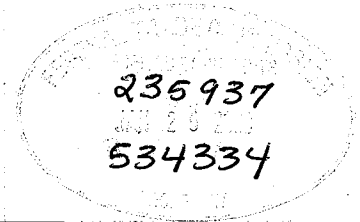


ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9320

PUBLIC VERSION

IN THE MATTER OF
REALCOMP II LTD.

APPEAL BRIEF OF COUNSEL SUPPORTING THE COMPLAINT

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I.
STATEMENT OF THE CASE

A. Introduction

The real estate brokerage industry has long exhibited a general lack of price competition¹ and has a history of traditional brokers taking steps to exclude competition from brokers offering innovative or discounted services.² These steps include limiting access to one of the most important competitive tools in the industry – the local multiple listing service (MLS). The MLS is a collaboration of competing local real estate brokers that aggregates and disseminates “listings,” information regarding homes for sale in a local area, enabling wide exposure for members’ listings.³ At first, traditional brokers simply excluded discount brokers from membership in the MLS.⁴ Later, after that tactic was condemned by the courts, traditional brokers allowed discounters to join the MLS but excluded the type of listing they used to offer discounts – the Exclusive Agency (EA) listing.

¹ See, e.g., FTC Staff Report, *The Residential Real Estate Brokerage Industry*, 11-13, 64 (Dec. 1983) (“1983 Report”) (noting uniformity in commission rates); *Competition in the Real Estate Brokerage Industry*, A Report by the Fed. Trade Comm’n and U.S. Dep’t of Justice, 45 (April 2007) (“2007 Report”) (“commission rates are relatively inflexible”). The Commission may be informed by its own reports and enforcement experience in the industry. See, e.g., *North Texas Specialty Physicians*, Dkt. No. 9312, Slip op. at 9 (F.T.C. Nov. 29, 2005).

² See, e.g., *United States v. Nat’l Ass’n of Real Estate Bds.*, 339 U.S. 485, 488-89 (1950) (broker association rules setting rates and barring discounting); 1983 Report at 20-21 (finding disparagement and steering by traditional brokers); 2007 Report at 63-70 (use of MLS rules and steering).

³ See, e.g., *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370 (5th Cir. 1980); *Oates v. Eastern Bergen Multiple Listing Serv.*, 273 A.2d 795, 800 (N.J. Super. Ch. 1971) (broker without access to MLS at competitive disadvantage because consumers “naturally desire[] the widest market exposure” for their homes).

⁴ See, e.g., *Realty Multi-List*, 629 F.2d at 1370-71 (MLS membership rules excluding certain brokers held anticompetitive).

Through a series of enforcement actions, the Commission addressed this type of rule. An EA listing – unlike the Exclusive Right to Sell (ERTS) listing used by traditional brokers – provides a discount on the broker’s commission if the home is sold to a buyer who is not represented by another broker. By banning the use of EA listings in the MLS, traditional brokers penalized discounting through EA listings by denying the wide exposure only the MLS provided. To protect competition, the Commission issued a number of consent orders prohibiting MLSs from excluding EA listings.⁵

Advised by legal counsel not to entirely exclude EA listings from the MLS, the full service brokers who dominate Realcomp – the largest MLS in Michigan – found another means to stem this competitive threat. While allowing EA listings to be aggregated in the MLS database, Realcomp instituted two policies affecting the dissemination of those listings. First, Realcomp excluded EA listings from its Internet dissemination, which is the only means to reach three of the top four types of real estate websites (the “Website Policy”). Second, Realcomp set the default search within the Realcomp MLS database to include only ERTS listings, thereby limiting the exposure of EA listings to other brokers (the “Search Function Policy”). Finally, to ensure that brokers using ERTS listings in fact provide “full service,” Realcomp defined ERTS listings to include a minimum bundle of services.

Realcomp therefore accomplished the same result the Commission sought to prevent in its previous enforcement actions; the arbitrary handicapping of discount brokers. Realcomp’s

⁵ See *Port Wash. Real Estate Bd., Inc.*, 120 F.T.C. 882 (1995); *United Real Estate Brokers of Rockland, Ltd.*, 116 F.T.C. 972 (1993); *Am. Indus. Real Estate Ass’n*, 116 F.T.C. 704 (1993); *Puget Sound Multiple Listing Serv.*, 113 F.T.C. 733 (1990); *Bellingham-Whatcom County Multiple Listing Bureau*, 113 F.T.C. 724 (1990); *Metro MLS, Inc.*, No. C-3286, 1990 WL 10012611 (F.T.C. Apr. 18, 1990); *Multiple Listing Serv. of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985); *Orange County Bd. of Realtors, Inc.*, 106 F.T.C. 88 (1985).

Policies are plainly anticompetitive. EA listings offer significant savings if the buyer is not represented by a broker – commonly 3% of the sales price (the portion of the commission that would otherwise go to the buyer’s broker). By keeping EA listings off of the key websites and limiting their exposure within the Realcomp database, Realcomp’s broker members are penalizing EA listings and therefore discounting. An agreement to penalize discounting comes very close to a form of price-fixing.

In addition, Realcomp’s Policies are effectively an agreement among Realcomp brokers not to compete using certain packages of services. The Policies removed from the market a product that is highly desired by the consumers of brokerage services – namely, an EA listing that is marketed on key real estate websites.

By denying EA listings the wide exposure reserved for ERTS listings, the Realcomp Policies made EA listings less attractive to consumers. Consumers must either settle for an EA listing with the limited exposure allowed by the competitors of discount brokers or purchase a more expensive ERTS listing with the bundled services. As a consequence, discount brokers exited the market, were deterred from entering, incurred increased costs attempting to alleviate the disadvantage, suffered loss of reputation, and were forced to change their business models to conform more closely with traditional brokers. By 2006, EA listings were virtually non-existent in the Realcomp MLS, comprising less than 1% of all listings – far less than the percentage in MLSs without restrictive policies and far less than what the national figures would suggest. Full service ERTS listings therefore accounted for over 99% of the listings in Realcomp.

B. Summary of Argument

Despite this evidence, the ALJ dismissed the Complaint. The ALJ found that discount brokers use EA listings to offer unbundled services and commissions, thereby putting price

pressure on brokerage commissions. Although he found that the Policies were imposed by a combination of competitors with market power and that the Website Policy is by nature anticompetitive, the ALJ concluded that Complaint Counsel had not demonstrated a sufficient restraint on competition. The ALJ found that EA listings were “sufficiently available” on the Internet and the Realcomp MLS at a “nominal cost” and that the Website Policy is plausibly procompetitive. Although the ALJ found that the Search Function Policy is not anticompetitive by nature, he entered a stipulated order that eliminates the Policy and bars Realcomp from imposing a minimum set of services for a listing to qualify as an ERTS.

The Commission should reverse and enter the proposed order proscribing both Policies.

Although the ALJ found the Website Policy to be anticompetitive by nature, he failed to appreciate that the Policies come very close to a form of price-fixing and that they constitute an agreement among full service brokers to eliminate a valued product from the market. Nor did the ALJ fully recognize that the Policies are but another means to approximate the same stifling of competition as the outright ban of EA listings previously condemned by the Commission.

Instead, the ALJ concluded that EA listings are “sufficiently accessible” on Internet sites and in the MLS database. This is wrong as a matter of fact and also reflects a misunderstanding of the anticompetitive character of the restraint.

The ALJ’s conclusion is factually wrong. It is based largely on a single supposed “statistic” that lacks any foundation and that is contradicted by reliable industry studies, website statistics, and broker testimony. In addition, it ignores substantial evidence that the websites from which EA listings have been excluded are, by far, the most important for marketing properties in the relevant area. There are no adequate substitutes for these websites. Their importance is reflected in the record evidence of the impact on discount brokers using EA

