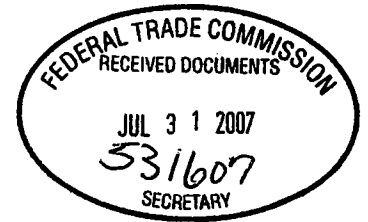


UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

REALCOMP II LTD.,

Respondent.

PUBLIC

Docket No. 9320

Chief Administrative Law Judge
Stephen J. McGuire

RESPONDENT REALCOMP II LTD.'S
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Dated: July 31, 2007

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I. PROPOSED FINDINGS OF FACT

A. Terminology

1. A real estate broker is a licensed real estate professional who acts as a representative for either home sellers or home buyers, and who is authorized to engage in the sale of real estate and to provide services in connection with such sales (JX 1, ¶3).

2. A real estate agent is a licensed real estate professional who works for, or under the supervision of, a real estate broker (JX 1, ¶4).

3. A listing broker is the broker hired by the seller as its agent to sell the home to an appropriate buyer (JX 1, ¶5).

4. A listing agreement is the contract between the seller and the listing broker that spells out the nature of their relationship concerning the sale of the home. Usually the listing agreement will include provisions that specify the duration of the contract (also known as the "listing period"), the compensation to be paid to the listing broker, and the offer of compensation to any cooperating broker (JX 1, ¶6).

5. A cooperating broker is a broker who works with buyers interested in purchasing a home (JX 1, ¶7).

6. The offer of compensation is the amount of money or commission percentage that will be paid by the listing broker to any cooperating broker who is the procuring cause of the sale, *i.e.* finds the buyer that purchases the home (JX 1, ¶8).

7. The offer of compensation is unconditional except that the cooperating broker must be the procuring cause of the sale (JX 1, ¶9).

8. A selling broker is a cooperating broker whose fiduciary duty is to the home seller in the real estate transaction. A selling broker acts as what is called a "sub-agent" of the listing broker (JX 1, ¶10).

9. A buyer's broker is a cooperating broker who has a fiduciary duty to the buyer in the real estate transaction, either through an agency disclosure or a "buyer's agency agreement" (JX 1, ¶11).

10. An Exclusive Right to Sell ["ERTS"] Listing is a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. An Exclusive Right to Sell Listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services (Complaint, ¶8; Answer, ¶8).

11. An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency ["EA"] Listing.¹ An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker. (Complaint, ¶9; Answer ¶9).

12. A Limited Service Listing is a Listing Agreement under which the Listing Broker will provide at least one, but not all, of the following services to the seller:

¹ Because experts for both parties referred to "non-ERTS" in their respective reports and testimony, that term will also be used below. For purposes of analysis in this case, that term is synonymous with Exclusive Agency.

- (a) Arrange appointments for cooperating brokers to show listed property to potential purchasers;
- (b) Accept and present to the seller(s) offers to purchase procured by cooperating brokers;
- (c) Advise the seller(s) as to the merits of the offer to purchase;
- (d) Assist the seller(s) in developing, communicating, or presenting counteroffers; and
- (e) Participate on behalf of seller(s) in negotiations leading to the sale of listing property. (Joint Glossary of Commonly-Used Terms, p. 2)

13. An MLS Entry Only Listing, under Realcomp's rules, is a Listing Agreement under which the Listing Broker will provide none of the following services to the seller:

- (a) Arrange appointments for cooperating brokers to show listed property to potential purchasers;
- (b) Accept and present to the seller(s) offers to purchase procured by cooperating brokers;
- (c) Advise the seller(s) as to the merits of the offer to purchase;
- (d) Assist the seller(s) in developing, communicating, or presenting counteroffers; and
- (e) Participate on behalf of seller(s) in negotiations leading to the sale of listed property. (Joint Glossary of Commonly-Used Terms, p. 3)

14. A Full Service Listing, under Realcomp's rules, is a Listing Agreement under which the Listing Broker will provide all of the following services to the seller:

- (a) Arrange appointments for cooperating brokers to show listed property to potential purchasers;
 - (b) Accept and present to the seller(s) offers to purchase procured by cooperating brokers;
 - (c) Advise the seller(s) as to the merits of the offer to purchase;
 - (d) Assist the seller(s) in developing, communicating, or presenting counteroffers; and
 - (e) Participate on behalf of seller(s) in negotiations leading to the sale of listed property. (Joint Glossary of Commonly-Used Terms, p. 2)
15. An Exclusive Agency Listing involves the services of a listing broker (JX 1, ¶55).
16. A For-Sale-By-Owner real estate transaction does not have a listing broker (JX 1, ¶54).
17. "Approved Websites" are those websites to which Realcomp provides information concerning Realcomp MLS listings for publication (JX 1, ¶22).
18. The National Association of Realtors® ("NAR") is the national organization to which many, but not all, MLSs belong and subscribe to its rules. (Kage, Tr. 900, 1001).
19. Internet Data Exchange ("IDX") is a means by which listing information is downloaded and/or otherwise displayed by brokers. (Complaint and Answer, ¶13; Kage, Tr. 948).

B. Respondent

20. Realcomp II, Ltd. ("Realcomp") is a corporation organized, existing, and doing business under, and by virtue of, the laws of the State of Michigan (JX 1, ¶41).

21. Realcomp's office and principal place of business is located at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334 (JX 1, ¶42).

22. Realcomp is organized for the purpose of serving its members' interests (JX 1, ¶43).

23. Each Realcomp member is required to hold an active real estate license, an active appraiser license, or both (JX 1, ¶45).

24. Realcomp had approximately 13,800 members at the time of trial. (Kage, Tr. 1026).

25. All members of the Realcomp MLS must agree to abide by the Realcomp II Ltd. Rules and Regulations, and the policies and procedures in the Realcomp II Ltd. Policy Handbook (JX 1, ¶18; CX 35 (Kage, Dep. at 9)).

26. The Realcomp Rules are adopted by the Realcomp Board of Governors. (Kage, Tr. 971).

27. Realcomp's primary function is the operation of the Realcomp Multiple Listing Service ("Realcomp MLS") (JX 1, ¶44).

28. Realcomp services the territory within Southeastern Michigan, including the counties of Livingston, Oakland, Macomb and Wayne (JX 1, ¶46). This is sometimes called the Realcomp Service Area.

29. Realcomp is owned by seven Shareholder Boards and Associations: The Dearborn Board of Realtors®, Detroit Association of Realtors®, Eastern Thumb Association of Realtors®, Livingston Association of Realtors®, Metropolitan Consolidated Association of Realtors®, North Oakland County Board of Realtors®, and Western Wayne Oakland County Association of Realtors® (JX 1, ¶13).

30. A Realcomp Shareholder must be a Realtor Board or Association that is a member in good standing of the National Association of Realtors® (JX 1, ¶14).

31. The business and affairs of Realcomp are conducted by its Board of Governors (JX 1, ¶15).

32. Realcomp's Shareholder Boards and Associations select the Governors and Alternates to the Realcomp Board of Governors (JX 1, ¶16).

33. For the basic services, Realcomp charges identical dues and fees to all its members, regardless of the listing types used with their clients (JX 1, ¶36).

34. Each Realcomp office pays \$75 per quarter as a participating office fee and each member pays \$99 per quarter as a participating member fee. (Kage, Tr. 904).

35. Realcomp at all times pertinent to this matter has permitted agents: (1) to enter Exclusive Agency Listings into the Realcomp Multiple Listing Service ("MLS"); and (2) who enter Exclusive Agency Listings to be members of Realcomp. (JX 1, ¶57).

36. On each listing filed with the Realcomp MLS, the listing broker must make the unilateral offer of compensation to any Realcomp member who acts as a cooperating broker and procures a buyer who purchases the listed property (JX 1, ¶17).

37. Only a seller who has a listing agreement with a licensed real estate broker who is a Realtor® and member of Realcomp may have his or her home listed on the Realcomp MLS (JX 1, ¶19).

38. Each Realcomp member broker who submits a listing to the Realcomp MLS agrees to comply with the Realcomp Rules and Regulations with respect to that listing (JX 1, ¶20).

39. For-Sale-By-Owner (FSBO) homes, where the seller does not retain a Realtor®, are not permitted to be listed in Realcomp's MLS as all listings must be entered by Realtors® (JX 1, ¶60).

C. MiRealSource

40. At all times pertinent to this matter, there has been another Multiple Listing Service, MiRealSource, in addition to Realcomp, serving at least part of the Southeastern Michigan (JX 1, ¶58).

41. MiRealSource is a competitor of Realcomp, competing for business throughout Southeastern Michigan. (Kage, Tr. 1057-58).

42. The costs of belonging to MiRealSource are similar to belonging to Realcomp, and there is not a significant cost difference to change membership from one to the other. (Sweeney, Tr. 1313-1314).

43. MiRealSource charges brokers who want to be members \$100 for a share of MiRealSource. After that initiation fee, there is a monthly charge of \$29 per licensee and broker, and \$24 for each office. (CX 407 (Bratt, Dep. at 19)).

44. MiRealSource is able to compete against Realcomp. (CX 407 (Bratt, Dep. at 35)).

45. MiRealSource is one of the top MLSs in the country. (CX 407 (Bratt, Dep. at 30)).

46. MiRealSource is ranked in the top 1% of MLSs in the country based on a survey of technology. (CX 407 (Bratt, Dep. at. 50-51); RX 101.)

47. MiRealSource is actively recruiting new members. (CX 407 (Bratt, Dep. at 31)).
MiRealSource added 32 new offices in the first three months of 2005. (CX 407 (Bratt, Dep. at 58)).

48. MiRealSource moved its main office in August 2006 from Macomb County to Oakland County to be closer to some of its membership and to expand its membership. (CX 407 (Bratt, Dep. at 9)).

49. MiRealSource intends to continue to grow, targeting Oakland and Livingston Counties for its growth. (CX 407 (Bratt, Dep. at 9-10)).

50. MiRealSource's membership has increased 40% in the past four years. (CX 407 (Bratt, Dep. at 74)).

51. MiRealSource's growth in members has come mainly from counties other than Macomb. (CX 407 (Bratt, Dep. at 73)). The growth in MiRealSource's membership in the past four years is coming from all over Southeastern Michigan. (CX 407 (Bratt, Dep. at 74)).

52. MiRealSource is not a member of the National Association of Realtors®. (Kage, Tr. 1056-1057; (CX 407 (Bratt, Dep. at 87)).

53. MiRealSource is not bound by the National Association of Realtors® Rules. (CX 407 (Bratt, Dep. at 88)).

54. Beginning in August 2003, MiRealSource refused to accept Exclusive Agency listings into its Multiple Listing Service. (CX 407 (Bratt, Dep. at 72); RX 91 - Page 3).

55. By precluding Exclusive Agents from having their listings placed onto its MLS since August 2003, MiRealSource denied those listings distribution to Realtor.com, the public web sites and its Broker Data Sharing (CX 407 (Bratt, Dep. at 89-90)), which is MiRealSource's version of the Internet Data Exchange (CX 407 (Bratt, Dep. at 13-14)).

56. MiRealSource adopted its Rules precluding Exclusive Agency listings from going into its MLS based upon concerns expressed about compensation issues. Selling agents were troubled about the prospect of not being compensated for listings. Since the homeowner could sell the house themselves, there would occasionally be For Sale By Owner signs in front of the property and a selling broker would take a client there with a risk that the buyer would then cut their own deal with the seller and leave out the agent. (CX 407 (Bratt, Dep. at 23-25, 43)). Additionally, there were problems with setting up times and showing properties, since the agent would have to deal with a homeowner who would be difficult to reach. (CX 407 (Bratt, Dep. at 25-26)). Another problem that developed was with MLS-only listings, where the selling brokers would be required to handle the paperwork on both sides of the transaction. (CX 407 (Bratt, Dep. at 26)).

57. The concern with members not being compensated when there is an Exclusive Agency listing, even though compensation is required for listings to be placed on the MLS, was not a theoretical concern as that did actually occur. (CX 407 (Bratt, Dep. at 42-43)).

58. MiRealSource had problems with Exclusive Agents. (CX 407 (Bratt, Dep. at 23-26)). One problem was that the selling agent, who came to the transaction through the buyer, ended up doing both sides of the transaction, the Exclusive Agent broker member submitted a listing into the MLS and walked away thereby requiring that all communications go through the seller. (CX 407 (Bratt, Dep. at 26)).

59. An estimated two-thirds of MiRealSource's members also belong to Realcomp. (CX 407 (Bratt, Dep. at 16)).

60. MiRealSource has members who belong only to it and not Realcomp; this is true not only in Macomb County, but also in counties such as Oakland and Wayne. (CX 407 (Bratt, Dep. at 18-19)).

61. Real estate brokers can compete in Southeastern Michigan by belonging to MiRealSource and not Realcomp; this is true for Wayne County and Oakland County. (CX 407 (Bratt, Dep. at 32-33)).

62. As a result of MiRealSource being in good financial shape, it decreased its fees charged to its members from \$35 per month to \$29 per month in March of 2005. (CX 407 (Bratt, Dep. at 59-60)).

63. MiRealSource continues to be in very good financial shape and has built a reserve for technology and legal expenses. (CX 407 (Bratt, Dep. at 34)).

64. MiRealSource, as a result of entering into a Consent Decree with the Federal Trade Commission, began accepting Exclusive Agency listings in or about April, 2007 and, in turn, placing those onto public websites, including Realtor.com and its version of the Internet Data Exchange, which is referred to as Broker Data Sharing. (CX 407 (Bratt, Dep. at 22, 13-14)).

65. MiRealSource places its listings on its own MLS and sends them to Realtor.com, Homeseekers and Google. (CX 407 (Bratt, Dep. at 11, 52); RX 101).

66. All of MiRealSource's listings are placed onto its MLS and Broker Data Sharing and the approved web sites so long as the broker gives permission for that distribution. (CX 407 (Bratt, Dep. at 11)).

67. MiRealSource's settlement with the FTC was based, at least in part, on its interest in avoiding the expense of defending against the claims regarding its treatment of EA listings

where it did not include them in its MLS and did not send them to approved websites (CX 407 (Bratt, Dep. at 27)), as it did not have the wherewithal to fight the issue even though MiRealSource felt its policy was totally justified and it was reluctant to enter into an agreement with the FTC (Sweeney, Tr. 1332).

D. The Southeastern Michigan Residential Real Estate Market is in the Throes of a Buyer's Market.

68. According to Complaint Counsel's real estate expert, Southeastern Michigan has been in a buyer's market with respect to its residential real estate, for the past three years. (Murray, Tr. 267). A "buyer's market" is characterized as a softening of the residential real estate market with a decrease in sales and an increase in inventory. (Murray, Tr. 266).

69. For the last three years, the Detroit area has had the worst buyer's market in the country for residential real estate. (Murray, Tr. 268).

70. Complaint Counsel's real estate expert, Stephen Murray, has worked with John Kersten and knows him to be a broker in Southeastern Michigan who is competent about the residential real estate industry in Southeastern Michigan. (Murray, Tr. 268-269).

71. John Kersten describes the Southeastern Michigan residential real estate market as the worst that it has been in the past 41 years due to the automobile industry and economic gridlock. (CX 413 (Kersten, Dep. at 53-54)).

72. The residential real estate market in Southeastern Michigan is in a "free fall," it is a buyer's market. (Sweeney, Tr. 1306).

73. The residential real estate market in Southeastern Michigan is considerably worse than the national market, and has been for about five years, attributable to the loss of 350,000 jobs in the last several years. (Sweeney, Tr. 1306).

74. Exclusive Agents called by Complaint Counsel as witnesses agree that Southeastern Michigan is in the midst of a buyer's market:

- (a) Southeastern Michigan is a buyer's market, the economy is very difficult. (Mincy, Tr. 454.). Mr. Mincy saw a downturn in the residential real estate market in Michigan in mid-2005. (Mincy, Tr. 387-388).
- (b) It is a buyer's market in Southeastern Michigan. (G. Moody, Tr. 879-880).
- (c) The residential real estate market in Michigan is very tight, it is a buyer's market. (Hepp, Tr. 699).

75. Because of the buyer's market condition in Southeastern Michigan, sellers are being advised to price their property below the current market value in order to sell the property, because the market is declining so quickly, if the property is priced at market value, it is over priced the next month; as such a prominent broker in Southeastern Michigan advises sellers to price 2% to 10% lower than market value. (Sweeney, Tr. 1309-1310). One consequence of the current market condition is that homes are constantly and consistently losing value, estimated to be occurring at the rate of 1% per month. (Sweeney, Tr. 1309).

76. It is very difficult to do residential real estate business in Southeastern Michigan as real estate agents are down in volume approximately 20%. (CX 525 (Adams, Dep. at 11)).

77. The residential real estate market in Southeastern Michigan is very slow, meaning that listings are staying on the market for a long time and there are very few sales. (CX 407 (Bratt, Dep. at 29-30)). This is attributable to the lack of jobs and home prices rising too rapidly in the past. (CX 407 (Bratt, Dep. at 30)).

78. In a buyer's market, it is expected that new people will not be attracted to the business and there would be a loss of membership. (Murray, Tr. 270-271).

E. Realcomp's Listings are Experiencing the Effects of a Buyer's Market.

79. Realcomp's number of active listings presently is approximately 60,000, as compared with approximately 30,000 in 2004 and 2005. (Kage, Tr. 1029).

80. Properties in Realcomp are taking longer to sell and there is a higher inventory because of the declining domestic automobile-related economy in Southeastern Michigan. (Kage, Tr. 1030-1031).

81. In May, 2007, Realcomp's average number of Days on Market for a property was 230 as compared to 123 in 2006. (Kage, Tr. 1032).

82. Realcomp has seen its membership decrease from 15,000 at the end of 2005 to 13,800 members. (Kage, Tr. 1026). There has been a decline in the number of brokers as people are leaving the business. (Kage, Tr. 1027).

83. Michigan Consolidated Association of Realtors® ("MCAR"), a Realcomp Shareholder Board (JX 1, ¶13), has lost approximately 15% of its membership over the past two years as there have been many mergers, consolidations, downsizes, office closings and attrition out of the business, with more expected due to Southeastern Michigan's troubled residential real estate market. (Sweeney, Tr. 1307).

F. There is Competition Within Southeastern Michigan's Residential Real Estate Market.

84. Southeastern Michigan a very competitive market with agents competing with one another. (CX 418 (Smith, Dep. at 37)).

85. The Southeastern Michigan market is known on a national level as being unique, and extremely competitive. (CX 418 (Smith, Dep. at 37)).

86. Agents in Southeastern Michigan negotiate everything, including commission rates. (CX 418 (Smith, Dep. at 36, 38)).

87. The real estate industry is a model of competition. (CX 414 (Niersbach, Dep. at 123)).

G. The Challenged Policies.

88. The Complaint alleges that what are referred to as Realcomp's Web Site Policy and Search Function Policy constitute a restraint of trade. (Complaint, ¶ 7).

89. By Web Site Policy, the Complaint refers to Realcomp's rule that prohibits Exclusive Agency listings from being sent to public web sites, meaning Realtor.com; Realcomp's own web site, which is MoveInMichigan.com.; and its Internet Data Exchange ("IDX"). (Complaint, ¶15).

(a) Realtor.com is the official website for the National Association of Realtors® ("NAR"), whose domain address is owned by NAR. (CX 412 (Goldberg, Dep. at 24-25)). Move, Inc. operates Realtor.com consistent with the terms of an operating agreement between the parties. (CX 412 (Goldberg, Dep. at 24-25)). Realtor.com accepts listings only from authorized providers. (CX 412 (Goldberg, Dep. at 28)). In excess of 90% of all MLSs submit their listings to Realtor.com. (CX 412 (Goldberg, Dep. at 30)).

(b) MoveInMichigan.com is a website that Realcomp owns and operates for the purpose of providing information on properties, brokers and agents. (Kage, Tr. 932; CX 258). ClickonDetroit.com frames MoveInMichigan.com, but Realcomp does not actually send data to ClickonDetroit.com. When a viewer goes to the ClickOnDetroit.com real estate link, the viewer sees the framed data from MoveinMichigan.com.

(Kage, Tr. 925-926). Framing occurs when the border of the website you are viewing remains visible, but the middle of the page opens to another website. (Kage, Tr. 947).

- (c) Realcomp offers its brokers an IDX feed (Kage, Tr. 945). 82% of Realcomp members authorized their listing data to be included in the IDX feed. (Kage, Tr. 948).
- (d) Information is shared through the IDX; offices that are members of Realcomp that participate in the IDX system can use and publish listings on their own websites, their private websites or office websites. (Murray, Tr. 208; Mincy, Tr. 337).

90. The Search Function Policy refers to Realcomp having set its members' search function screen so that it defaults automatically to Exclusive Right to Sell and unknown listings. (Complaint, ¶16).

91. The Web Site Policy was adopted in 2001 (Kage, Tr. 958-959), but was not enforced until 2004 when Realcomp also put into place the Search Function Policy and, in turn, required members to designate the listing type, rather than making that optional. (Kage, Tr. 964-965; CX 18).

92. As such, these Policies did not become enforced and effective until May of 2004. (Williams, Tr. 1152-1153; CX 498-Pages 39-40, *in camera*; CX 522; CX 523).

93. As a result of these Policies, Realcomp's Exclusive Agency Listings were not sent to Realtor.com, MoveInMichigan.com or the IDX, and they were not included in the Search Default. (Kage, Tr. 970).

H. Realcomp's Exclusive Agents are able to: 1) List Their Properties on Realcomp's MLS; 2) Bypass Realcomp's Web Site Policy by Sending Their Listings to Realtor.com; and 3) Compete on the Internet.

1. The MLS.

94. Complaint Counsel's case claims that there has been decreased exposure for the Exclusive Agency listings as result of Realcomp's Policies. (Complaint, ¶¶13-16). For example, Mr. Mincy testified that the Web Site Policy limits public exposure to his EA listings (called "EZ listings") because they are not uploaded to the IDX system or MoveInMichigan.com. (Mincy, Tr. 418-419).

95. Regardless of a Realtor®'s business model, the MLS offers many benefits. (CX 418 (Smith, Dep. at 21)).

96. The Multiple Listing Service is the most significant thing that has happened in the real estate industry to promote competition. (Murray, Tr. 257).

97. The Multiple Listing Service levels the playing field between large and small brokers as, without the Multiple Listing Service, large real estate agencies would attract more consumers since they have larger marketing budgets. (Murray, Tr. 257).

98. The Exclusive Agents themselves agree that while exposure is important, the MLS is by far the most important source of Internet exposure.

- (a) Internet exposure is important to the seller. (Hepp, Tr. 706).
- (b) The MLS is substantially more important than any other tool for the sale of residential real estate in Southeastern Michigan. (Hepp, Tr. 706).
- (c) The MLS finds a buyer three times more often than other home selling tools. (Hepp, Tr. 708).

(d) The MLS is, by a considerable extent, the most effective means of promoting residential real estate in Michigan. (CX 422 (Aronson, Dep. at 21-23)).

99. At no time has Realcomp restricted Exclusive Agents from being listed on its Multiple Listing Service. (JX 1, ¶57).

2. Realtor.com.

100. Exclusive Agents ranked Realtor.com as being the second most important of the web sites. (Hepp, Tr. 709; G. Moody, Tr. 870-871, 886-999; CX 422 (Aronson, Dep. at 22)).

101. 80% of all buyers are reached by the MLS, and if one combines that with Realtor.com, the combination reaches 90% of all buyers. (Mincy, Tr. 449-450; RX 109; Kermath, Tr. 795; RX 4; RX 5).

102. One way that Exclusive Agency listings can be listed on both the Realcomp MLS and on Realtor.com is by listing the property on another MLS, with which Realcomp has a data sharing agreement. (Kage, Tr. 991; JX 1, ¶51).

103. Realcomp has data sharing arrangements with seven MLSs in Southeastern Michigan. (Kage, Tr. 916).

104. The Ann Arbor MLS, Flint MLS, Shiawassee County MLS, Downriver MLS, and Lapeer MLS are all Realcomp data sharing partners that serve as potential bypass sources for Exclusive Agency Listings to be sent to Realtor.com. (Kage, Tr. 1060). All of these MLSs border one of the four primary counties that comprise Realcomp's service area: Wayne, Oakland, Macomb and Livingston. (Kage, Tr. 1060).

105. Under the current Realcomp system, an Exclusive Agency property can be listed on Realtor.com by listing the property on another MLS that downloads Exclusive Agency Listings to Realtor.com. (Kage, Tr. 991).

106. Agents place their Exclusive Agency Listings on Realtor.com by listing the properties with another MLS. (Mincy, Tr. 438, 442; D. Moody, Tr., 552-53; CX 422 (Aronson, Dep. at 36); Kermath, Tr. 789).

107. Exclusive Agents use the Ann Arbor, Shiawassee and Flint MLSs to list their Exclusive Agency Listings on Realtor.com. (Mincy, Tr. 410-11; D. Moody, Tr. 552-53; Kermath, Tr. 789).

108. Exclusive agents can also have their listings sent to Realtor.com by placing them in MiRealSource in light of its consent decree with the FTC, which was expected to become effective in April 2007. (CX 407; Bratt, Dep. at 22, 13-14).

109. The costs associated with joining a by-pass MLS are nominal.

(a) The Ann Arbor MLS charges \$55/month to be a member. (Kermath, Tr. 789).

(b) The Flint MLS charges \$99/quarter to be a member. (D. Moody, Tr. 554).

(c) MiRealSource charges \$29 per licensee and broker and \$24 per office after the initiation fee is paid. (CX 407; Bratt, Dep. at 19-20).

110. Some Exclusive Agents contend there is a "time cost" associated with listing Exclusive Agency Listings on more than one MLS to by-pass Realcomp.

(a) Agents with Exclusive Agency Listings indicate that it takes between forty minutes to two hours to update a listing over its life. (Mincy, Tr. 415-416; D. Moody, Tr. 561; Hepp, Tr. 693).

- (b) Exclusive agents pay anywhere from \$7.00 to \$20.00 per hour for data entry. (Mincy, Tr. 436-437; Hepp, Tr. 693). Mr. Mincy indicated that this dual listing was an inconvenience as well as an additional cost. (Mincy, Tr. 415-418).
- (c) Employees at Realcomp will enter listing data free of charge to members and subscribers. (Kage, Tr. 1053). It takes the Realcomp staff 10-15 minutes to enter a listing, and an additional one to five minutes to update a listing over its life. (Kage, Tr. 1055).

111. Through the data share agreements, persons can have their listings sent to Realcomp without even joining Realcomp, and therefore without incurring the cost of joining more than one MLS. (Kage, Tr. 1035-1036).

112. Exclusive Agents incur no or minimal additional costs to dual-list, inasmuch as "dual-listing" is a prevalent practice among these brokerage firms. (CX 133-014 - CX 133-015, ¶25).

113. Some Exclusive Agents charge customers additional fees to cover the dual-listing cost. (Hepp, Tr. 701-702).

- (a) MichiganListing.com charges an additional \$100. (Mincy, Tr. 430-431), and Mr. Mincy's customers typically pay for this upgrade. (Mincy, Tr. 431).
- (b) Greater Michigan Realty charges an additional \$50. (D. Moody, Tr. 553).
- (c) This additional charge is designed to offset the cost of having multiple MLS memberships. (Mincy, Tr. 411).

114. Consumers can avoid the effects of Realcomp's Policies on the exposure of their listing by paying slightly more to the agents offering Exclusive Agency listings to have their listing sent to Realtor.com or to have an Exclusive Right to Sell Listing.

- (a) AmeriSell Realty charges a flat fee of \$349, \$499 or \$699, depending upon the package. (Kermath, Tr. 729). It costs an additional \$200 to upgrade from AmeriSell's \$499 silver limited service listing to its ERTS package at \$699. (RX 1).
- (b) Michiganlisting.com charges a flat fee of \$495 for an E-Z listing, plus an extra \$100 to be listed in Realtor.com for \$595. (Mincy, Tr. 411; CX 109).
- (c) Greater Michigan Realty offers a bronze package for \$299, which includes a Limited Service, MLS entry only listing. For an extra \$50.00, customers can upgrade to the silver package for \$349 which includes a limited service, Exclusive Agency Listing and inclusion in Realtor.com. The charge for its Exclusive Right to Sell Package is \$599. (CX 435-01).

115. Flat-fee (discount) ERTS contracts (*i.e.*, contracts that offer the same services as EA contracts plus additional features or services for a modestly higher fee than fees typically charged for EA arrangements) appear to be more prevalent in the Realcomp Service Area, evidencing that the allegation of reduced availability of alternative brokerage arrangements in the Realcomp Service Area is untrue. (CX 133-030 - CX 133-031, ¶45.)

3. Competing on the Internet.

116. Sometimes listings are entered in more than one MLS for reasons that are completely unrelated to the Realcomp Policies, such as if a seller lives near bordering counties. (D. Moody, Tr. 558-559).

117. One way smaller companies can improve visibility and compete on the Internet is through search engine optimization. (G. Moody, Tr. 846). Search engine optimization is a mechanism where you take a specific website, and create appropriate content and links so that the major search engines such as Google, MSN and Yahoo bring up that website in response to internet searches. (G. Moody, Tr. 869-870). The goal of search engine optimization is to have a particular website seen by more people. (G. Moody, Tr. 870).

(a) Gary Moody performs search engine optimization for Greater Michigan Realty's website to improve visibility. (G. Moody, Tr. 846-847).

118. The Internet is a dynamic process. (G. Moody, Tr. 980) The Internet sites that have the greatest value to the market are a moving target. (Sweeney, Tr. 1315). "It's kind of a wild west out there right now. They come and they go." (Sweeney, Tr. 1316)

119. Public websites (*i.e.*, other than the "Approved Websites") are numerous, and listings reach those websites without regard to Realcomp's Policies. In light of their growing popularity, such other websites are an economically viable and effective channel for reaching prospective buyers. (CX 133-015 - CX 133-024, ¶¶26-37.)

120. Realtor.com and the other Approved Websites are a few among numerous Internet sources from which the general public can, and does, obtain information about real estate listings (CX 133-016 - CX 133-017, ¶27.)

121. Other publicly-available web sites available for Exclusive Agents, such as Google and Trulia, are gaining momentum. (G. Moody, Tr. 888; Murray, Tr. 258-260).

- (a) Google presently has a site and it is open to everyone - it takes Exclusive Agency Listings, and there is no charge for putting a listing into Google. (Murray, Tr. 259-260).
- (b) Google has publicly announced that it intends to build as large and robust a real estate site as possible. (Murray, Tr. 259).
- (c) Trulia is a growing public website that does not charge for listings, and which has grown substantially in the last several months. (Murray, Tr. 258).
- (d) The owner of an Exclusive Agency called by Complaint Counsel, Gary Moody, believes Google Base will be more important than the IDX in the near future. (G. Moody, Tr. 886-888). Mr. Moody received an undergraduate degree in electrical engineering, with computers and controls, from Michigan Technical University, a very technical school. (G. Moody, Tr. 812). He has been involved with computers and databases since 1982 or 1983, website programming since 1985, and database programming since the late eighties. (G. Moody, Tr. 812-813).
- (e) MLS systems across Michigan are beginning to put their data onto Google Base and Trulia. (G. Moody, Tr. 888).

122. Sellers and their listing agents can effectively market properties to the public in the Realcomp Service Area under Exclusive Agency and other limited service contracts without access to the Approved Websites. (CX 133-07 to CX 133-08, ¶15.)

I. The Search Function Policy.²

123. A practical requirement of being a real estate agent is the ability to use a computer, and log on and use the MLS. (Sweeney, Tr. 1336). Persons utilizing the search default necessarily must be able to use a computer to at least some extent. (Murray, Tr. 264).

124. Under Realcomp's old Search Function Policy, Exclusive Right to Sell Listings are the default, and Exclusive Agency Listings must be independently selected. (Kage, Tr. 906-907).

125. Realcomp's old search screen is demonstrated by RX 159; while the newly proposed screen (to reflect Realcomp's recent rule change) is demonstrated at RX 160-Page 3. (Kage, Tr. 1039-1040; 1046)

126. Under Realcomp's old search screen, if someone wanted to see all listings, he or she just had to click one other button with the mouse. (Kage, Tr. 1039).

127. A user could also permanently change the search default. (CX 36 (Kage, IHT at 92-93)).

128. A user could also "turn off" the default search settings permanently, so that Exclusive Agency Listings were always included in the output, by saving the changes to their settings. (Kage, Tr. 1048-1049).

129. Users who wanted to view "all listings," including Limited Service Listings, could individually select the types of listings they wanted to view or click the "select all listing types." (Kage, Tr. 1042).

² The parties have entered into an agreement on the Search Function Policy for the purpose of having a Consent Decree entered. Because that Order has not yet been entered and, at least to some extent, the Search Function Policy effects the consideration of Complaint Counsel's experts' opinions, this issue is set forth below.

130. Likewise, users could also utilize the qualifier on the right side of the screen that says "match any" or "exclude." (Kage, Tr. 1042).

131. Searching "all listings" was very simple, and it was not difficult to override the search default. (G. Moody, Tr. 878; Kage, Tr. 1048-49; RX 159). It does not require extra steps to search "all listings." (CX 415 (Nowak, Dep. at 46)).

132. Agents with Exclusive Agency Listings have acknowledged they did not require any special training to figure out how to override the search default. (D. Moody, Tr. 551; CX 526 (Groggins, Dep. at 43)).

133. Realcomp has recently changed its Rules to repeal the Search Function Policy and to change the definition of ERTS, so that full services are no longer required with an ERTS listing (RX 160). This change was adopted by Realcomp's board as reflected in its April 27, 2007 minutes (CX 626). The new proposed website screen reflecting the change to the Search Function Policy is exemplified in RX 160. (Kage, Tr. 1045-47).

134. Realcomp's changing of the Search Function Policy nullifies the Exclusive Agent's problems, and gives Exclusive Agency sellers the same level playing field and exposure. (Kermath, Tr. 771-772).

135. Realcomp is agreeable to making the change in its Search Function Policy part of a consent decree. (June 22, 2007 agreement of counsel, Tr. 1022; Kage, Tr. 1047). In fact, Realcomp's Counsel signed a Joint Stipulation Regarding Respondent's Search Function Policy on July 30, 2007, which has, or will be, submitted to this Court.

136. Realcomp's Search Function Policy was not, prior to its repeal, a significant impediment to brokers acquiring information on Realcomp Online® about limited service contracts. Realcomp members were required only to click once on an icon to access all listings

instead of only ERTS listings. (CX 133-07 - CX 133-08, ¶15; CX 133-024 - CX 133-026, ¶¶38-40)

J. Justification for the Policies.

137. Realcomp's Web Site Policy was adopted by its Board out of concern with sellers wanting the option to sell their homes themselves, which they would have the incentive to do so as they would not be paying a commission; and Realtors®, in turn, were paying for the sites. The Board felt that it was not in the best interests of its Realtors® to advertise for free for sellers who were negotiating their own deals. (Kage, Tr. 1051).

138. Realcomp's Search Function Policy was designed to make its MLS easier for Realcomp users and improve efficiency. (CX 421 (Whitehouse, Dep. at 142-143); Kage, Tr. 1039).

(a) 98% - 99% of the listings on the Realcomp MLS were Exclusive Right to Sell Listings, and the default was set by the Search Function Policy to reflect the majority of the listings. (CX 409 (Burke, Dep. at 71); Kage, Tr. 1039).

(b) The Search Function Policy made it so there was one less "click" of the mouse for the majority of users searching only for Exclusive Right to Sell Listings. (Kage, Tr. 1039).

139. The efficiency justifications for the Realcomp Policies at issue concern free riding from advertising and subsidizing sellers who are not using a cooperating broker thereby giving buyers, who do not use a cooperating broker, a bidding advantage and dissuading cooperating brokers from showing the property. (Eisenstadt, Tr. 1401-1402, 1404-1407).

K. Effect on Competition.

1. Non-ERTS Share

140. Darrell Williams, Ph.D., Complaint Counsel's antitrust economic expert witness (Williams, Tr. 1092-1093), opined that but for Realcomp's "access restrictions," the percentage of non-ERTS listings would increase by about 5.5%. (Williams, Tr. 1171).

141. Dr. Williams' opinions are based on the combined effect of what he called "access restrictions" which are the Search Function Policy, Web Site Policy and Minimum Service Definition. (Williams, Tr. 1236-1237). Under the Minimum Service Definition, there were five minimum services that had to be performed by real estate agents, and if they were not all performed, the listing was a limited service listing or MLS Entry Only Listing. (Murray, Tr. 40). Realcomp passed a rule which eliminated the minimum service requirements and has agreed to enter into a consent decree with the FTC on that issue. (Kage, Tr. 1048).

142. Dr. Williams cannot disentangle the effects of the Search Function Policy, Web Site Policy and Minimum Service Definition. (Williams, Tr. 1236-1237).

143. Dr. Williams did not have data available that is sufficient to analyze the impact of Realcomp's Search Function Policy separate from the Web Site Policy and Minimum Service Definition. (Williams, Tr. 1237-1238).

144. Dr. Williams did not determine what the effect would be on competition if Realcomp eliminated the Search Function Policy. (Williams, Tr. 1237-1238).

145. Dr. Williams did not determine what the effect would be on competition if Realcomp eliminated its Minimum Service Definition. (Williams, Tr. 1238-1239).

146. In performing his analysis that is based in part on the Minimum Service Definition, Dr. Williams considered matters that are not challenged in the Complaint. (Complaint, ¶¶ 13-16).

147. Dr. Williams is of the opinion that the "combination" of the Web Site Policy, Search Function Policy and Minimum Service Definition inhibits competition. (Williams, Tr. 1236).

148. Analysis demonstrates that Realcomp's Policies' effect on the non-ERTS share in Realcomp was at most a 1% decrease in the percentage of non-ERTS listings. (Eisenstadt, Tr. 1408). The analysis that formed the basis for that finding consisted of Realcomp's antitrust economic expert, David Eisenstadt, Ph.D. (Eisenstadt, Tr. 1379-1381), considering:

- (a) The Time Series Analysis utilized by Complaint Counsel's expert, Dr. Williams, in his April 3, 2007 Report (CX 498, *in camera*), Exhibit 23 (CX 521), finding that the percent of non-ERTS new listings in Realcomp decreased by approximately 0.8 percentage points from May 2004 through December 31, 2006.
- (b) The control group of MLSs without restrictions utilized by Dr. Williams, where, based upon Dr. Williams' own analysis as set forth in RX 162, the closest Multiple Listing Service to Realcomp in terms of the factors used to select Multiple Listing Services was Dayton, which had a non-ERTS share of 1.24% as contrasted with Realcomp's non-ERTS share during the same period of 1.01%. (Williams, Tr. 1255-1257).
- (c) That the only MLS utilized by Dr. Williams in his study that had a period of time without restrictions and with restrictions, the Boulder MLS, had a

pre-restriction average non-ERTS share was 2.03% compared to the average non-ERTS share during the restriction period in Boulder being .98%. (Eisenstadt, Tr. 1413).

(d) The non-ERTS share in Washtenaw County of the Ann Arbor MLS, which did not have the restrictions, of 1.6% to Realcomp's share of non-ERTS listings in its four primary counties of 0.74%. (Eisenstadt, Tr. 1418-1419).

(e) The Probit Regression Analysis set forth in more detail below in Paragraphs 226-230.

(Eisenstadt, Tr. 1407-1422)

149. If Realcomp's access restrictions resulted in a reduction of non-ERTS listings by 2.75%, as opposed to the 5.5% reduction Dr. Williams believes occurred, he does not know whether such a reduction's anti-competitive effect would be economically significant. (Williams, Tr. 1275).

150. RX 162 is the summary table used by Dr. Williams to select the control MLSs. (Williams, Tr. 1247).

151. Dr. Williams' Cross Sectional Analysis, which is found at CX 524, uses a weighted average by number of listings, meaning that Denver, with more listings, received more weight than Dayton even though Dayton was closer to Realcomp with respect to the sum of the standard deviations used to select the MLSs. (Williams, Tr. 1259, 1288).

152. Denver had almost 14% non-ERTS listings while Dayton had a 1.24% share of non-ERTS listings. (Eisenstadt, Tr. 1425).

153. Dr. Williams did not do a Cross Sectional Analysis of Boulder. (Williams, Tr. 1284).

2. Importance of Looking at Days on Market and Sales Price

154. Complaint Counsel's antitrust economic expert witness, Dr. Williams, agrees that when one looks at Realcomp's justifications and is attempting to determine the effect of these restrictions from the consumer's standpoint, the home seller is concerned about selling their house in a timely fashion at a price they believe to be a fair. (Williams, Tr. 1692-94).

a) Days on Market

155. Days on Market is how long it take for a listing, once it is on a Multiple Listing Service, to be sold. (Murray, Tr. 265).

156. Complaint Counsel's real estate expert has seen no data or information concerning Days on Market distinguishing between Exclusive Agency Listings and Exclusive Right to Sell Listings. (Murray, Tr. 265).

157. Complaint Counsel's other expert witness, its antitrust economist, Dr. Williams, did not do an analysis of Days on Market. (Williams, Tr. 1272).

158. The only expert who analyzed Days on Market was Realcomp's antitrust economist, Dr. Eisenstadt. Dr. Eisenstadt found that in the Realcomp MLS non-ERTS homes had 17% lower Days on Market than comparable ERTS homes. (Eisenstadt, Tr. 1392).

159. The average number of Days on Market for Realcomp non-ERTS properties is 118, compared to approximately 142 Days on Market for ERTS properties based upon data analyzed from January 2005 through October 2006. (Eisenstadt, Tr. 1388).

160. Craig Mincy, an Exclusive Agent called by Complainant Counsel, does not notice a difference in the days on market between Exclusive Agency listings and Exclusive Right to Sell Listings. (Mincy, Tr. 450).

b) Sales Price

161. The only expert to analyze what, if any, effect there was on the sales price of Exclusive Agency listings in Realcomp was Dr. Eisenstadt. He performed a sales price regression, which found that Exclusive Agency listings received a 14% better sales price in the Realcomp MLS than in Ann Arbor MLS, which does not have Realcomp's restrictions, and a 6% better sales price in Realcomp than in the control MLSs used by Complaint Counsel's antitrust economist, Dr. Williams, which did not have restrictions on Exclusive Agency Listings, for a blended amount of a 7% better sales price. (Eisenstadt, Tr. 1450-1455).

3. Exclusive Agents are Thriving in Southeastern Michigan in the Face of Realcomp's "Restrictions."

162. Exclusive Agency listings have been around "forever." (CX 36 (Kage, IHT at 31)).

163. Despite Michigan's economic downturn, agents offering Exclusive Agency Listings are thriving in Southeastern Michigan.

- (a) BuySelf's Exclusive Agency business has grown 10% to 35% since 2004. (Hepp, Tr. 699).
- (b) AmeriSell has grown substantially since 2003-2004, with over \$46 million in listings and more listings statewide than any other company. (Kermath, Tr. 788, 793; RX 5; RX 6).
- (c) MichiganListing.com has grown by 30% in its last full year of business, between 2005 and 2006, and was trending upward in 2007. Mr. Mincy is seeking to expand in Southeastern Michigan, and he expects his business

to keep growing throughout Southeastern Michigan. (Mincy, Tr. 428-430).

- (d) Greater Michigan Realty has done very well, and is growing. (G. Moody, Tr. 881-884; RX 25-Page 3). Denise Moody, of Greater Michigan Realty, had approximately 500 listings last year, when the industry average was 25. (G. Moody, Tr. 881-882; RX 29). Greater Michigan Realty generated \$23,275,000 in home sales in its first year of operation. (D. Moody, Tr. 567; RX 25).

164. It is hard to accept the contention that traditional brokers are stacking the rules against alternative business models, when the alternative business models are growing by leaps and bounds. (CX 414 (Niersbach, Dep. at 126; RX 117)).

165. Agents offering Exclusive Agency Listings in Southeastern Michigan compete with other agents offering Exclusive Agency Listings. (D. Moody, Tr. 545-546; G. Moody, Tr. 872; Mincy, Tr. 434-435).

166. No agents offering Exclusive Agency Listings suggested that they left Michigan because of Realcomp's Policies, except YourIgloo.com, which left Michigan for more reasons than Realcomp's Policies, and it has not fully abandoned Michigan as it continues to do a substantial referral business.

- (a) YourIgloo is a discount real estate company. (CX 422 (Aronson, Dep. at 4)).
- (b) YourIgloo is headquartered in Florida. (CX 422 (Aronson, Dep. at 4)).
- (c) YourIgloo used a broker in Michigan, Anita Groggins, to operate its business in Michigan from 2001 to 2004. (CX 422 (Aronson, Dep. at 9)).

- (d) YourIgloo's vice president and general manager, Wayne Aronson, (CX 422 (Aronson, Dep. at 4)) testified that but for the Realcomp Rules, he probably would not have withdrawn from Michigan. (CX 422 (Aronson, Dep. at 112)).
- (e) There appear, however, to be other factors involved with YourIgloo's withdrawal from the State of Michigan. Those factors include:
- (1) YourIgloo has encountered problems in other states, pulling out of two of the nine states in which it is licensed, Pennsylvania and New Jersey. (CX 422 (Aronson, Dep. at 31-32)). YourIgloo left New Jersey because it was required to inspect the property if it listed it. (CX 422 (Aronson, Dep. at 32)). YourIgloo left Pennsylvania because its operation was not profitable enough. (CX 422 (Aronson, Dep. at 32)).
 - (2) YourIgloo also faced additional competition in Michigan that "popped up" in 2003 or 2004, and which it did not face when it first started in Michigan in 2001 as there were few competitors at that point. (CX 422 (Aronson, Dep. at 9-10)).
 - (3) The person who worked as an associate broker for YourIgloo while it was in Michigan was Anita Groggins, who described YourIgloo as being in the Exclusive Agency business. (CX 526 (Groggins, Dep. at 8)).
 - (4) Ms. Groggins was let go by YourIgloo in 2004 not only because it was too tough to do business in Michigan, but also because the

ownership of YourIgloo at that time did not like her. (CX 526 (Groggins, Dep. at 36-37)). Ms. Groggins is not a morning person and she had problems with YourIgloo's management as she would not come into the office during hours that she was expected to be available. (CX 526 (Groggins, Dep. at 37)).

- (5) YourIgloo represented to MiRealSource, to which it also belonged (CX 422 (Aronson, Dep. at 15)), that it was leaving Michigan because it did not care for MiRealSource's procedures that required a broker in Michigan to be responsible for payments of MiRealSource's fees and charges. (CX 407 (Bratt, Dep. at 66-67)).
- (6) Between 2001 and 2004, YourIgloo listed between 100 and 500 properties. (CX 422 (Aronson, Dep. at 16)). Since the time that YourIgloo claims it has stopped doing business in Michigan, YourIgloo has sent between 50 and 100 referrals to Gary Moody and additional referrals to another discount broker, Shannon Scott. (CX 422 (Aronson, Dep. at 92-93)).

167. Complaint Counsel's antitrust economic expert witness maintains that people in the marketplace would know about things such as profitability. (Williams, Tr. 1660-61). That expert, however, was not present for the first week of trial and had not read the trial testimony of agents offering Exclusive Agency Listings, Gary Moody, Craig Mincy and Jeff Kermath, who all testified that their businesses were doing very well on the Exclusive Agency side in Southeastern Michigan and growing. (Williams, Tr. 1698-1701).

L. Exclusive Agents are not Growing Nationally.

168. From 2002 to 2005, Exclusive Agency Listings grew from 2% to 15% nationally, which was attributable, at least in considerable part, to the hot market, particularly on the coast. (Murray, Tr. 288-289).

169. Between 2005 and 2006, Exclusive Agency listings decreased from 15% to 8%, which is attributable to the softening of the housing market, meaning it was more of a buyer's market with a decrease in sales and increase in inventory. (Murray, Tr. 289-290; CX 535-0116).

170. The 8% Exclusive Agency Listings in 2006 referenced in the above paragraph includes more than just Exclusive Agency Listings as defined in Paragraph 11, because it also includes flat fee brokers who offer Exclusive Right to Sell Listings. (Murray, Tr. 290).

171. These alternative models, meaning Exclusive Agency, are not getting the "traction" that industry buzz would suggest. (Murray, Tr. 291; CX 535-0116).

172. These alternative models do not compete well with traditional models for trust and professionalism. (Murray, Tr. 292; CX 535-0109).

173. The evidence does not suggest that discount brokers are going to grow significantly over time beyond their current market share. (Eisenstadt, Tr. 1464).

174. From September 2003 through the end of 2006, the non-ERTS listing share has been roughly flat in the control MLSs, meaning the MLSs without restrictions, utilized by Complaint Counsel's expert witness, Darrell Williams, Ph.D., in his analysis. (Eisenstadt, Tr. 1464; CX 524).

M. Realcomp's Policies Have had a Net Benefit to Consumers.

175. A Cost Benefit Analysis demonstrates that Realcomp's Policies end up benefiting consumers as they result in a gain for sellers that substantially off-sets any higher brokerage fees that are paid. (Eisenstadt, Tr. 1454-1457).

176. In assessing the extent of any additional brokerage fees paid by sellers in the Realcomp service area who utilized an ERTS listing in place of a non-ERTS listing attributable to the Realcomp Policies, it is not appropriate to assume that cost to be a standard 3% commission rate on a sale of the home that goes to the listing broker, assuming that another 3% is paid to the cooperating broker, because there are flat fee ERTS listings, available in the Realcomp service area for only \$200 more than a non-ERTS listing, as evidenced by the testimony of Jeff Kermath. (Kermath, Dep. at 729-731, 791; Eisenstadt, Tr. 1451-1452, 1474).

177. In determining the extent of damages as the result of an alleged restraint of trade, one can consider the analogy of a prospective purchaser going into a Kia dealer and being told that they could not buy a Kia because of some artificial restriction, and that prospective purchaser chooses to walk out of the Kia dealership and go to a Cadillac dealership and buys a Cadillac, instead of walking across the street to a Hyundai dealership and buying a comparable Hyundai for \$200 more than the Kia. The right measure of consumer harm is the \$200 price difference between a Kia and a Hyundai, not the price difference between the Kia and Cadillac, because the consumer chose to buy the Cadillac. (Eisenstadt, Tr. 1513-1514).

178. It is not appropriate to use a percentage decline to measure the effect of a decrease in non-ERTS listings attributable to the Realcomp Policies because the market share of the discount brokers is so minimal to begin with. A 50% reduction in a minimal share will not have much of a competitive consequence. (Eisenstadt, Tr. 1461). If a person started with \$2 and lost

\$1, while there would be a 50% loss of wealth, the person was not very rich to begin with. (Eisenstadt, Tr. 1461).

N. The Exclusive Agents Have Problems with their Business Model That are Unrelated to Realcomp's Policies.

179. Unlike in robust real estate markets, Exclusive Agency Listings have not made significant in-roads in the Southeastern Michigan market. (Sweeney, Tr. 1326, 1330). Traditional agents in Southeastern Michigan do not perceive them to be a threat. (Sweeney, Tr. 1326, 1330).

180. Without regard to Realcomp, agents offering Exclusive Agency Listings are not growing. (Murray, Tr. 289-291; CX 524).

181. Agents offering Exclusive Agency Listings do not provide the same level of personal service, and do not compete well with full service brokers for trust and professionalism. (Murray, Tr. 291-292; CX 535-0109).

(a) Albert Hepp does not meet any Michigan customers face-to-face. (Hepp, Tr. 695).

(b) Jeff Kermath rarely meets customers face-to-face. (Kermath, Tr. 800).

(c) Generally, Denise Moody does not physically meet her customers. (D. Moody, Tr. 570-571).

182. 77% of traditional sellers thought their agent was paid fair compensation versus only 58% of the alternative sellers. (Murray, Tr. 292-293; CX 535-0109).

O. Realcomp's Challenged Policies Also Have Pro-Competitive Benefits.

183. Even if one were to assume that Realcomp's challenged policies have some adverse effect on competition, those policies also have important competitive benefits.

Specifically, Realcomp's policies enhance efficiency by increasing selling agents' incentives to show properties listed under Exclusive Agency contracts. (CX 133-031 - CX133-043, § VIII).

184. Proper consideration must be given to the net welfare of consumers in the Realcomp Service Area. Complaint Counsel's case appears to consider sellers' payments of commissions as one-sided costs. However, sellers in the Realcomp Service Area benefit from higher selling prices, and higher net selling prices, even after paying sales commissions. Specifically, Dr. Eisenstadt examined sales of residential home listed in the Realcomp MLS and the Ann Arbor MLS (which does not have policies of the nature challenged here). Controlling for differences in location and home characteristics, he observed that sellers in the Realcomp Service Area realize significantly higher prices, even if it is assumed that all sellers in the Realcomp Service Area must pay the higher commissions associated with ERTS contracts. (CX 133-044 - CX 133-047, ¶¶ 64-68).

185. An efficient brokerage services market enables a seller to realize the highest possible price for his or her home by ensuring that the buyers who value the property most likely will bid for it. A comparative analysis of sale prices in the Realcomp Service Area and that of the Ann Arbor MLS shows that Realcomp's policies have not harmed sellers, but instead appear to have helped sellers realize higher net prices. (CX 133-06 - CX 133-07, ¶13).

186. While the Complaint essentially seeks the "unbundling" of traditional, full-service, Exclusive Right to Sell listings, Realcomp's policies protect selling agents from having to subsidize the cost that property owners would otherwise have to incur to procure buyers who do not use selling agents. (Eisenstadt, Tr. 1401-1402). To the extent non-ERTS listings are available on public websites, sellers may be better able to sell directly to buyers without using any broker. (Sweeney, Tr 1333-34). Realcomp members should not have to subsidize or

otherwise facilitate transactions that directly conflict with Realcomp members' business purpose. (Sweeney, Tr. 1333-1334).

187. A seller who signs an Exclusive Agency or MLS Entry Only contract both seeks services from, and competes with, real estate brokers who are working to procure buyers for that seller's property (CX 133-032, ¶47).

188. Buyers have more incentive to use the services of selling agents when they acquire ERTS properties than when they acquire Exclusive Agency properties, because they are economically disadvantaged as bidders in the latter case. (CX 133-032 - CX 133-033, ¶¶48-49).

189. The challenged Realcomp Policies limit the free distribution of information to buyers who do not intend to use the services of selling agents. (CX 133-034, ¶51).

190. Because listing and selling brokers each pay Realcomp the same quarterly membership fees per agent and per office, this result prevents the situation where selling agents are forced to subsidize the marketing of sellers who use EA and other limited service arrangements. (CX 133-034, ¶50.)

191. This result is economically efficient because different groups of buyers are not artificially disadvantaged. (CX 133-034, ¶51.)

192. Realcomp's Policies do not force brokers using non-traditional (limited service) arrangements to subsidize those who do not. Complaint Counsel argues that, because EA and ERTS brokers pay the same dues but receive different levels of services on account of the challenged policies, the EA brokers are economically disadvantaged. Assuming, *arguendo*, that this putative disadvantage bears some relationship to consumer welfare and thus is relevant, an analysis of incremental cost per listing shows just the opposite to be true. Because EA brokers maintain a higher volume of listings - but provide fewer services per listing - than ERTS brokers,

Realcomp's pricing structure actually favors, rather than penalizes, nontraditional brokers – and the advantage that nontraditional brokers enjoy is even greater if one takes into account the fact that they also receive services from Realcomp for their EA listings. (CX 133-035 - CX 133-043, ¶¶52-63).

P. Further Review of the Economic Experts' Analyses.

1. Overview of Complaint Counsel's Economic Expert's Opinion and Methodology.

193. Dr. Williams testified that the effect of the Web Site Policy is to restrict EA listings from “public” websites and from IDX realtor websites, and that, in combination with the Search Function Policy, it affects “every” channel through which a potential buyer could see an EA listing. (Williams, Tr. 1130-1132).

194. Dr. Williams concluded that the Realcomp Policies effected a 5.5% reduction in the usage of EA listings, resulting in a decline of competition from limited service brokers. Tr. 1097. (Williams, Tr. 1093).

195. Dr. Williams based his conclusions on three pieces of work.

(a) First, based on a “time series” (i.e., before-and-after) analysis, Dr. Williams observed that the percentage of EA listings on the Realcomp MLS declined after the Realcomp Policies were implemented. (Williams, Tr. 1150-1160; (CX 523)).

(b) Second, Dr. Williams compared the prevalence of EA listings in Metropolitan Statistical Areas (MSAs) where the local MLS had no restrictions similar to the Realcomp Policies (the Control Group) during 2005-2006 to that in MSAs (including Southeast Michigan) where such restrictions existed during that period. This comparison was based on the

overall average percentage of EA listings in each of the two groups, weighting the average according to the number of listings in each MSA. He observes that the weighted average percentage of EA listings is higher in MSAs without restrictions. (Williams, Tr. 1161-1183; CX 524).

- (c) Finally, Dr. Williams compared the prevalence of EA listings among the same two groups of MSAs using a statistical regression model in an attempt to hold constant certain factors that may account for differences in the raw percentages of EA listings. He testified that he found a statistically significant difference between the two groups, from which he concluded that the Realcomp Policies have reduced the supply of EA listings compared to what would have existed had those policies not been in effect. (Williams, Tr. 1168-1171; CX 498-Page 71, *in camera*).

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

196. Dr Williams found evidence of adverse effects from the Realcomp Policies in his determination that the average monthly share of new EA listings (i.e., as a percentage of total new listings) declined from 1.6% to .74% over the period from May 2004 to year-end 2006. (CX 498-Page 38, ¶¶ 75-76; CX 521).

197. Dr. Williams stated that basing his measurement on the monthly average percent of new EA listings insulated the calculation from "market flux" because the percentage ratio of EA to ERTS listings should not change even if total listings decline. (Williams, Tr. 1149). This is a fundamentally incorrect assumption because:

- (a) Dr. Williams admitted that he is not a real estate expert. (Williams, Tr. 1280). Respondent's witness, Kelly Sweeney, is an experienced broker who has been in the residential real estate business in Southeast Michigan since 1975. (Sweeney, Tr. 1302-1303). Mr. Sweeney testified that in a declining or distressed market, where both the value of a home and the seller's equity is constantly declining, more sellers will choose full service ERTS listings over EA listings because they want and need the professional marketing services of a full-service broker. (Sweeney, Tr. 1326-1327). Mr. Sweeney observed that the EA model is therefore more prevalent in, for example, seller's markets like California and Arizona, than in Southeastern Michigan. (Sweeney, Tr. 1326-1327).

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

a) Dr. Williams' Methodology for Selecting the Control MSAs is Based on unexplained assumptions and omits obvious comparisons.

198. Dr. Williams selected the Control MLSs (Charlotte, Dayton, Denver, Memphis, Toledo, and Wichita) based on seven (he described eight but only used seven) economic and demographic characteristics that he believes are "likely to affect the level of non-ERTS listings." (RX 151-Page 41, ¶; CX 458-Page 41, ¶86; Williams, Tr. 1250).

199. Dr. Williams ranked his possible choices according to their respective closeness to Detroit across all of the economic and demographic characteristics. (RX 162; Williams, Tr. 1250).

200. Dr. Williams computed the difference in standard deviation units from Detroit for each of the characteristics, and then summed the absolute value of those standard deviations for each MSA. (RX 162; Williams, Tr. 1254).

201. Dr. Williams never explained why he would expect any of his criteria (i.e., the economic and demographic characteristics) to affect the choice of an EA contract, or why he gave all of the factors equal weight. Weighting each factor the same would make sense only if each factor had the same effect on the share of an EA listings, a condition which is both implausible and counter to the facts. (CX 458-Page 6, ¶9).

202. The list of potential choices from which Dr. Williams selected his Control MSAs omitted cities (e.g., Pittsburgh, Cleveland, Milwaukee) that intuitively might be thought more similar to Detroit in terms of being Midwestern industrial "rust belt" areas than, for example Charlotte or Memphis. (Williams, Tr. 1264-1265).

203. The percentage of EA listings the group of Control MLSs range from a low of approximately one percent in Dayton to a high of almost 14 percent in Denver. (Williams, Tr. 1255-1258). Dayton, the MSA closest to Detroit under Dr. Williams methodology, had an EA share (1.24%) only slightly above Realcomp's (1.01%). (CX 458, App. I, Attachment A; Williams, Tr. 1258; Eisenstadt, Tr. 1423). The next lowest MSA, Toledo, had an EA share (3.4%) nearly three times that of Dayton. The MSA with highest EA share, Denver, which was 5th (out of 6) in closeness to Detroit, had a share more than 10 times that of Dayton. (RX 161-Page 40; Williams, Tr. 1254-1258).

204. As Dr. Eisenstadt noted, if Dr. Williams' had correctly identified economic and demographic factors that determine the share of EA contracts at the MSA level, one would expect the EA shares of the Control MSAs to be very similar. (CX 458-Page 8, ¶12). Instead,

the wide variation demonstrates that Dr. Williams has not accounted for the factors that are actual determinants of the EA shares in the Control MSAs. (CX 458-Page 8, ¶12).

205. Dr. Eisenstadt also notes that significant differences exist among the six control MSAs even with respect to the different economic and demographic characteristics that Dr. Williams used. Table III of his Supplemental Report lists the six control MSAs, and the MSA-by-MSA value of each of the eight economic and demographic variables. The table shows that there is significant sample variance, as measured by the sample coefficient of variation, for several of Dr. Williams' economic/demographic factors. These include the one-year median price change, population, population density, and median house price. (CX 458-Page 8, ¶13).

206. This conclusion is dramatically illustrated by RX 161-Page 36, which graphically depicts the strong positive association between a control MSA's similarity to Detroit and its EA share. That is, MSAs that are statistically closest to the Detroit MSA (even though they may still be very distant in terms of housing market behavior and/or other economic and demographic characteristics) have lower EA shares than control MSAs that are statistically more distant. (Eisenstadt, Tr. 1426).

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

207. In addition to Realcomp, Dr. Williams's group of Restriction MLSSs includes Green Bay, Williamsburg, and Boulder, all of which are much smaller urban areas than Detroit. (Williams, Tr. 1161-1163). The selection of this grouping was made not by Dr. Williams, but by the FTC, and Dr. Williams could describe no criteria for the selection process other than the availability of data. (Williams, Tr. 1261). Dr. Eisenstadt notes that Dr. Williams' own analysis shows that the MSA in which Williamsburg is located ranks 28th in terms of closeness to Detroit, significantly more distant than any of the Control MSAs. Further, the Green Bay-

Appleton and Boulder MSAs each have populations less than 500,000, and for that reason alone they would have been excluded from Dr. Williams' sample of Control MSAs. (CX 458-Page 9, ¶14).

208. Dr. Williams attributed differences in EA shares between Control MSAs and Restriction MSAs to the restrictions when, in fact, those differences in EA shares could instead be due to variations in his economic and demographic factors. (See CX 458-Page 7, ¶ 11; CX 458-Page 9, ¶14).

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

209. CX 524, Exhibit 26 of Dr. Williams' Report (CX 498, *in camera*), purports to track and compare the EA shares of MSAs with and without restrictions over time. The difference in EA shares between the two types of MLSs ranges between 5 and 6 percentage points. (Williams, 1170-1185).

210. Dr. Williams testified that the average EA percentage in Restriction MSAs for the time period studied was 1.4%, and the average EA percentage in the Control MSAs was approximately 7%. (Williams, Tr. 1162-1163).

211. Dr. Williams' calculation of the average EA percentage share for the Control MSAs and the Restriction MSAs was weighted based on the number of listings. (Williams, Tr. 1262). This means the larger MSAs counted more toward the average than the smaller MSAs. Also, by combining all control MSAs, the closeness of any MSA to Detroit (i.e., the lowest summed standard deviations) was not a factor in Dr. Williams' estimate of the difference in EA shares in the two types of MSAs. (Williams, Tr. 1261-1263).

212. Denver, the largest of the Control MSAs, is both (a) the second most *dis*-similar Control MSA to Detroit and (b) the MSA with the highest EA share. (Williams, Tr. 1258-1264).

213. Dr. Williams' method of analysis gave Denver significantly more weight in this comparison of control MSAs to Restriction MSAs than, for example, Dayton – the Control MSA most similar (in Dr. Williams' analysis) to Detroit but having the smallest EA share among the Control MSAs. (Williams, Tr. 1261-1263).

214. Realcomp's expert, Dr. Eisenstadt, also performed direct comparisons of Realcomp (i.e., the Detroit MSA) to Dr. Williams' Control MSAs. Dr. Eisenstadt testified that, using Dr. Williams' rankings of the Control MSAs, it would be most logical to compare Realcomp to Dayton, the MSA least statistically different from Detroit. (Eisenstadt, Tr. 1427). As noted, Dayton's percentage of EA listings was 1.24%, as contrasted with Realcomp's EA share during the same period of 1.01%. (Eisenstadt, Tr. 1423). Dr. Eisenstadt also observed that the only MLS utilized by Dr. Williams in his study that had a period of time both without restrictions and with restrictions was Boulder, Colorado. Dr. Williams' data showed that Boulder had a pre-restriction average EA share of 2.03% compared an average EA share during the restriction period of 0.98%. (Eisenstadt, Tr. 1413). He also noted that there appeared to be a downward trend in the share of EA listings on the Boulder MLS during the last three months of the pre-restriction period, presumably for reasons unrelated to the restrictions, which had not yet taken effect. (Eisenstadt, Tr. 1413). Dr. Eisenstadt concluded that if those last three months were used as a benchmark, rather than the entirety of the pre-restriction period, the percentage point reduction in EA listings would be even smaller than one percent. (Eisenstadt, Tr. 1413).

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

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

216. Dr. Williams also relied on statistical regression ("probit") analyses in an attempt to predict the effects of the Realcomp Policies. (Williams, Tr. 1168-1169). In the probit analyses contained in his initial report, Dr. Williams attempted to hold constant (control for) a few selected individual housing characteristics between and among the Restriction MSAs and the Control MSAs that may account for the choice of listing type (i.e., EA or ERTS). (Williams, Tr. 1168-1169).

217. Dr. Williams believes his results predict that the prevalence of EA listings in the Restriction MLSs is 5.5 percentage points lower than in the Control MLSs. (Williams, Tr. 1170-1172). From this, Dr. Williams predicts that the percentage of EA listings in Realcomp would be higher, and the use of ERTS listings would be lower, in the absence of the Realcomp Policies. (Williams, Tr. 1166-1167).

218. Dr. Williams did not consider the economic and demographic characteristics of each local housing market and the demographic characteristics of buyers and sellers in each market. (Eisenstadt, Tr. 1427). Dr. Eisenstadt described how such factors would ordinarily would be addressed in economic analysis, and the errors introduced into Dr. Williams' Probit analyses by his failure to do so. (CX 458-Pages 13-15, ¶¶21-22). Dr. Eisenstadt corrected Dr. Williams' errors, he found that the same data revealed no predictable difference in the percentage of EA listings due to the existence or absence of MLS restrictions in the MSAs. (Eisenstadt, Tr. 1431).

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

219. As discussed above, Dr. Williams selected the Control MSAs for his Time Series analysis based on eight economic and demographic factors that he believed “likely to affect the level of [EA] listings.” (CX 498-Page 41, ¶86, *in camera*).

220. Nonetheless, Dr. Williams did not use any of the eight factors as independent variables in his probit analysis. (CX 498-Page 71, *in camera*).

221. As Dr. Eisenstadt explained, Dr. Williams' omission would not be a problem if the eight factors did not vary much from MSA to MSA. But Dr. Eisenstadt looked at the data and found that the eight factors varied dramatically from MSA to MSA. (CX 458-Page 8, ¶13).

222. Dr. Williams' analysis attributes to the existence of MLS restrictions (what he calls the "RULE" variable) outcomes that are affected by – and may well be attributable to – economic and demographic variables (Eisenstadt, Tr. 1435).

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

223. Dr. Williams' original probit analysis did include a few housing characteristics as independent variables in one of his equations. (Williams, Tr. 1168-1169).

224. Only one of those variables (numbers of bedrooms) was statistically significant to the analysis. (CX 458-Page 12, ¶20, n. 19).

225. Accordingly, the effects Dr. Williams purports to measure from his analysis end up being attributed to the RULE variable (i.e., the MLS restrictions). As Dr. Eisenstadt explained, this means that Dr. Williams' regression analysis is nothing more than a simple test for the difference between the weighted average EA share in the six Control MSAs versus the weighted average EA share in the four Restriction MSAs. In other words, his probit results are

simply a restatement of his first comparative analysis. (CX 458-Page 11 - CX 458-Page 13, ¶¶19-21). As described in ¶¶211-214; 218-224 above, the comparison of the two is meaningless because Dr. Williams did not account for the (statistical) proximity (or lack thereof) of any Control MSA to the Detroit MSA, nor more significantly for the economic and demographic factors that affect a home seller's choice of listing type. The same problem plagues his probit analysis, so that analysis does not establish that the Realcomp Policies adversely affected the use of EA contracts in the Realcomp service area.

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

226. Dr. Eisenstadt ran the same basic probit regression model that Dr. Williams used (Eisenstadt, Tr. 1428), but Dr. Eisenstadt added a separate independent variable for each of the eight economic and demographic factors that Dr. Williams identified as relevant to the prevalence of EA listings (but which he omitted from his analysis), as well as several other economic and demographic factors which Dr. Eisenstadt identified as likely to affect contract choice both across and within the MSAs.

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

change in county days on market over the prior year at the MSA and county level. (Eisenstadt, Tr. 1435-1445; CX 458-Page 14 - CX 458-Page 15, ¶22).

228. Dr. Eisenstadt's re-estimation of Dr. Williams' work shows that that additional economic and demographic characteristics in fact should be included as independent variables in a proper regression analysis, because a high number of them (thirteen) proved to be statistically significant at the generally-accepted level of confidence. (Eisenstadt, Tr. 1435-1440; CX 458-Page 15 - CX 458-Page 16, ¶23).

229. When other variables that are relevant to the choice of an EA listing were included in the analysis, Dr. Eisenstadt found that the effect of the Realcomp Policies on the share of EA contracts was less than one-quarter of one percentage point, and that this effect was not statistically different from zero. (Eisenstadt, Tr. 1429-1430; RX 161-Page 31). Dr. Eisenstadt's results demonstrated that all or virtually all of the difference between the percentage of EA listings in the Realcomp service area and the average EA share for Control MSAs is due to local economic and demographic factors and not to the Realcomp Policies. (Eisenstadt, Tr. 1434-1435; CX 458-Page 15 - CX 458-Page 16, ¶23).

230. Dr. Eisenstadt then went one step further. He estimated the same basic regression equation with the inclusion of a separate "RULE" variable for each of the Restriction MSAs. (Eisenstadt, Tr. 1432). This step isolated the effects of the Realcomp Policies (on choice of listing contract from the effects of the restrictions in the other Restriction MSAs. (Eisenstadt, Tr. 1431). This analysis found that the effect of the Realcomp Policies on the percentage share of EA contracts in the Detroit MSA was less than one ten-thousandth of a percentage point, and was not statistically significant from zero. (Eisenstadt, Tr. 1431-1432; CX 458-Page 15 - CX 458-Page 16, ¶23 n. 21).

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

231. Dr. Eisenstadt estimated a regression using only the data from the six Control MSAs selected by Dr. Williams. (Eisenstadt, Tr. 1430). He used the output from this regression to predict the EA share for the Realcomp service area under the assumption that it also had no restrictions. The results indicate that, given the economic and demographic characteristics of the Realcomp service area, the predicted percentage of EA listings in the Realcomp service area in the absence of the Realcomp Policies is about 0.25 percent. (Eisenstadt, Tr. 1430; CX 458-Page 17, ¶25). The actual percentage of EA listings in the Realcomp was nearly four times larger for the corresponding time period. (Eisenstadt, Tr. 1418).

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

232. Dr. Williams attempted to measure only the effect of the Realcomp Policies (plus the minimum service requirements) on the prevalence of EA listings. (Williams, Tr. 1236). As Dr. Eisenstadt explained, Dr. Williams' analysis thus provides only an indirect test for anticompetitive effect. That is, Dr. Williams surmises from his prediction of reduced EA output that consumers pay higher prices for brokerage services (Williams, Tr. 1228), but Dr. Williams did not attempt to measure any higher brokerage costs incurred by consumers who, as a consequence of Realcomp's Policies, substitute ERTS contracts for EA contracts. He also did not investigate whether sellers of residential properties who used EA listings on the Realcomp MLS received higher or lower sale prices for their properties. (CX 458-Page 18 - CX 458-Page 19, ¶28). Dr. Williams specifically testified that he did not analyze the effect of Realcomp's restrictions on the number of days that homes remain on the market, or whether commission rates on ERTS listings are higher when MLSs impose restrictions in the nature of the Realcomp

Policies. (Williams, Tr. 1272). Thus, even if Dr. Williams' test and statistical results were valid, they are inefficient to demonstrate that Realcomp's Policies caused measurable harm to price competition between traditional and non-traditional brokers or to consumers. (CX 458-Page 18 - CX 458-Page 19, ¶28).

233. In his initial Report of April 17, 2007, Dr. Eisenstadt identified published studies that describe regressions used to estimate effects of housing characteristics on the sale price of residential properties. (CX 133-045, ¶66 n.114).³ Relying on this published work, Dr. Eisenstadt examined whether home sellers in the Realcomp service area have experienced adverse economic effects as a consequence of Realcomp's Policies.

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

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

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

235. In his April 17, 2007 Report (CX 133), Dr. Eisenstadt compared the home sale prices for residential properties in the Realcomp service area the years 2005 and 2006 against those for homes in the Ann Arbor MLS (an MLS without policies comparable to the Realcomp Policies) during the same period. Dr. Eisenstadt accounted for differences in home

³ These studies are G. Stacy Sirmans and David A. Macpherson, *The Value of Housing Characteristics*, National Association of Realtors, December 2003, and Paul E. Carrillo, *An Empirical Two-sided Equilibrium Search Model of the Real Estate Market*, October 2005.

characteristics and location characteristics that might also affect sales prices, as well as the use of EA vs. ERTS listing types, by means of statistical regression. This methodology permitted Dr. Eisenstadt to measure the effects of the Realcomp Policies on sales prices of EA-listed properties in the Realcomp service area relative to Ann Arbor, by holding constant differences in the sale prices of ERTS-listed properties in the two areas. (CX 133-044 - CX 133-045, ¶¶65-66).

236. Dr. Eisenstadt found that the estimated effects on the sale price were *positive* (and the result was statistically significant). Sellers of EA properties listed on Realcomp realized higher sale prices than sellers of EA properties listed on the Ann Arbor MLS, after controlling for housing characteristics, location, and differences in the average sale prices of ERTS properties in the two areas. (Eisenstadt, Tr. 1447, et seq.; CX 133-045 - CX 133-046, ¶67).

237. The estimated magnitude of the difference (approximately 14%) was far greater than any increased brokerage costs for home sellers, even if one assumed that sellers of EA properties in Realcomp's service area *always* paid the traditional three percent selling commissions to agents. (Eisenstadt, Tr. 1446; CX 133-045 - CX 133-047, ¶¶67-68).

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

238. In his May 31, 2007 Supplemental Expert Report (CX 458) Dr. Eisenstadt described the results of a further direct test of the potential anticompetitive effect of the Realcomp Policies on sellers who use EA contracts. This analysis, in terms of methodology, was highly similar to the sales price analysis in Dr. Eisenstadt's April report. (CX 458-Page 20 - CX 458-Page 21, ¶¶31-32). Dr. Eisenstadt compared the sale prices of EA properties listed and sold in Realcomp to those listed and sold in the five of the control MSAs used by Dr. Williams. (CX

458-Page 21 - CX 458-Page22, ¶33). (These MSAs also used EA contracts - one did not provide sales price data.)

239. Dr. Eisenstadt's analysis showed that, after accounting for home characteristics, locational effects, and differences in the sale prices of ERTS properties, the Realcomp Policies did not depress the expected sale prices that home sellers using EA contracts received for their residential properties. Instead, on average, residential sellers in Realcomp's service area using EA contracts realized approximately six percent higher sale prices for their homes than sellers in the Control MSAs that used EA contracts. (CX 458-Page 22 - CX 458-Page 23, ¶35).

240. Dr. Eisenstadt went on to estimate whether the beneficial effect of higher sales prices for EA-listed properties predicted by his analysis would be offset by higher brokerage fees caused by an artificial substitution of ERTS contracts for EA contracts. For purpose of this estimate, Dr. Eisenstadt assumed (contrary to the results of his probit regression analyses, which showed no statistically significant effect of the Realcomp Policies on the prevalence of EA contracts) that the Realcomp Policies reduced the share of EA listings on the Realcomp MLS over the relevant time period by one percentage point. He further assumed, conservatively, that every affected home seller would choose an ERTS listing, instead of selling the property without a listing broker (i.e., FSBO), and that all affected sellers would be required to pay a three percent commission to a cooperating broker. He further assumed that the Realcomp Policies had no offsetting benefits to home buyers, which is contrary to the evidence discussed in ¶¶244-245 below. (CX 458-Page 23, ¶36).

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

Eisenstadt estimated to be approximately \$1,700,000. (Eisenstadt, Tr. 1454-1458; CX 458-Page 23 - CX 458-Page 25, ¶¶37-39).

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

242. Dr. Williams claimed that there is no free-riding problem that justifies the Realcomp Policies. (Williams, Tr. 1639-1654). He testified that an EA listing agent does not "free-ride" because he/she participates in the transaction and is paid. (Williams, Tr. 1642-1643). He further testified that cooperating agents do not free ride because (1) they benefit by having the opportunity to participate in the transaction; (2) most brokers are both cooperating and listing brokers; and (3) 80 percent of the time a cooperating broker participates in a non-ERTS transaction. (Williams, Tr. 1639-1654).

243. Dr. Williams therefore opined that any benefit from the Realcomp Policies inures to cooperating brokers, not consumers. (Williams, Tr. 1221-1224, 1655-1656). He further stated that, even if a free-rider problem exists, the Realcomp Policies do not eliminate the problem because a cooperating broker who belongs to an MLS other than Realcomp (e.g., MiRealSource) can find out about a property on a public website and represent a (successful) buyer for the property. He also noted that Realcomp participates in data sharing arrangements with other MLS's that permit brokers who are not Realcomp members to present Realcomp-listed properties. (Williams, Tr. 1644-1645). Therefore, in Dr. Williams' view, the access restrictions do not assure that a Realcomp cooperating broker will participate in a given transaction. (Williams, Tr. 1224-1225, 1645-1647).

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

EA property by enhancing the incentives of these brokers to show and promote EA properties to their buyer-clients. (CX 133- Pages 31-34, ¶¶46-49; Eisenstadt, Tr. 1398).

245. Dr. Williams fails to recognize that Realcomp's data-sharing arrangements are *reciprocal*, so that Realcomp brokers get the same benefit that they give to brokers in other MLSs by participating in data sharing. (Kage, Tr. 914).

11. The Realcomp Policies Create Additional Efficiencies.

246. Dr. Eisenstadt explained that an important characteristic of an MLS relevant to efficiency is the fact that an MLS is a "platform" that serves a "two-sided" market, similar to newspapers, credit card systems, and shopping malls. These "platforms" connect (*i.e.*, bring together) two distinct groups of users (in this case, real estate listing brokers and cooperating brokers). An important characteristic of a two-sided market is that demand for the platform among users on one side increases as the number of participants on the other side increases. In the case of an MLS, all else equal, listing agents will have a higher demand for an MLS platform that also attracts more cooperating agents. (Eisenstadt, Tr. 1405).

247. The customers on one side of a platform are not necessarily equal to one another in terms of creating indirect network effects for the customers on the other side of a platform. (Eisenstadt, Tr. 1405). As Dr. Eisenstadt explained, an "anchor" department store in a shopping mall may be charged a lower rental rate than a boutique in the same mall because the anchor store can be expected to attract more customers to the mall. (Eisenstadt, Tr. 1406). In the case of an MLS, different rules for promoting EA listings versus ERTS listings could be expected to increase the participation of cooperating brokers. (Eisenstadt, Tr. 1407). This is because cooperating brokers would be expected to place less value on the number of EA brokers (*i.e.*, brokers with nontraditional business models) who belong to an MLS platform than on the

number of traditional, full-service brokers who belong, even if limited service and ERTS contracts each offered cooperating brokers identical commission rates. This lower value stems from the fact that EA contracts can impose higher transaction costs (e.g., scheduling on-site visits and completing paper work at closings) on cooperating brokers who must deal directly with owners rather than with listing brokers. (Eisenstadt, Tr. 1407). Additionally, as explained above, potential buyers who view a property on a public website could be expected to be less likely to use a cooperating agent when that property is offered under an EA contract. These factors support the conclusion that cooperating agents would prefer a platform that favored ERTS listing contracts on the other side than one that had only limited service contracts of equivalent number on the other side. The Realcomp Policies promote this result and thereby the efficiency of the cooperative MLS "platform."

248. The Realcomp Policies also promote efficiency by reducing the bidding disadvantage for buyers who are represented by a cooperating broker. (Eisenstadt, Tr. 1403). Buyers who use cooperating brokers are disadvantaged relative to buyers who do not use a cooperating broker when both bid for properties listed under EA contracts. (Eisenstadt, Tr. 1403). Because the seller must pay a commission when a buyer uses a cooperating broker, the rational seller will subtract the value of that commission when comparing offers made by prospective buyers who use cooperating brokers against offers from buyers who are unrepresented. (Eisenstadt, Tr. 1403). The Realcomp Policies, by not promoting EA properties to the same extent as ERTS properties, increase the probability that the client of a Realcomp member who is acting as a cooperating broker will make a successful offer for that property.

II. PROPOSED CONCLUSIONS OF LAW

A. Jurisdiction

249. The Commission has jurisdiction to prevent "corporations from using unfair methods of competition in or affecting commerce" 15 U.S.C. § 45.

250. Realcomp is, and at all relevant times has been, a corporation as "corporation" as defined by Section 4 of the FTC Act, 15 U.S.C. § 44 (JX 1, ¶61).

251. At all times relevant herein, Realcomp has been, and is now, engaged in commerce as "commerce" is defined in Section 4 of the FTC Act, 15 U.S.C. § 44 (JX 1, ¶62).

252. Realcomp's acts and practices have been or are in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and Respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the acts and practices of Realcomp:

- (a) affect the purchase and sale of real estate by persons moving into and out of Southeastern Michigan; and
- (b) affect the transmission of real estate listing information to public real estate web sites that are intended for a national audience, including Realtor.com (JX 1, ¶63).

B. Burden of Proof

253. The parties' burden of proof is governed by the Administrative Procedure Act ("APA") and the Federal Trade Commission Rules of Practice. Section 556(d) of the APA states that "Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. 556(d). Pursuant to Commission Rule 3.43(a), "Counsel representing the

Commission. . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto." 16 C.F.R. 3.43(a).

254. Generally, the standard of proof for administrative adjudications is by the preponderance of the evidence. See *Steadman v. SEC*, 450 U.S. 91, 98-102 (1981). FTC adjudications typically have used the preponderance of the evidence standard. See, e.g., *FTC v. Abbott Laboratories*, 853 F. Supp. 526, 535 (D.C. 1994); *In the Matter of Adventist Health System*, 117 F.T.C. 224, 297 (1994).

255. Commission Rule 3.51 governs the content of the Initial Decision and states that "An initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence." 16 C.F.R. 3.51(c)(3). Section 556(d) of the APA, however, includes the substantial evidence standard: "A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative, and substantial evidence." 5 U.S.C. 556(d).

256. "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. It must be of such character as to afford a substantial basis of fact from which the fact in issue can be reasonably inferred. It excludes vague, uncertain or irrelevant matter. It implies a quality and character of proof which induces conviction and makes a lasting impression on reason." *Carlay Co. v. FTC*, 153 F.2d 493, 496 (7th Cir. 1946). See also, *In the Matter of Schering-Plough Corp.*, No. 9297, 2002 WL 32445970 (F.T.C. June 27, 2002).

257. An unfair act or practice under 15 U.S.C. § 45 is one that causes or is likely to cause substantial injury (not merely trivial or speculative harm) to consumers, which is not

reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. 15 U.S.C. § 45 (n); S. Rep. No. 103-130, at 13 (1994).

258. Under the standard of 15 U.S.C. § 45(n), Complaint Counsel had the burden to prove "substantial injury to consumers." Upon the enactment of § 45(n), Congress explained that "substantial injury is not intended to encompass merely trivial or speculative harm. In most cases, substantial injury would involve monetary or economic harm or unwarranted health and safety risks." S. Rep. No. 1303-130, at 13 (1994).

259. The assessment of the effects of a challenged practice must be considered collectively, not in isolation: "The Commission . . . will not find that a practice unfairly injures consumers unless it is injurious in its **net effects**." (FTC Policy Statement on Unfairness (December 17, 1980) (emphasis added).

260. This case must be evaluated under the Rule of Reason, as discussed below in Section E. To be unlawful under the Rule of Reason, the challenged restraints must have a significant or substantial adverse net effect on competition. *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *Dickson v. Microsoft Corp.*, 309 F.3d 193 (4th Cir. 2002); *Roy B. Taylor Sales, Inc. v. Hollymatic Corp.*, 28 F.3d 1379 (5th Cir. 1994); *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates, Inc.*, 996 F.2d 537 (2d Cir. 1993); *Smith v. Pro Football, Inc.*, 593 F.2d 1193 (D.C. Cir. 1978).

261. The initial burden under the Rule of Reason lies with Complaint Counsel to demonstrate that the Realcomp Policies materially impaired competition. Rule of Reason analysis first requires a determination of whether the challenged restraint has a substantially adverse effect on competition. *United States v. Brown University*, 5 F.3d 658, 668 (3rd Cir. 1993); *SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 965 (10th Cir. 1994). If the plaintiff meets

this burden, the inquiry then shifts to an evaluation of whether the procompetitive attributes of the conduct justify the otherwise anticompetitive effects. *Brown University*, 5 F.3d at 669.

262. Complaint Counsel failed to carry its burden of proving a "substantial injury to consumers," since the evidence demonstrates that Realcomp's Policies are not injurious in their net effects.

263. Complaint Counsel also failed to carry its burden of proving a substantial injury to consumers because (in addition to the challenge to the Search Function Policy being moot as discussed in Section C below), even assuming there is a substantial injury to consumers due to decreased exposure of Exclusive Agency Listings under the Web Site Policy, that injury is reasonably avoidable by the consumers, who are informed that they get what they pay for with an Exclusive Agency Listing and can choose, for example, to pay another \$50 to \$100 for their Exclusive Agency listing to be placed into Realtor.com., or to pay another \$200 for an Exclusive Right to Sell Listing.

264. Complaint Counsel's case also fails as unproven, since Complaint Counsel's expert's opinion as to the "combined" effects of what he refers to as Realcomp's access restrictions does not correspond to the Complaint, and cannot be separated, as discussed below in Section D.

265. Even assuming Complaint Counsel carried its initial burden, Realcomp justified its challenged policies as discussed below in Section F.

C. The Challenge to the Search Function Policy is Moot.

266. In *United States v. W. T. Grant Co.*, 345 U.S. 629, 73 S.Ct. 894, 97 L.Ed. 1303 (1953), the lower court dismissed the action against the corporation for violations of the Clayton Act. The Supreme Court affirmed, but held that the case was not moot:

[T]he voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot. A controversy may remain to be settled in such circumstances. The defendant is free to return to his old ways. This, together with a public interest in having the legality of the practices settled, militates against a mootness conclusion. For to say that the case has become moot means that the defendant is entitled to a dismissal as a matter of right. The courts have rightly refused to grant defendant's such a powerful weapon against public law enforcement. 345 U.S. 629, 632-33 (1953) (citations omitted).

267. Under this doctrine, courts will not simply declare an issue moot because the defendant changed its ways; however, the defendant must prove mootness by showing the alleged wrongful behavior will not repeat:

The case may nevertheless be moot if the defendant can demonstrate that there is no reasonable expectation that the wrong will be repeated. The burden is a heavy one. *Id.*

268. In *County of Los Angeles v. Davis*, the county changed its challenged policies during the litigation. The Supreme Court held that the case was moot because

(1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. When both conditions are satisfied it may be said that the case is moot because neither party has a legally cognizable interest in the final determination of the underlying questions of fact and law. 440 U.S. 625, 631, 99 S.Ct. 1379, 59 L.Ed. 2d 642 (1979).

269. In *Princeton University v. Schmid*, the Supreme Court held the university's amendments to the regulations at issue mooted the case. 455 U.S. 100, 102 S.Ct. 867, 70 L.Ed. 2d 855 (1982). The Court noted, "We do not sit to decide hypothetical issues or to give advisory opinions about issues as to where there are not adverse parties before us" and concluded that "the issue of the validity of the old regulation is moot, for this case has lost its character as a present,

live controversy of the kind that must exist if we are to avoid advisory opinions on abstract questions of law." 455 U.S. 100, 102-03, 102 S.Ct. 867, 70 L.Ed. 2d 855 (1982).

270. In *Winokur v. Bell Fed. Sav. & Loan Assn.*, plaintiffs had asserted the savings and loan association's method of computing interest violated the Securities Exchange Act. 560 F.2d 271, 274-75 (7th Cir. 1977). However, when the association changed its practices and the plaintiff entered an affidavit, noting that change, the Circuit Court held that this action mooted the case. *Id.*

271. In their pre-trial brief at pp. 56-57, Complaint Counsel relied on the test established in *United States v. Oregon State Medical Society*, to assert the difficulty of proving the problem will not recur:

When defendants are shown to have settled into a continuing practice or entered into a conspiracy violative of antitrust laws, courts will not assume that it has been abandoned without clear proof. . . . It is the duty of the courts to be aware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption. 343 US 326, 333, 72 S.Ct. 690, 695, 96 L.Ed. 978 (1952).

272. Nevertheless, Complaint Counsel must bear the burden of showing that an injunction is still needed.

[T]he moving party must satisfy the court that relief is needed. The necessary determination is that there exists some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. The chancellor's decision is based on all the circumstances; his discretion is necessarily broad and a strong showing of abuse must be made to reverse it [by a higher court reviewing a lower court's decision on whether to grant injunctive relief]. To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and in some cases, the character of the past violations. *Grant*, 345 U.S. 629, 633 (1953) (citations omitted).

273. Complaint Counsel failed to carry its burden to show that an injunction is needed with regard to the Search Function Policy, since the undisputed evidence reflects that Realcomp has changed that policy and is willing to enter into a consent decree that would preclude resumption of the Search Function Policy.

D. There is No Sound Basis to Provide Relief for a Matter That is Not Challenged in the Complaint, Nor to Base Relief on an Expert Opinion that Does Not Correspond to the Complaint Nor Prove any Substantial Injury to Consumers.

274. Complaint Counsel's expert, Dr. Williams, based his opinion on the combined effects of the Web Site Policy, Search Function Policy, and Minimum Service Definition (Williams, Tr. 1236); yet no challenge to the Minimum Service Definition is pled in the Complaint. There is no basis to provide relief based on Dr. Williams' opinion with respect to the Minimum Service Definition, since "there is no 'duty (on the part) of the trial court or the appellate court to create a claim which appellant has not spelled out in his pleading.'" *Clark v. Nat'l Travelers Life Ins Co*, 518 F.2d 1167, 1169 (6th Cir. 1975), quoting *Case v. State Farm Mutual Automobile Ins Co*, 294 F.2d 676, 678 (5th Cir. 1961).

275. Similarly, Dr. Williams cannot separate the effect of the Minimum Service Definition from his "combination" opinion (Williams, Tr. 1236, 1238-1239), and that opinion depends on the moot Search Function Policy and unpled (as well as moot, since repealed) Minimum Service Definition. Dr. Williams' analyses also suffer from analytical flaws, as described by Dr. Eisenstadt, and therefore, are indeterminate with respect to any effect of the challenged policies. Therefore, Complaint Counsel's case is unproven and cannot support the requested relief. *E.I. duPont de Nemours v FTC*, 729 F.2d 128, 140-42 (2d Cir. 1984) (vacating FTC's decision that challenged business practices constituted "unfair methods of competition,"

where the practices were adopted for legitimate business reasons, and the record demonstrated that the practices had little if any effect on competition).

E. Analytical Framework.

1. Standard for Analysis of the Alleged Horizontal Restraint of Trade

276. The elements of a combination or conspiracy that unreasonably restrains trade are: (1) the existence of a contract, combination, or conspiracy among two or more separate entities, that (2) unreasonably restrains trade, and (3) affects interstate or foreign commerce. *See, e.g., Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998) (identifying elements of a violation of Section 1 of the Sherman Act); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941) (Section 5 of the FTC Act violations may be based on conduct that violates the Sherman Act) (JX 1, ¶64).

277. Respondent is a combination of its members with respect to the policies at issue (the "Web Site Policy" and the "Search Function Policy"). *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978) (JX 1, ¶65).

278. The purpose of the antitrust laws is to protect competition, not competitors. *Brown Shoe Co v. United States*, 370 U.S. 294, 320 (1962) (JX 1, ¶66). *See also, Brunswick Corp. v. Riegel Textile Corp.*, 752 F.2d 261, 266 (7th Cir. 1984), *cert. den.*, 472 U.S. 1018 (1985) ("The purpose of the antitrust laws as it is understood in the modern cases is to preserve the health of the competitive process -- which means . . . to discourage practices that make it hard for consumers to buy at competitive prices -- rather than to promote the welfare of particular competitors.").

279. The standard by which horizontal restraints are judged under 15 U.S.C. § 45 is identical to that of Section 1 of the Sherman Act, 15 U.S.C. § 1, with respect to the conduct at issue. *North Texas Specialty Physicians*, 2005-2 Trade Case. (CCH) 75,032 (FTC 2005); *International Association of Conference Interpreters*, 5 Trade Reg. Rep. (CCH) 24,235 (FTC 1997).

280. Restraints of trade can be considered under three separate theories: (1) *per se*, (2) rule of reason, or (3) truncated or "quick look" rule of reason. *California Dental Ass'n. v. FTC*, 526 U.S. 756, 763 (1999); *Viazis v. Am. Ass'n of Orthodontists*, 314 F.3d 758, 765 (5th Cir. 2002).

2. The Per Se Approach is Not Applicable

281. *Per se* analysis under Section 1 of the Sherman Act is reserved for categories of restraints that are almost always harmful and rarely, if ever, accompanied by substantial procompetitive justifications. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289-90 (1985).

282. *Per se* categorization requires judicial experience with the type of restraint at issue, such that it can be predicted that the restraint is almost always harmful to competition. *Arizona v. Maricopa Co. Med. Soc'y.*, 457 U.S. 332, 344 (1982).

283. Only conduct that is "manifestly anticompetitive" is appropriate for *per se* condemnation under the antitrust laws. *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 723 (1988). The alleged boycott in this case does not involve the enforcement of a price agreement, territorial allocation, coercive conduct toward suppliers or customers, or denial of access to an essential facility. EA brokers freely advertise non-traditional flat-fee arrangements to the public at large. (Sweeney, Tr. 1323, 1329). Rather, the alleged harm to competition

involves allegedly adverse effects on consumers that are not readily foreseeable, which is not an appropriate context for a *per se* analysis. See, *Northwest Wholesale Stationers v. Pacific Stationary and Printing Co.*, 472 U.S. 284, 298; 105 S. Ct. 2613; 86 L.Ed 2d 202 (1985) (holding that the *per se* rule applies only where the challenged practice facially appears to be one that always or almost always would tend to restrain competition and decrease output). See also, *People v. Colorado Springs Bd. of Realtors, Inc.*, 692 P.2d 1055, 1063, 1068-69 (1984) (holding that where arrangement limiting access to MLS service was not shown to be designed to destroy abilities of competitors to compete or that it in fact restricted the ability of potential sellers and purchasers of homes to enjoy competitive markets, the State failed to carry its burden of proving a *per se* violation, and remanding for a Rule of Reason analysis).

284. An underlying effort to enforce a price (or other *per se* unlawful) agreement characterizes many (if not most) decisions holding a concerted refusal to deal to be *per se* unlawful. See *FTC v. Superior Court Trial Lawyers Assn.* 493 U.S. 411, 436 n. 19 (1990) (characterizing concerted refusal to deal in an effort to coerce higher payment rates as "not only a boycott but also a horizontal price-fixing arrangement"). Indeed, some courts have held that boycotts are illegal *per se* only if used as a means to enforce agreements that are themselves illegal *per se*. *Collins v. Associated Pathologists, Ltd.*, 844 F.2d 473, 479 (7th Cir. 1988); *Westman Commission Co. v. Hobart International, Inc.*, 796 F.2d 1216 (10th Cir. 1986). This case does not involve such an agreement.

285. A concerted refusal to deal with disfavored suppliers or customers is an element classically associated with an economic boycott. See, *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 64 (2004) ("To the extent the group boycott label is useful at all to describe a *per se* violation, it is principally a warning against anticompetitive

secondary boycotts – e.g., manufacturers who agree not to supply a store that buys from a discounting manufacturer.") This existence of a secondary boycott is found in the historically significant Supreme Court decisions attaching *per se* liability to concerted refusals to deal, as well as in recent Circuit Court decisions reaching such a conclusion. *See, e.g., Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (appliance suppliers' boycott of retailer); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457 (1941) (concerted agreement by competitors to coerce agreement of third parties to injure competitors' rivals); *Paramount Famous Lasky Corp. v. U.S.* 282 U.S. 30 (1930) (motion picture distributors' refusal to deal with exhibitors who would not agree to standardized contract terms); *Eastern Retail Lumber Dealers' Assn. v. U.S.*, 234 U.S. 600 (1914) (retailer boycott of wholesalers); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000) (manufacturers' refusal to deal with discount warehouse clubs); *Carpet Group Intern. v. Oriental Rug Importers Assn., Inc.*, 227 F.3d 62 (3rd Cir. 2000) (importers' boycott of trade show). The Realcomp Policies do not require or cause any secondary boycott.

286. Complaint Counsel previously acknowledged that "the essential facilities doctrine" does not apply (May 4, 2007 Opposition at 8). Even if the doctrine were applicable, cases imposing *per se* liability evidence consistent themes of complete exclusion from an essential element of competition. *See, e.g., Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co.*, 364 U.S. 656 (1961); *Primetime 24 Joint Venture v. National Broadcasting co., Inc.*, 219 F.3d 92 (2d Cir. 2000). These elements are not present in this case, since Realcomp does not deny membership in the Realcomp MLS to Exclusive Agency brokers, nor does Realcomp prevent Exclusive Agency brokers from placing Exclusive Agency Listings on the Realcomp MLS. Accordingly, *per se* treatment is not appropriate.

3. The Quick Look Approach is Not Applicable.

287. An abbreviated or "quick look" analysis under the rule of reason may only be utilized when "the great likelihood of anticompetitive effects can easily be ascertained." *California Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Where anticompetitive effects are not "intuitively obvious," an abbreviated rule of reason analysis is inappropriate. *Id* at 759.

288. The case presented by Complaint Counsel fails to present a situation in which the likelihood of anticompetitive effects is obvious, so an abbreviated analysis is not appropriate. *California Dental Ass'n v. FTC*, 526 U.S. 756, 778 (1999).

4. This Case Requires a Balancing Analysis Under the Rule of Reason.

289. "[A]greements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed" are analyzed under the rule of reason. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978).

290. Courts apply the rule of reason in cases that, as here, involve non-price restraints by trade associations. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458-59; 106 S. Ct. 2009; 90 L. Ed. 2d 445 (1986) ("we have been slow to condemn rules adopted by professional associations as unreasonable per se . . . , and, in general, to extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious . . ."); *California Dental Ass'n v. FTC*, 526 U.S. 756, 771; 119 S. Ct. 1604; 143 L. Ed. 2d 935 (1999) (remanding for full rule of reason consideration where the challenged advertising restrictions "might plausibly be thought to have a net procompetitive affect, or possibly no effect at all on competition").

291. Rule of reason analysis takes into account specific information about the relevant business, its condition before and after the restraint was imposed, and the restraint's history, nature, and effect. *State Oil v. Khan*, 522 U.S. 3 (1997).

292. Complaint Counsel failed to carry its initial burden under a rule of reason analysis, as discussed above in Sections B, C and D.

293. Even assuming Complaint Counsel carried its initial burden, Realcomp justified its challenged Policies as discussed below.

F. The Realcomp Policies Have Procompetitive Benefits Because They Correct a Free Rider Problem.

294. Rule of reason analysis takes into account competitive jurisdictions for the challenged restraint. *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *U.S. v. Brown University*, 5 F.3d 658 (3d Cir. 1993); *U.S. v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); *In re Detroit Auto Dealers Assn.*, 955 F.2d 457 (6th Cir. 1992).

295. The antitrust laws impose no duty on a firm to cooperate with its competitors if there are valid business reasons for the refusal. There is no legal requirement to provide a "free ride" to competitors. See, *Morris Communications v. PGA Tour, Inc.*, 364 F.3d 1288, 1296 (11th Cir. 2004); *State v. Cedar Rapids Bd. of Realtors*, 300 N.W. 2d 127, 129 (Iowa 1981) (giving MLS access to non-members of the defendant Board would give a few competitors a monetary advantage over the MLS brokers whose organizing ability, money, and volunteer time has made the service a viable tool for effective selling); *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 378 (7th Cir. 1986); *Montgomery County Ass'n of Realtors Inc. v. Realty Photo Master Corp.*, 878 F. Supp. 804, 817 (D. Md. 1995), *aff'd*. 91 F.3d 132 (4th Cir. 1996) (WL No. 95-2488) (rejecting a group boycott claim, and reasoning that the real estate association

had no duty to provide its MLS database to a photographic service for free, nor to allow the photographic service to compete with it more efficiently).

296. Free-riding is the diversion of value from a business rival's efforts without payment. *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 675 (2d Cir. 1992). Judge Easterbrook there explained that the free-riding makes investments less attractive, thereby reducing investments to the detriment of consumers because, "It costs money to make a product attractive against other contenders for consumers' favor. Firms that take advantage of costly efforts without paying for them, that reap what they have not sown, reduce the payoff that the firms making the investment receive." 961 F.2d. at 674.

297. Guidance by analogy is provided by *Supermarket of Homes, Inc. v. San Fernando Bd. of Realtors*, 786 F.2d 1400 (9th Cir. 1986), where the plaintiff, a discount, limited service brokerage firm, alleged that the defendant Board was engaged in an unlawful group boycott in violation of Section 1 of the Sherman Act based, in part, on the Board's rule prohibiting direct public access to the MLS (*i.e.*, the Board required the public to access the MLS through a broker). The defendant Board was a membership association of about 95% of the real estate business entities in the San Fernando Valley of California. Board members did not show the plaintiff's listed properties because there was little or no economic incentive to do so. The District Court granted summary disposition in favor of the defendant Realtors and the Court of Appeals affirmed. The District Court noted that the restricted access rule had procompetitive effects on the market by assisting listing and cooperating brokers to conveniently match customers with properties, and that the rule protected the listing agent's right to the agreed commission upon sale. *Id.* at 1407.

298. Realcomp is a trade association, with its members paying to facilitate their real estate businesses. There is no requirement for Realcomp members' business dollars to be used to feed non-ERTS listings to publicly-available websites, for purposes of facilitating transactions that directly conflict with Realcomp members' business purpose (i.e., advertising and otherwise facilitating sales by property owners directly to buyers without using, or paying, a broker).

G. Complaint Counsel's Proposed Remedies Would Harm, Not Benefit, the Public

299. "Markets slowly but surely undermine practices that injure consumers. Competition does not undermine judicial decisions, so the costs of wrongly condemning a beneficial practice may exceed the costs of wrongly tolerating a harmful one." *Chicago Prof. Sports Ltd. Partnership v NBA*, 961 F.2d 667, 676 (2d Cir. 1992). Thus, in considering the appropriateness of a remedy, the court must take into account the costs that the remedy would entail. As the Commission itself has recognized, such include not only the costs to the parties, but also the impact of proposed relief on consumers generally. *See FTC Policy Statement on Unfairness* (Dec. 17, 1980).

300. An MLS is procompetitive and its primary objective is the formation of a subagency relationship between the listing broker and a selling broker. *See, e.g., Derish v San Mateo-Burlington Bd. Of Realtors*, 136 Cal. App. 3d 534, 538-39; 186 Cal. Rptr. 390 (1982). The challenged policies promote this purpose, and are specifically tailored to serve it. Without some assurance that those who list properties on the MLS and perform the vital function of subagents, neither listing nor selling brokers would be encouraged to use the service and the procompetitive benefits of the MLS would be lost. Complaint Counsel's position is detrimental to cooperation among realtors, and therefore would be detrimental to the public.

301. Complaint Counsel's proposal to enjoin Respondent's Web Site Policy and Search Function Policy, if granted, would not improve consumer welfare. Instead, the proposed relief would require Realcomp agents and their clients to subsidize Exclusive Agency home sellers, and would disadvantage buyers who choose to use cooperating brokers. Therefore, an injunction should not be issued.

302. As discussed above, there are valid efficiency reasons for the disputed Realcomp policies. The relief that Complaint Counsel seeks will increase the costs to buyers who prefer to have real estate professionals assist them in the process of purchasing a home. A cooperating (selling) agent's incentive to show a property to a client is directly related to the expected compensation from doing so. (See Mincy, Tr. 457). In turn, the expected compensation is directly related to the probability that the client will place an offer and purchase the property. (See Eisenstadt, Tr. 1447-1449).

303. Complaint Counsel expects its proposed relief to increase information about EA and other limited service properties available to prospective buyers who do *not* use selling agents, and to increase the number of offers those buyers make for such properties. In that event, the proposed relief would also be expected to reduce the number of offers for limited service properties made by buyers who prefer to use selling agents. Therefore, the net effect of the Complaint Counsel's proposed relief on the total number of prospective buyers who make offers on such properties, and the net price (*i.e.*, the gross sale price less commissions) that the owners of those properties receive is analytically indeterminate. (CX 133-031 - CX 133-032, ¶46.)

304. However, the empirical evidence suggests that Realcomp's policies increase selling agents' incentives to promote and show their limited service properties to their clients, and this effect outweighs any reduction in "traffic" among those buyers who do not use selling

agents. (CX 133-07, ¶14.) This result would be lost under the proposed relief. The proposed relief thus would actually disadvantage prospective home buyers who contract with selling agents to show them properties, including those marketed under limited service contracts. The proposed relief would not only reduce selling agents' incentives to render their services in conjunction with purchasing EA or MLS-only properties, but also would harm home buyers who prefer to use a realtor when they purchase those properties. (CX 133-034, ¶50.)

305. Complaint Counsel's proposed relief also would require Realcomp agents who work with home buyers (*e.g.*, selling agents, cooperating agents, or buyers' agents) to purchase properties to subsidize other property owners who, through their use of limited service contracts, compete with them to procure or produce buyers. (CX 133-07 - CX 133-08, ¶15.) Just as markets function best when classes of sellers are not artificially disadvantaged, they also function best when different groups of buyers are not artificially disadvantaged. There is no apparent reason why it would be efficient to require selling agents (or an MLS that provides services to them) to distribute for free information to buyers who do not intend to use their services, especially when the practice would disadvantage those buyers who do intend to use them. (CX 133-034, ¶51.)

306. There is no economic basis for believing that, if implemented, Complaint Counsel's proposed relief would result in more socially optimal pricing of MLS services than Realcomp's current policy. (133-07 - CX 133-08, ¶15.) For the sake of argument, assume that non-traditional listing brokers who are Realcomp members do subsidize the traditional listing brokers. Some Realcomp members primarily function as selling rather than listing agents. If Complaint Counsel prevails, those selling agents will subsidize nontraditional listing brokers who use a flat-fee business model. As explained above, this is because some buyers will use the

information that Realcomp feeds to public websites about EA and other limited service properties to purchase those properties without retaining the services of Realcomp selling agents who partly underwrite the cost of Realcomp's operations. Selling agents employed by traditional brokers would be required to subsidize the customers of listing agents who use EA contracts. Complaint Counsel's relief, if implemented, cannot benefit one group of brokers (and its customers) without harming the other group. (CX 133-041, ¶60.)

307. Further, Complaint Counsel proposes to make Approved Website more attractive by increasing the volume of listings on them, and the number of visitors to them. As a consequence, non-approved websites may become less attractive, thereby retard the development of platforms to compete with MLSs and Approved Websites. (CX 133-042 - CX 133-043, ¶62.)

Respectfully submitted,

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

Dated: July 31, 2007

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Certificate of Service

I hereby certify that on this 31st day of July, 2007, I caused an original and two paper copies of the foregoing Respondent's Proposed Findings of Fact and Conclusions of Law to be filed with the Secretary of the Commission.

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

Sean P. Gates, Esq.
601 New Jersey Ave., N.W.
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I also certify that I caused two paper copies of the foregoing document to be hand delivered to:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
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