal factors for price differences in otherwise comparable home sales proves that MLS sales figures overstate the average amounts received by home sellers because of distortions caused by the inclusion of sales of properties owned by real estate brokers and agents. According to a study by Dr. Steven D. Levitt, professor of economics at the University of Chicago, real estate agents yield more on the sale of their own homes than they do on the sale of their fiduciary's homes. In his 2005 New York Times best seller, Freakonomics, Dr. Levitt determined from a sample of 100,000 home sales that real estate agents yielded 3-4% more on average from the sale of their own home as compared to the proceeds of their clients' home. There were a large number of ERTS sales of homes owned by real estate agents in the sample, which proves MLS sales data generally overstates the amount received by ERTS home sellers who are not themselves real estate agents.

A home seller may be willing, able, and prefer to show their own properties to prospective buyers. That saves real estate agents and brokers money and time, and is most likely part of the reason many EA sellers use EA discount brokers. Making a seller pay for a service they may neither want nor need is not pro-competitive, as Realcomp contends.

Realcomp argues that the majority of buyers can access actual MLS listings through Realcomp online. Realcomp online is a password protected website. To access that data a home buyer would first need to go through a Realcomp member, and many home buyers today have already

done their online property searches before they contact a real estate agent. However 80% of home buyers are independently searching on public websites from their homes or offices, which saves a tremendous amount of time for their current or future real estate broker or agent. Many of those home buyers will have already targeted the home they want to buy before they contact a broker or agent for assistance in making an offer, saving the agent still more time. At that point the buyer's agent would not know whether the buyer had seen a public website that included EA listings or not. It is unlikely that the buyer's agent/broker will want to slow down the process by pointing out a way to see EA listings that the buyer may not yet have seen, and the home buyer has no way of knowing that they haven't yet seen EA listings on the public websites in their area. For that reason home buyers have no ability to know that they will have to search further to find the EA listings, which may well include their dream home.

Realcomp's arguments regarding subsidies is that those brokers who charge higher commission rates subsidize other brokers who charge lower commission rates, and subsidies of lower commission rates are therefore unfair and undesirable. This implications are that lower commission rates are therefore bad (notwithstanding the consumer benefits) and that there should be some sort of "standard" selling cost charged by the listing broker and/or offered to the cooperating broker. It also ignores that the trend of Internet commerce in other brokerage industries, as yet unrecognized in real estate, has been to drive down transaction costs. Such a standard would also be a stark contradiction to active and aggressive disavowals by the real estate brokerage industry in its public policy communications that its members do not consistently propose a 6% commission rate to most home sellers most of the time. Absent a 6% or other consistent standard, there can be no numerical point of reference below which a subsidy would allegedly exist.

Such a notion also ignores that some selling techniques may be more cost effective than others, and is anti-competitive in that it implies that such a standard is appropriate. Most EA buyers are represented by real estate agents who come through offers of compensation used by EA sellers, and the offers of compensation in EA listings is, although not required, almost always in the range offered by ERTS listings (typically 2.5 – 3%). As a result property owners have paid their listing broker in accordance with their contract, and the cooperating brokers and agents get commissions comparable to ERTS sales. Everyone is happy, everyone got paid what they expected and nobody was injured. Realcomp members received amounts acceptable to them and enough to cover their costs of membership in Realcomp, so Realcomp itself was not injured. For these reasons there is no subsidy of any home buyer or seller or any category of Realcomp member.

What is particularly troubling is the disrespect for their EA listing clients and other American homeowners demonstrated by Realcomp members who voted in favor of Realcomp's EA policy. Real estate brokers and agents owe a fiduciary duty to their clients. In addition article 1 of NAR's code of ethics states: "When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary." Realcomp is a member of NAR, as are most of its Board and other members, so Realcomp has the same obligation to its members' clients. All of those



clients with EA listings would like their listings put on Realcomp member's local public websites, so it is Realcomp's fiduciary duty to do so. Instead Realcomp has taken overt action to deny their members' clients the fiduciary duty that they both owe the clients, which is also a violation of NAR's code of ethics. We urge the FTC Commissioners to require that Realcomp and its members come into compliance with the NAR Code of ethics and their fiduciary duty by prohibiting the boycotting of EA listing dissemination to public websites in the future.

Realcomp notes that cooperating (selling) agent's incentive to show a property is related to the expected compensation from doing so. If true, this evidences a lack of Realcomp member awareness of article 1 of NAR's code of ethics and their fiduciary responsibility. In addition to reversing its EA boycott rules, Realcomp should be directed to immediately conduct a membership education program so they understand that the order of priority should not be which home sale pays them the most but which home sale most benefits their client.

In addition, the National Association of Realtors board of directors in November 2006 approved a policy that requires all Realtor association-owned MLSs "to include all property listings carried by MLSs in feeds distributed to MLS members and national aggregators like Realtor.com. That policy applies to all listings, regardless of the type of listing agreement." Unlike NAR website policies that are being litigated with DoJ, this policy makes sense. The FTC should require Realcomp to adhere to this policy.

The assertion that buyers have less incentive to use agents in pursuing EA listings is erroneous. EA listings aren't identified as such on public websites, so EA versus ERTS status has no bearing on the buyers' decision regarding the use of an agent when the buyer is using local public websites. In most cases, the buyers end up using a real estate agent in their home purchase as all the data and testimony demonstrates, and many of those agents are undoubtedly Realcomp members. The home sellers are using a Realcomp member listing broker and would not have been able to get the listing in the MLS had they not. Realcomp also fails to acknowledge that some home sellers might prefer, and have the right, to acquire the real estate services they need on an a la carte basis, from any mixture of real estate brokers and agents, real estate attorneys, etc. Realcomp asserts that the primary objective of the MLS is the formation of subagency relations, but the actual primary objective of the entire exercise is selling the home. Putting EA listings on local public websites helps and in no ways interferes with that function. EA listings almost always include offers of subagency according to testimony in this case from discount brokers who use EA listings. Even if an EA listing did not include an offer of a commission to the buyer's broker, it in no way precludes a home buyer from asking the home seller to compensate their buyer's broker even if the listing does not include an offer of commission to the cooperating broker. Realcomp has provided no reliable data to suggest that cooperating broker compensation is not provided in the vast majority of EA sales through public websites.

The initial finding does not reflect an appreciation of the new role of MLS's in Internet commerce. Their role in Internet commerce is to directly feed data from MLS listings to their member's local public websites so consumers can see them. In doing so, they are no longer just business-to-business organizations, but have become integral components in a business-to-

consumer network and should be treated as such legally. That function has become the MLSs' most important function from the standpoint of successful home sales and consequently from the perspective of their own members' financial success.

Realcomp's boycott of EA listings is in many cases discriminates directly against consumers. Many home sellers provide all the intellectual property content for MLS listings, including discount brokers EA listings. That content includes the property description, photographs, and all other non-public content. Discount brokers respect the contribution of home sellers to the effort, which is one of the reasons that discount brokers are willing to pass many of the savings on to those home sellers. The home sellers are thus the owners of the listings content, and Realcomp is violating its duty to consumers as well as its own members in boycotting the dissemination of the home seller's listing and intellectual property to its members' public websites.

Other applications of reason and common sense also lead to the conclusion that the Realcomp policy is anticompetitive and will impose significant costs on American homeowners. The Realcomp EA policy is contrary to the NAR MLS antitrust policy, which bars MLS's from "discouraging participants from taking exclusive agency listings." It also contravenes NAR's policy that prohibits MLSs from restricting the uploading of EA listings to sites like Realtor.com. For that reason, it seems highly unusual that NAR has invested \$300,000 of its member's money (according to Inman News) to fight this case and help Realcomp maintain a protectionist policy that is completely contrary to NAR's own official policy. Common sense suggests that a national association would never invest so much money on a local regulatory issue that was against its own policy and which had minimal market impact unless it thought the issue would have a much wider and far-reaching impact. NAR's substantial financial support suggests that NAR may believe that success in this case will set a precedent that will allow its members across the country to discriminate against home sellers and buyers and discount brokers through their MLS by boycotting EA distributions to their members' public websites.

None of the other national real estate trade associations are supporting Realcomp on this issue. In addition to AREBA, whose president testified in opposition to the EA boycott, The National Association of Exclusive Buyer Agents (NAEBA) is also opposed. NAEBA is a non-profit organization of real estate professionals dedicated to representing real estate buyers only. NAEBA President Barry L. Nystedt told AHGA that "NAEBA believes that limitations on the ability of the homebuyer to view all the listed homes for sale on public MLS access websites that claim to be comprehensive are misleading. These limitations skew the market data preventing them from making informed decisions when making their biggest lifetime investment. The homebuyer may never see the home that would be the perfect choice for them. NAEBA further believes that the competitive restrictions on exclusive buyer agents' public websites means they cannot offer complete coverage on their consumer websites for their clients' and customers' benefit. This limitation restricts their ability to freely conduct their business when they would otherwise choose to offer their clients and customers a complete view of the homes listed for sale."

#### **IV Proposed Form of Order**

AHGA agrees with the FTC Counsel's original proposed order and urges the Commissioners to adopt it. In addition we urge the Commissioners to take any additional steps that are within their power to reign in the anticompetitive practices of Realcomp and other segments of the real estate services sector.

## **V Conclusion**

According to Robert E. Litan, former Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "if Congress wants a more competitive real estate market, it should start by rectifying the industry's fundamental problem: brokers themselves set the market's rules, with no effective oversight to protect home buyers and sellers. The Securities and Exchange Commission, state regulators and an independent industry body (the National Association of Securities Dealers) oversee the securities markets. But there is no state or federal oversight of the listing services — the industry association runs the show. Congress should fix this clear structural conflict of interest by empowering the Federal Trade Commission, with its statutory mandate to protect consumers, to oversee the National Association of Realtors. The enabling legislation also should instruct the commission to ensure that real estate markets are competitive."

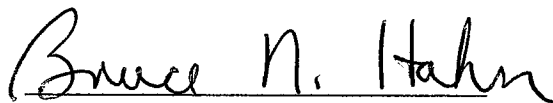
AHGA believes Mr. Litan's observations are on target. The real estate brokerage sector has been operating as an independent branch of government for too long, writing its own rules, ignoring its fiduciary duties to American homeowners and its own code of ethics and fighting the FTC and DoJ every step of the way when they intercede on the behalf of American homeowners. AHGA urges the Commissioners to use their existing powers to the fullest. The real estate brokerage sector, including national, state and local trade associations, MLSs, and state real estate commissions, which often act as shadow agents for the aforementioned organizations, do not solicit, welcome, and refuse to consider the recommendations of consumer organizations. They fight the efforts of FTC and DoJ to protect the interests of American homeowners. As Mr. Litan further recommended, "multiple listing services must provide all properly licensed brokers access to the marketplace on equal terms.... (and)... make markets more efficient, but only if they don't discourage entry by new competitors.

The real estate services industry (national and state real estate services trade associations and multiple listing services) has been systematically pursuing protectionist and anticompetitive regulatory and legislative initiatives. These efforts are intended to thwart the natural evolution of a competitive marketplace and protect the market share of the dominant real estate services business model that existed prior to the influence of the Internet on the business models of many brokerage sectors. The record in this case clearly proves the anticompetitive nature and objectives of Realcomp's efforts. In the record of this case the FTC Commissioners have more than sufficient information to reverse the initial decision.

The reason that efforts of the real estate brokerage sector to protect high commission rates have not been totally successful is that the Federal Trade Commission and the U.S. Department of

Justice have interceded and successfully stopped efforts such as Realcomps and other MLSs, national and trade associations. American homeowners and future homeowners owe a great debt of gratitude to the FTC and DoJ for their ongoing dedication to reverse the protectionist efforts of real estate organizations such as Realcomp to interfere in the marketplace in order to force American homeowners to pay more than necessary for real estate services.

Respectfully submitted,



Bruce N. Hahn  
President  
American Homeowners Grassroots Alliance  
6776 Little Falls Road  
Arlington, VA 22213  
703-536-7776

Dated: January 25, 2008

#### **VI Certificate of Service**

#### **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on January 25, 2008, I caused true and correct copies of the *Amicus Curiae* Brief of the American Homeowners Grassroots Alliance in Support of Complaint Counsel to be served as described below.

Service by hand delivery of paper copies, including an original, signed version, and 12 photocopies, and by electronic mail, was provided to:

Donald S. Clark  
Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue, N.W., Rm. H-159  
Washington, D.C. 20580

Service of two copies by hand delivery was provided to:

#### *Counsel Supporting the Complaint:*

Sean P. Gates, Esq.  
Federal Trade Commission  
601 New Jersey Ave., NW

Room NJ-6219  
Washington, D.C. 20001

*Administrative Law Judge:*

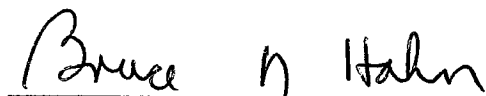
Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
Rm. H-112  
600 Pennsylvania Ave., N.W.  
Washington, D.C. 20580

Service of two copies by overnight delivery was provided to:

*Counsel for Respondent:*

Steven H. Lasher  
Scott L. Mandel  
Stephen J. Rhodes  
Emily L. Matthews  
FOSTER, SWIFT, COLLINS & SMITH, P.C.  
313 S. Washington Square  
Lansing, MI 48933  
517-371-8100

Robert W. McCann  
DRINKER BIDDLE & REATH, L.L.P.  
1500 K Street., NW  
Washington, DC 20005  
202-842-8800

---

Bruce N. Hahn