ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9320

PUBLIC VERSION

IN THE MATTER OF

REALCOMP II LTD.

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT REALCOMP II LTD.'S PROPOSED FINDINGS OF FACT

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Dated: August 20, 2007

COMPLAINT COUNSEL'S RESPONSE TO RESPONDENT REALCOMP II LTD.'S PROPOSED FINDINGS OF FACT

TABLE OF CONTENTS

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).

Response to Finding No. 1:
Complaint Counsel do not disagree.

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).

Response to Finding No. 2:
Complaint Counsel do not disagree.

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).

Response to Finding No. 3:
Complaint Counsel do not disagree.

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).

Response to Finding No. 4:
Complaint Counsel do not disagree.

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

Response to Finding No. 5:
Complaint Counsel do not disagree.

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).

Response to Finding No. 6:
Complaint Counsel do not disagree.

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

Response to Finding No. 7:
Complaint Counsel do not disagree.

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).

Response to Finding No. 8:
Complaint Counsel do not disagree.

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).

Response to Finding No. 9:
Complaint Counsel do not disagree.

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).

Response to Finding No. 10:
Complaint Counsel do not disagree.

11. An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency ["EA"] Listing. 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).

Response to Finding No. 11:
The proposed finding is incomplete, and therefore misleading. The full definition of Exclusive Agency admitted to by Respondent is as follows: "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, **in which case the listing broker is paid a reduced or no commission when the property is sold.**" (Complaint, ¶ 9; Answer, ¶ 9 (emphasis added to identify missing language)).

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:

(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)

Response to Finding No. 12:
Complaint Counsel do not disagree.

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)

Response to Finding No. 13:
Complaint Counsel do not disagree.

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)

Response to Finding No. 14:
Complaint Counsel do not disagree.

15. An Exclusive Agency Listing involves the services of a listing broker (JX 1, ¶55).

Response to Finding No. 15:
Complaint Counsel do not disagree.

16. A For-Sale-By-Owner real estate transaction does not have a listing broker (JX 1, ¶54).

Response to Finding No. 16:
Complaint Counsel do not disagree.

17. "Approved Websites" are those websites to which Realcomp provides information concerning Realcomp MLS listings for publication (JX 1, ¶22).

Response to Finding No. 17:
Complaint Counsel do not disagree, but for completeness would add that the Approved Websites include MoveInMichigan.com, ClickOnDetroit.com, Realtor.com, and the Realcomp member IDX websites. (CCPF ¶¶ 3, 369).

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).

Response to Finding No. 18:
The proposed finding is incomplete and therefore misleading. According to the National Association of Realtors ("NAR"), the national trade association for real estate professionals, there are approximately 800 MLSs across the country that are affiliated with NAR. (CX 414 (Niersbach, Dep. at 7-8, 73)). While there are no known accurate accounts of how many total MLSs there are in the United States, it is informative that Move, Inc. (which operates Realtor.com) receives feeds from approximately 900 MLSs with "near complete coverage of the United States." (CX 411 (Dawley, Dep. at 14-15)). In addition, MLSs that are owned and/or operated by local Associations of Realtors, such as Realcomp, must comply with NAR's mandatory rules regarding the operation of their MLSs. (CX 414 (Niersbach, Dep. at 36, 39)). Thus, approximately 89% (800 out of 900) of MLSs in the United States belong to NAR and subscribe to its rules. (CX 414 (Niersbach, Dep. at 7-8, 73); (CX 411 (Dawley, Dep. at 14-15)).

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).

Response to Finding No. 19:

The proposed finding is technically correct, but it is not sufficient to fully define IDX. IDX is a means for brokers to publish other brokers' listings on their respective websites. (CX 36 (Kage, IHT at 51); Kage, Tr. 947). For a more complete discussion of IDX, *see* CCPF ¶¶ 245-247, 403-412.

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).

Response to Finding No. 20:

Complaint Counsel do not disagree.

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).

Response to Finding No. 21:

Complaint Counsel do not disagree.

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

Response to Finding No. 22:

Complaint Counsel do not disagree.

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

Response to Finding No. 23:

Complaint Counsel do not disagree.

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

Response to Finding No. 24:

Complaint Counsel have no specific response.

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)).

Response to Finding No. 25:
Complaint Counsel do not disagree.

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

Response to Finding No. 26:
Complaint Counsel do not disagree.

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

Response to Finding No. 27:
Complaint Counsel do not disagree.

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.

Response to Finding No. 28:
Complaint Counsel do not disagree.

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).

Response to Finding No. 29:
Complaint Counsel do not disagree.

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).

Response to Finding No. 30:
Complaint Counsel do not disagree.

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

Response to Finding No. 31:
Complaint Counsel do not disagree.

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

Response to Finding No. 32:
Complaint Counsel do not disagree.

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).

Response to Finding No. 33:
Complaint Counsel has no specific response.

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).

Response to Finding No. 34:
Complaint Counsel do not disagree.

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).

Response to Finding No. 35:
Complaint Counsel have no specific response.

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).

Response to Finding No. 36:
Complaint Counsel have no specific response.

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).

Response to Finding No. 37:
Complaint Counsel do not disagree.

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).

Response to Finding No. 38:
Complaint Counsel do not disagree.

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).

Response to Finding No. 39:
Complaint Counsel do not disagree.

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).

Response to Finding No. 40:
Complaint Counsel have no specific response.

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

Response to Finding No. 41:
This proposed finding is overly broad, incomplete and misleading. First, as Realcomp itself acknowledged in its earlier findings, Realcomp's service area consists of Oakland, Wayne, Livingston and Macomb counties. (Kage, Tr. at 1059; CCRF ¶ 28). The market share data from Realcomp and MiRealSource overwhelmingly establish that MiRealSource is not a significant competitor in Oakland, Wayne, Livingston, and the western half of Macomb county. (CCPF ¶¶ 729-731, 738-756).

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).

Response to Finding No. 42:
This proposed finding is overly broad, incomplete and misleading because it fails to account for costs other than membership fees. There are significant costs for brokers to belong only to MiRealSource, if they want to do business in Oakland, Wayne, Livingston and Macomb counties, in terms of the loss of key exposure for listings, loss of access to the main inventory of listings for buyers, and difficulties in competing for new listing agreements. (CCPF ¶¶ 502-519 (explaining why the Realcomp MLS is "critical" for brokers practicing in Oakland, Wayne, Livingston and Macomb counties)). The evidence is overwhelming that brokers believe they have to be members

of Realcomp to do business in Oakland, Wayne, Livingston, and the western part of Macomb counties. (CCPF ¶¶ 502-535, 729-731, 738-756). Additionally, an individual agent cannot join MiRealSource, an entire office has to join MiRealSource even if other agents do not do business in Macomb county. (CX 409 (Burke, Dep. at 10-11)).

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)).

Response to Finding No. 43:
Complaint Counsel have no specific response.

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

Response to Finding No. 44:
This proposed finding is overly broad, without foundation, incomplete, misleading and against the weight of the evidence. As discussed in CCRF ¶ 42, brokers in Oakland, Wayne, Livingston and Macomb counties need to belong to Realcomp and would incur substantial costs if they belonged only to MiRealSource. (CCRF ¶ 42). This finding is self-serving and solely supported by Virginia Bratt, the CEO of MiRealSource. Virginia Bratt has never worked for Realcomp, and has never seen the Realcomp MLS data. (CX 407 (Bratt, Dep. at 5-6, 91-92)).

In addition, MiRealSource does not send listings to MoveInMichigan.com, ClickOnDetroit.com, or the Home Preview Channel; it does not have data sharing agreements with Ann Arbor Board of Realtors, Flint Area Association of Realtors, Monroe County Association of Realtors, Downriver Association of Realtors, Jackson Area Association of Realtors, Lenawee County Association of Realtors or the Lapeer and Upper Thumb Association of Realtors, and its membership is less than half of the size of Realcomp. (CX 407 (Bratt, Dep. at 8, 86-87)).

Finally, the market share data, which was not refuted by Dr. Eisenstadt, Respondent's expert, clearly shows that Realcomp has the [redacted] of listings in Oakland, Livingston, Wayne and Macomb counties. (CCPF ¶¶ 721-764). For example, Realcomp had [redacted] of new listings in

Oakland, Wayne, Livingston and Macomb counties for the last four years. (CCPF ¶¶ 739). Realcomp's market share in terms of unique listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 through 2006 was [redacted]. (CCPF ¶ 747). Therefore, MiRealSource is not able to truly compete against Realcomp in Oakland, Wayne, Livingston, and parts of Macomb counties.

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

Response to Finding No. 45:

This proposed finding is misleading, without foundation, self-serving and deserves no weight. Ms. Bratt, the CEO of MiRealSource, is the only person substantiating this claim. (CX 407 (Bratt, Dep. at 30)). As CEO of MiRealSource, Ms. Bratt is hardly a neutral or impartial observer; she has a natural and professional interest in inflating the image of MiRealSource. She was asked by Respondent's counsel if MiRealSource was considered to be among the top MLSs in the country and she replied "I think so." (CX 407 (Bratt, Dep. at 30)). There is no evidence supporting this claim and Ms. Bratt, who has never worked for another MLS, and never has been a real estate broker or agent, has no foundation to support this claim. (CX 407 (Bratt, Dep. at 5-6, 83-84)).

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.)

Response to Finding No. 46:

This proposed finding is incomplete and misleading. Ms. Bratt lacks foundation to confirm this finding. Ms. Bratt testified that "at one point in time" MiRealSource was considered by some source that she can't remember, to be in the top 1% of MLSs in terms of its technology. (CX 407 (Bratt, Dep. at. 50-51)). Ms. Bratt cannot even remember when this ranking came out. (CX 407 (Bratt, Dep. at. 50-51)).

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)).

Response to Finding No. 47:

This proposed finding is incomplete and misleading. MiRealSource has in fact been losing members in the last year. (CX 407 (Bratt, Dep. at 85)). In August 2006, MiRealSource had about 7,000 members. (CX 407 (Bratt Dep. at 85)). [redacted] (CX 407 (Bratt, Dep. at 8, 80-82); RX 87, *in camera*). Between August 2006 and February 2007, MiRealSource was actively recruiting new members, but its overall membership [redacted] (CX 407 (Bratt, Dep. at 85); RX 87, *in camera*).

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)).

Response to Finding No. 48:

This proposed finding is misleading to the extent that it implies that MiRealSource began trying to expand its membership in Oakland county in August 2006. Virginia Bratt testified that MiRealSource has always tried to expand its membership. (CX 407 (Bratt, Dep. at 85-86)). Notwithstanding these efforts, it still has fewer than half the number of members of Realcomp. (CX 407 (Bratt, Dep. at 8, 86-87)). There is no evidence that suggests that MiRealSource's efforts will be any more successful in the future.

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

Response to Finding No. 49:

The proposed finding is incomplete and misleading to the extent that it implies that MiRealSource is just now trying to expand its membership, targeting Oakland and Livingston counties. MiRealSource has always tried to recruit new members to increase its membership and expand its service. (CX 407 (Bratt, Dep. at 85-86)). Furthermore, a comparison of the location of the majority of the MiRealSource listings with the majority of the Realcomp listings would require a comparison of the MLS data from MiRealSource and the MLS data from Realcomp.

(CX 407 (Bratt, Dep. at 91-92)). The data clearly shows that MiRealSource [redacted] of listings in Livingston or Oakland counties. (CCPF ¶¶ 729-731, 740-764). There is no evidence that MiRealSource's efforts will likely be more successful in the future.

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

Response to Finding No. 50:

The proposed finding is incomplete and misleading. MiRealSource's membership has in fact decreased in the last year. (CX 407 (Bratt, Dep. at 85)). In August 2006, MiRealSource had about 7,000 members. (CX 407 (Bratt Dep. at 85)). [redacted] (CX 407 (Bratt, Dep. at 8, 80-82); RX 87, *in camera*). Furthermore, MiRealSource has fewer than half of the number of members of Realcomp. (CX 407 (Bratt, Dep. at 84-85); Kage, Tr. 1026 (Realcomp currently has about 13,800 members)).

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)).

Response to Finding No. 51:

The proposed finding is incomplete and misleading. (CCRF ¶ 50). Ms. Bratt is referring to growth in 2003 and 2005. (CX 407 (Bratt, Dep. at 73-74)). Additionally, the market share data, which was not refuted by Dr. Eisenstadt, Respondent's expert, clearly shows that even with this so-called growth of members for MiRealSource, Realcomp continues to have the [redacted] of listings in Oakland, Livingston, Wayne and Macomb counties. (CCPF ¶¶ 721- 764). For example, Realcomp had [redacted] of new listings in Oakland, Wayne, Livingston and Macomb counties for the last four years. (CCPF ¶¶ 739). Realcomp's market share in terms of unique listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 through 2006 was [redacted]. (CCPF ¶ 747).

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

Response to Finding No. 52:
Complaint Counsel do not disagree.

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

Response to Finding No. 53:
Complaint Counsel do not disagree.

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).

Response to Finding No. 54:
Complaint Counsel do not disagree.

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)).

Response to Finding No. 55:
Complaint Counsel have no specific response.

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)).

Response to Finding No. 56:
This proposed finding is incomplete, misleading and irrelevant. The reasons that MiRealSource entered into its anticompetitive agreements has no bearing on the reasons for Realcomp's Policies. There is no evidence that Realcomp knew of any possible problems that may have been experienced by MiRealSource.

Moreover, MiRealSource has always had a mechanism in place, either directly through MiRealSource or through the local Boards of Realtors, to protect commissions that are owed to selling agents if the seller "leaves out the agent," enabling selling agents to have recourse to get commissions that are due to them. (CX 407 (Bratt, Dep. at 90-91)). Realcomp, like MiRealSource, has always had mechanisms in place to ensure that cooperating brokers have recourse to receive any commissions owed to them. Moreover, there is no evidence in the record that Realcomp ever considered this issue when adopting the Website Policy or Search Function Policy. Members of the Realcomp Board of Governors testified that they do not know why these Realcomp Policies were adopted. (CCPF ¶¶ 1266-1280).

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)).

Response to Finding No. 57:

This proposed finding is irrelevant, incomplete and misleading. As stated above in CCRF ¶ 56, MiRealSource has always had a mechanism in place, either directly through MiRealSource or through the local Boards of Realtors, to protect commissions that are owed to selling agents if the seller "leaves out the agent," enabling selling agents to have recourse to get commissions that are due to them. (CX 407 (Bratt, Dep. at 90-91); CCRF ¶ 56). Moreover, the Realcomp Board of Governors never discussed any instances where a Realcomp Realtor was "taken out of the equation" because of an Exclusive Agency listing, prior to the adoption of the Website Policy. (CX 36 (Kage, IHT at 54)).

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)).

Response to Finding No. 58:

This proposed finding is irrelevant, and lacks foundation. This finding is supported solely by Virginia Bratt, the CEO of MiRealSource. Virginia Bratt has never worked for Realcomp, and was not involved in the decision by the Realcomp Board of Governors to adopt the Website Policy or the Search Function Policy. (CX 407 (Bratt, Dep. at 5-6)). There is no evidence that Realcomp ever considered this issue when adopting the Website Policy or Search Function Policy. (CCRF ¶ 56). Members of the Realcomp Board of Governors testified that they do not know why these Realcomp Policies were adopted. (CCPF ¶¶ 1266-1280).

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

Response to Finding No. 59:

Complaint Counsel have no specific response.

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)).

Response to Finding No. 60:

This proposed finding is overly broad, without foundation and misleading. Virginia Bratt has never seen the Realcomp member roster, so she has no way to substantiate this claim. (CX 407 (Bratt, Dep. at 16)). Moreover, the evidence is overwhelming that brokers who do business in Oakland, Wayne, Livingston and western Macomb counties need to belong to Realcomp. (CCPF ¶¶ 502-535, 729-731, 738-756).

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)).

Response to Finding No. 61:

This proposed finding is against the weight of the evidence, overly broad, incomplete and misleading. The evidence is overwhelming that brokers need to be a member of Realcomp to do business in Oakland, Wayne, Livingston, and the western part of Macomb county. (CCPF

¶¶ 502-535, 729-731, 738-756). Moreover, the market share data, which was not refuted by Dr. Eisenstadt, Respondent's expert, clearly shows that Realcomp has the [redacted] of listings in Oakland, Livingston, Wayne and Macomb counties. (CCPF ¶¶ 721- 764). For example, [redacted] of new listings in Oakland, Wayne, Livingston and Macomb counties for the last four years are in the Realcomp MLS. (CCPF ¶¶ 739). Realcomp's market share in terms of unique listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 through 2006 was [redacted]. (CCPF ¶ 747). Therefore, brokers need to be a member of Realcomp if they want to compete effectively in Wayne and Oakland county and in Southeastern Michigan.

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)).

Response to Finding No. 62:
Complaint Counsel have no specific response.

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)).

Response to Finding No. 63:
Complaint Counsel have no specific response.

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)).

Response to Finding No. 64:
This proposed finding is misleading to the extent that it implies that MiRealSource now sends its listings to the same real estate websites that Realcomp does. MiRealSource does not send its listings to MoveInMichigan.com, ClickOnDetroit.com or the Realcomp member IDX websites. (CX 407 (Bratt, Dep. at 86-87)). Moreover, at any time, MiRealSource can decide to stop sending all of its listings to Realtor.com or can decide to discontinue its Broker Data Sharing. (CX 407 (Bratt, Dep. at 88)).

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).

Response to Finding No. 65:

This proposed finding is misleading to the extent that it implies that MiRealSource has an obligation to send its listings to these public websites. At any time, MiRealSource can decide to stop sending its listings to Realtor.com, Homeseekers and Google. (CX 407 (Bratt, Dep. at 88)).

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)).

Response to Finding No. 66:

This proposed finding is misleading to the extent that it implies that MiRealSource's "approved websites" are the same as the Realcomp Approved Websites. MiRealSource does not send its listings to MoveInMichigan.com, ClickOnDetroit.com or the Realcomp member IDX websites. (CX 407 (Bratt, Dep. at 86-87)). Moreover, at any time, MiRealSource can decide to stop sending its listings to Realtor.com, or other public websites, or can decide to discontinue its Broker Data Sharing. (CX 407 (Bratt, Dep. at 88)).

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).

Response to Finding No. 67:

Complaint Counsel have no specific response.

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).

Response to Finding No. 68:

Complaint Counsel have no specific response.

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).

Response to Finding No. 69:

This proposed finding is incomplete. Mr. Murray testified that Detroit is one of the worst, if not worst, buyer's markets in the country. (Murray, Tr. 267-268). Mr. Murray also described the real estate market in Southeastern Michigan as being similar to that in Denver, Colorado, and testified that "a lot of other markets" have home sellers that are "price conscious" or "under duress" due to declining equity in their homes. (Murray, Tr. 169-171). More importantly, Realcomp's own documents dispel the notion that Detroit stands alone in having experienced a buyer's market. In the Spring of 2007, Realcomp released a chart titled, "Positive REALTOR® Messages Toolbox" for use by its members when communicating with the public about the Detroit area real estate market. (CX 113). Listed prominently as one of the "MYTHS" in the chart was the sentiment that "It doesn't get much worse than the Detroit real estate market." (CX 113). Realcomp provided several "FACTS" to rebut the myth about Detroit being a uniquely bad real estate market, including: (1) The Midwest in general was tough; (2) Existing-home sales slowdowns in the South were not far off the Midwest pace in late 2006; (3) Boston showed a larger decline than Detroit in '06; and (4) 7 of the Top 20 major markets showed declines in '06. (CX 113). The statistical data to support these facts, according to the chart, can be verified by both NAR and Realcomp. In addition, the chart noted as one of its "KEY MESSAGES" that "the Michigan real estate realm is poised for a comeback."

Furthermore, another document advanced by Respondent is RX 162, which is a table showing a number of other Metropolitan Statistical Areas ("MSAs") across the country ranked by similarity to the Detroit MSA according to seven economic and demographic measures. (CX 498-A-070; CCRF ¶¶198-199). In the column headed "5 Year Price Change," the table shows eight other MSAs that, like Detroit, have experienced less than 20 percent price appreciation during the period from 2002 through 2006, including Denver, Toledo, Dayton, Memphis and Wichita. (RX 162).

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).

<u>Response to Finding No. 70:</u>
Complaint Counsel have no specific response.

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)).

<u>Response to Finding No. 71:</u>
Complaint Counsel have no specific response.

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

<u>Response to Finding No. 72:</u>
The proposed finding is incomplete and misleading. Realcomp told its members that over the course of the first quarter of January 2007, home sales in Southeastern Michigan rose 36.6%. (CX 628; Kage, Tr. 1065-1066 (Karen Kage admitted that she wanted this information to be truthful and accurate)).

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).

<u>Response to Finding No. 73:</u>
This proposed finding is against the weight of evidence, which finds that Southeastern Michigan has been a buyer's market for three years or less. (*See supra* CCRF ¶¶ 68-69; *infra* CCRF ¶¶ 74(a), 76). There is also no foundation for Mr. Sweeney's statements regarding the residential real estate market outside of Southeastern Michigan; Mr. Sweeney testified that "all of his real estate business experience" has been in Southeastern Michigan. (Sweeney, Tr. 1303).

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).

Response to Finding No. 74:
Complaint Counsel have no specific response.

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).

Response to Finding No. 75:
The proposed finding is overly broad and misleading to the extent it suggests that it is the business practice of any brokers in Southeastern Michigan other than Mr. Sweeney to recommend to sellers that they price their home below current market value. This finding also lacks foundation because there is no evidence to support Mr. Sweeney's claim that homes are losing value at the rate of 1% per month.

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)).

Response to Finding No. 76:
Complaint Counsel have no specific response, except to note that Mr. Adams testified that his estimate on the decline of real estate agents was "very loose," and that he referred to the real estate market in Southeastern Michigan as being difficult for only the past year. (CX 525 (Adams, Dep. at 10-11)).

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)).

Response to Finding No. 77:

Complaint Counsel have no specific response.

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).

Response to Finding No. 78:

This proposed finding is overly broad and misleading to the extent it suggests that limited service brokers would not have growth opportunities in Southeastern Michigan or other markets that are experiencing a buyer's market with slow home price appreciation and the high potential of "short sales." (Murray, Tr. 169-171; CX 533-042; *see also* CCPF ¶¶ 216-219)). Limited service brokers appeal in particular to cost conscious consumers as well as those who may not have enough equity in their home to be able to afford brokerage services. (CCPF ¶¶194-197). As a result, Limited service brokers often have more opportunities in a buyer's market. (CCPF ¶¶194-197).

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).

Response to Finding No. 79:

Complaint Counsel have no specific response.

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).

Response to Finding No. 80:

Complaint Counsel have no specific response.

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).

Response to Finding No. 81:

This proposed finding is misleading. In March 2007, Realcomp changed the way it calculated Days on Market. (CX 62). Days on Market became cumulative at this time, adding all of the days "regardless of whether the property has been taken off the market and re-listed, or changes made to the listing agent or office." (CX 62). Prior to March 2007, Realcomp members could pull a listing out of the MLS, and then restart the days on market from zero once it was reentered. (CX 62). Therefore, Realcomp's comparison of days on market between 2006 and 2007 is not accurate and not reliable.

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).

Response to Finding No. 82:
Complaint Counsel have no specific response.

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).

Response to Finding No. 83:
Complaint Counsel have no specific response except to note that this is Mr. Sweeney's personal opinion.

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)).

Response to Finding No. 84:
This proposed finding is based on speculation and hearsay and deserves no weight. Mr. Smith's comments are merely a "presumption" based on what he hears from miscellaneous unnamed sources that Southeastern Michigan is experiencing a slow real estate market. (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)).

Response to Finding No. 85:
This proposed finding is based on hearsay, is deliberately misleading, lacks foundation,

and deserves no weight. The proposed finding does not have a valid and correct cite to the record in support, as required by Paragraph 3 of the Court's Order of August 1, 2007. The transcript of Mr. Smith's deposition testimony (CX 418) on page 37 does not state that the Southeastern Michigan market is known on a national level as being extremely competitive, nor is there any record evidence of such a statement from any source. In fact, the actual testimony of Mr. Smith concerning this subject is based entirely on hearsay and does not represent any study, survey, report or other source of direct information "on a national level" on the competitiveness or uniqueness of the real estate market in Southeastern Michigan. Moreover, the proposed finding is misleading and speculative to the extent it purports to represent what "is known" by any person(s) other than Mr. Smith about the Southeastern Michigan market. Mr. Smith testified that his organization, the Western Wayne–Oakland County Association of Realtors ("WWOCAR"), "do[es]n't have any formal way of going out there and surveying the market" or "bring[ing] in the information about the marketplace" from its members. (CX 418 (Smith, Dep. at 39)). As such, the finding also lacks foundation.

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

Response to Finding No. 86:

The proposed finding misstates the testimony. The portions of the deposition transcript cited by Respondent do not mention commission rates, expressly or by implication. (CX 418 (Smith, Dep. at 36, 38)). When asked directly whether he had any knowledge that consumers in Southeastern Michigan were looking for commission breaks and fee packages from brokers that allow them select what services they need, Mr. Smith stated, "I don't have any personal knowledge of it" and "I don't know about the specifics in this marketplace." (CX 418 (Smith, Dep. at 70-72); CX 68-02). In fact, WWOCAR has a policy in place prohibiting any discussion about commissions inside its offices, or in any WWOCAR meetings. (CX 418 (Smith, Dep. at

77-78)). Thus, it is understandable why Mr. Smith has no knowledge whatsoever concerning commission rates charged by WWOCAR members, or negotiations for any reductions or increases in those rates.

This finding also is based on hearsay and speculation, lacks foundation, and deserves no weight. Mr. Smith's testimony is based on "osmosis" and "side chatter" that he hears from members before and after meetings. (CX 418 (Smith, Dep. at 38-39)). This finding is also against the weight of evidence that brokers in Southeastern Michigan largely charge the same 6% commission and offer the same [redacted] offer of compensation. (*See* CCPF ¶¶ 190, 1140-1141; (CX 525 (Adams Dep. at 60-61) (Mr. Adams recommends that his customers offer a three percent commission to any cooperating broker who brings a buyer to the transaction); Kermath, Tr. 782-784 (Mr. Kermath recommends that his customers offer at least three percent commission to cooperating brokers.)).

Mr. Smith is not a broker or agent in Southeastern Michigan; he is the Executive Vice President of WWOCAR. (CX 418 (Smith, Dep. at 5-6)). He described his work experience at WWOCAR as being "far away from the practical end of selling real estate out there in the marketplace." (CX 418 (Smith, Dep. at 31)). Mr. Smith was a real estate broker "many, many years ago" in the suburbs of Aurora, Illinois. (CX 418 (Smith, Dep. at 16, 19) (stating that he was a broker from 1971 through 1981)). He did not testify that he had ever participated in or observed any negotiations involving real estate agents or brokers in Southeastern Michigan. Thus, the finding lacks foundation.

In addition, the testimony cited by Respondent in support of the finding is entirely speculative. Mr. Smith admitted that his views on this subject were just a guess, based on "osmosis" and not actual "research of the market territory." (CX 418 (Smith, Dep. at 36, 38) (stating "[M]y guess would be that the brokers are all over the place on the service agreements" and "I guess it's more from osmosis than it is from research of the market territory.")). (*See also* (CX 418 (Smith, Dep. at 43) ("Today my guess would be . . . it's all over the place as far as what their types of listing agreement they have," but Mr. Smith ultimately admitted that he "really do[es]n't get into the conversations [with brokers] about what the listing agreements are, or what they contain at that point.")). Such speculation cannot support the finding.

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

Response to Finding No. 87:

This proposed finding is irrelevant, has no foundation, and deserves no weight. This statement is irrelevant because it refers to the real estate industry as a whole and has no bearing on the state of competition in the real estate brokerage services market in Southeastern Michigan. This statement also lacks foundation because Mr. Niersbach admitted that he knew of no information that served as its basis. (CX 414 (Niersbach, Dep. at 123)). Mr. Niersbach also admitted that he did not have any specific knowledge about the economic or competitive conditions in the real estate industry in Southeastern Michigan. (CX 414, Niersbach, Dep. at 130, 132-133)).

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).

Response to Finding No. 88:

Complaint Counsel have no specific response.

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).

Response to Finding No. 89:

The proposed finding is incomplete in that the Website Policy also prevents Exclusive Agency listings from being included on ClickOnDetroit.com, and any other website to which Realcomp chooses to send its listings. (CCPF ¶¶ 868-898). Complaint Counsel have no specific response to the rest of the proposed finding.

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).

Response to Finding No. 90:

The proposed finding is incomplete. The Search Function Policy refers to Realcomp defaulting its MLS searches to Full Service/Exclusive Right to Sell listings and unknown listings. (CX 18-003; Kage, Tr. 965-966).

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).

<u>Response to Finding No. 91:</u>

The proposed finding is incomplete and therefore misleading. In September 2002, Realcomp added fines for the failure to indicate listing type. (CX 11-003; CX 36 (Kage, IHT at 144); Kage, Tr. 959-961). Realcomp also updated its Policy Handbook in 2002, to state that "MLS Entry Only, Limited Service or Exclusive Agency listings must be indicated with the proper flag in the Compensation Arrangements field." (CX 5-007). Therefore, prior to 2004, Realcomp had mechanisms in place to enforce the Website Policy.

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).

<u>Response to Finding No. 92:</u>

The proposed finding is incomplete and therefore misleading. (CCRF ¶ 91).

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).

<u>Response to Finding No. 93:</u>

The proposed finding is incomplete. Exclusive Agency, Limited Service and MLS Entry Only listings are not sent to MoveInMichigan.com, ClickOnDetroit.com, Realcomp member IDX websites or to Realtor.com, impacting the ability of limited service brokers to compete in the Realcomp service area. (CCPF ¶¶ 868-898).

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).

Response to Finding No. 94:

This proposed finding is incomplete because Realcomp's Policies also have reduced exposure for Exclusive Agency listings within the Realcomp MLS database through the Search Function Policy. (CCPF ¶ 768). In addition to being barred from Realcomp's feed to the IDX websites, and MoveInMichigan.com, Realcomp's Website Policy also reduces exposure for Exclusive Agency listings by barring them from Realcomp's feed to Realtor.com, ClickOnDetroit.com (via MoveInMichigan.com) and the Home Preview Channel. (CCPF ¶¶ 765-766, 824).

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

Response to Finding No. 95:

This proposed finding is overly broad and incomplete. An MLS provides many benefits to brokers of all different business models provided the MLS does not adopt anticompetitive policies that disadvantage certain types of business models. (CCPF ¶¶ 463-477, 908-936). Mr. Smith agreed that his organization should not treat any broker's business model better or worse than any other broker's business model – to do otherwise is not appropriate, professionally or ethically. (CX 418 (Smith, Dep. at 80-81)).

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

Response to Finding No. 96:

Complaint Counsel have no specific response.

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).

Response to Finding No. 97:

Complaint Counsel have no specific response.

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

Response to Finding No. 98:

Complaint Counsel agree that Realcomp's feed of listing information to the Approved Websites is "by far" the most important source of Internet exposure. (CCPF ¶¶ 536-563, 580-676). To the extent Respondent is referring to the MLS database system itself as a source of Internet exposure, this finding is inaccurate and misleading. While Realcomp provides its database services in an online format, it is a closed system that provides access only to Realcomp members through a log-in name and password. (CCPF ¶¶ 305-306). Internet exposure, however, refers to marketing listings on publicly accessible real estate websites that allow buyers to search for properties themselves. (*E.g.*, CCPF ¶¶ 536-587).

(a) Internet exposure is important to the seller. (Hepp, Tr. 706).

Response to Finding No. 98(a):

Complaint Counsel agree that Internet exposure is important to home sellers. (*See also* CCPF ¶¶ 460-462, 536-556, 673-676).

(b) The MLS is substantially more important than any other tool for the sale of residential real estate in Southeastern Michigan. (Hepp, Tr. 706).

Response to Finding No. 98(b):

Complaint Counsel have no specific response, except to note that this is Mr. Hepp's personal opinion. (Hepp, Tr. 706).

(c) The MLS finds a buyer three times more often than other home selling tools. (Hepp, Tr. 708).

Response to Finding No. 98(c):

This proposed finding has no foundation and deserves no weight. There is no foundation for the statistics in this finding, and Mr. Hepp testified that he did not know if the statistics were accurate, although he agreed with the concept, namely that the MLS is the most effective tool for selling real estate. (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)).

Response to Finding No. 98(d):
Complaint Counsel have no specific response.

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

Response to Finding No. 99:
Complaint Counsel have no specific response.

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)).

Response to Finding No. 100:
This proposed finding is incomplete and therefore misleading. Although some brokers offering Exclusive Agency listings ranked Realtor.com as being the most effective tool behind the MLS, they also testified to the growing importance of MoveInMichigan.com and IDX. (*See* Mincy, Tr. 448; Kermath, Tr. 773-775; CCPF ¶¶ 632-636, 649-655). In addition, as Mr. Hepp testified, while he recognized the importance of Realtor.com (and IDX websites and MoveInMichigan.com), he was not qualified to rank the relative importance of Realtor.com. (Hepp, Tr. 708, 710).

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).

Response to Finding No. 101:
The proposed finding is unreliable because these statistics are without foundation and therefore deserve no weight.

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).

Response to Finding No. 102:

The proposed finding is incomplete, misleading, and Respondent's cites do not support the proposed finding. (*See* Kage, Tr. 991 (discussing Exclusive Agency listings not being included in Realcomp search default); JX 1, ¶51 (After adopting the Website Policy, Realcomp had to make technical changes to only allow Exclusive Right to Sell listings to go to public websites)). Moreover, Exclusive Agency listings that are listed on a data sharing partner MLS are not sent to MoveInMichigan.com, ClickOnDetroit.com, Realcomp member IDX websites, and are not included in the Realcomp search default. (CCPF ¶¶ 429-431; 861-940). An Exclusive Agency listing that is sent to Realtor.com from another MLS carries a different MLS listing number than a corresponding listing in the Realcomp MLS, making it difficult for a cooperating broker to match an Exclusive Agency listing in Realtor.com with the corresponding listing in Realcomp. (CCPF ¶ 884).

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

Response to Finding No. 103:

Complaint Counsel have no specific response, except to note that Southeastern Michigan has been used in this case to refer to Wayne, Oakland, Macomb and Livingston counties. None of Realcomp's data sharing partners have a primary service area that includes those four counties.

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).

Response to Finding No. 104:

The proposed finding is misleading to the extent that it implies that the Ann Arbor MLS, Flint MLS, Shiawassee County MLS, Downriver MLS, and Lapeer MLS enable Realcomp members to bypass the Website Policy and Search Function Policy. First, the evidence is overwhelming that in order to compete in Southeastern Michigan, brokers have to belong to the Realcomp MLS. (CCPF ¶¶ 463-535). Moreover, Exclusive Agency listings listed on a data sharing partner MLS, are not sent to MoveInMichigan.com, ClickOnDetroit.com, Realcomp member IDX websites, and not included in the Realcomp search default. (CCPF ¶¶ 429-431; 861-940).

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).

Response to Finding No. 105:

Complaint Counsel do not disagree that brokers may put their Exclusive Agency listings on Realtor.com by double listing on a second MLS that does not have its own Website Policy. (*See* CCPF ¶¶ 881-885). Complaint Counsel disputes that Realcomp or the Realcomp system in any way facilitates this, nor does the record cite support this finding. (CCRF ¶ 104).

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).

Response to Finding No. 106:

The proposed finding is incomplete and misleading. The use of another MLS is not an adequate substitute for having Realcomp feed Exclusive Agency listings to Realtor.com, because using two MLSs is more costly and less efficient. (CCPF ¶¶ 881-883; CCRF ¶¶ 109-115).

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).

Response to Finding No. 107:

The proposed finding is incomplete and misleading. (CCRF ¶ 106).

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).

Response to Finding No. 108:

The proposed finding is incomplete and misleading. (CCRF ¶ 106). Complaint Counsel also note that MiRealSource was not an option prior to the effective date of the consent decree between the FTC and MiRealsource. (CCRF ¶¶ 54-55). Furthermore, MiRealSource can decide at any time to no longer feed its listings to public websites. (CCRF ¶¶ 64-65).

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

Response to Finding No. 109:

This proposed finding is contrary to the weight of evidence, *see* CCPF ¶¶ 494-501, including the testimony of Realcomp's own fact witness at trial, who described the per-agent monthly fees of belonging to two MLSs as a "significant cost only to be incurred if necessary," and that "actually the bigger cost" is the administrative burden associated with the double-entry of the listing. (Sweeney, Tr. 1312, 1340). In addition, as one Realcomp Governor, Alissa Nead, testified, belonging to two MLSs, MiRealSource and Realcomp, was perceived as a disadvantage for those agents who had to pay double dues. (CX 42 (Nead, Dep. at 96-97)).

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

Response to Finding No. 109(a):

This proposed finding is incomplete because it does not include all of the costs associated with belonging to two MLSs. (CCPF ¶ 495 (identifying costs of belonging to two MLS); *see also* Kermath, Tr. 789 (also identifying $400 annual fee to belong to the Ann Arbor MLS)).

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

Response to Finding No. 109(b):

This proposed finding is incomplete because it does not include all of the costs associated with belonging to two MLSs. (CCPF ¶ 495; *see also* D. Moody, Tr. 554-556 (identifying per licensee fee of $99/quarter and an annual fee of a few hundred dollars to belong to the Flint MLS)).

(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).

<u>Response to Finding No. 109(c):</u>

This proposed finding is incomplete because it does not include all of the costs associated with belonging to two MLSs. (CCPF ¶ 495; *see also* CX 407 (Bratt, Dep. at 19) (also identifying one time fee of $100 to join MiRealSource)).

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.

<u>Response to Finding No. 110:</u>

This proposed finding is incomplete and misleading to the extent it suggests that only brokers offering Exclusive Agency listings have testified to the "time cost" associated with double-listing. To the contrary, the full-service broker Realcomp introduced at trial, Kelly Sweeney, testified that the "administrative burden" of double-listing was "actually a bigger cost" of belonging to two MLSs. (Sweeney, Tr. 1312, 1340). In addition, Realcomp and MiRealSource entered into merger discussions in part so that those members who belong to both MLSs would be able to have "less duplication of time, energy, [and] effort with the listings." (*See* CX 40 (Elya, Dep. at 29-30); CCPF ¶ 499).

(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).

<u>Response to Finding No. 110(a):</u>

Complaint Counsel have no specific response, except to note that, for example, because Mr. Mincy spends an additional hour to service his approximately 80 listings (including initial entry plus any updates over the life of the listing), the cumulative total amounts to 80 hours of duplicate work per year. (Mincy, Tr. 417-418).

(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).

Response to Finding No. 110(b):

This proposed finding is overly broad because it merely reflects the salaries for administrative personnel of two brokers who offer Exclusive Agency listings. This finding is also inaccurate and misleading because Mr. Mincy did not testify that dual listing was an "inconvenience." Rather, Mr. Mincy testified that if he did not lose the 80 hours to double-list his listings on a second MLS because of the Website Policy, he would spend the 80 hours increasing his overall output "further marketing my services and trying to grow my business." (Mincy, Tr. 416, 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).

Response to Finding No. 110(c):

This proposed finding is irrelevant. Realcomp members have testified that they do not rely on Realcomp to enter listing data because of inaccuracies and the length of time it takes for submitted listings to finally be posted on the Realcomp MLS. (CX 39 (Taylor, Dep. at 14-15); Mincy, Tr. 416-417).

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).

Response to Finding No. 111:

The proposed finding is incomplete and misleading. In order to receive all of the services from Realcomp, a broker either needs to be an actual member of Realcomp or pay a large fee per listing to get all of the service. For example, Realcomp charges its data share participants $125 per listing if they want "Publication on MLS, IDX database, Internet, Open Houses if applicable & Home Preview Channel." (CX 273-001).

To the extent that this finding implies that Realcomp members can get around the Website Policy and Search Function Policy by joining a data share partner instead, this is untrue and against the weight of the evidence. (CCPF ¶¶ 429-431; 861-940). This finding is also against the weight of evidence because it is "critical" for brokers to belong to their local MLS, which for brokers practicing in Wayne, Livingston, Oakland and Macomb counties, is Realcomp. (CCPF ¶¶ 502-519).

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).

Response to Finding No. 112:

This proposed finding is inaccurate and against the weight of evidence and deserves no weight. (CCPF ¶¶ 494-501). There is no evidence that double listing is a prevalent practice among brokerage firms offering Exclusive Agency listings other than as a means to try to mitigate part of the anticompetitive impact of Realcomp's Website Policy. (CCPF ¶¶ 881-885; *see also* Mincy, Tr. 418 (testifying that he would not double list his properties but for the Realcomp Website Policy)). Moreover, this finding directly contradicts CCRF ¶ 113 below.

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).

Response to Finding No. 113:

This proposed finding is incomplete. First, Mr. Hepp testified that he could not recall a broker to whom he referred business who was willing to do "twice the work for the same amount of money, just to list on Realtor.com." (Hepp, Tr. 701). Second, according to Mr. Mincy, the additional cost to double list is to "offset the extra cost of having two MLS memberships and the time to do it." (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.

Response to Finding No. 114:

This proposed finding is overly broad and therefore misleading. Double-listing on a second MLS does not allow consumers to avoid the impact of Realcomp's Search Function Policy. In addition, consumers paying more for exposure on Realtor.com does not avoid all of the anticompetitive effects of the Website Policy because Exclusive Agency listings are still excluded from MoveInMichigan.com, ClickOnDetroit.com, the Home Preview Channel and the IDX websites. (*See* CCPF ¶¶ 890-898 (discussing how Website Policy is competitively significant even if limited service brokers incur added costs to gain access to Realtor.com)). Complaint Counsel agree that one anticompetitive effect of Realcomp's Website Policy is the increased cost that consumers must pay to expose their homes on Realtor.com. Complaint Counsel disagree with Respondent's characterization of these higher brokerage fees as "slightly more" because Exclusive Agency listings appeal to cost-conscious consumers and those who may not have the equity in their homes to be able to afford additional brokerage services. (CCPF ¶¶ 194-197, 216-219). There is no evidence that these consumers view these increased prices as being only "slightly more."

(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).

Response to Finding No. 114(a):

Complaint Counsel have no specific response other than to note that AmeriSell Realty customers must pay a listing price that is 40% higher than a complete Exclusive Agency listing price ($699 compared to $499) merely to avoid one anticompetitive effect of Realcomp's Policies.

(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).

Response to Finding No. 114(b):

Complaint Counsel have no specific response, other than to note that Michiganlisting.com customers must pay a listing price that is 20% higher than a complete Exclusive Agency listing price ($595 compared to $495) merely to avoid one anticompetitive effect of Realcomp's Policies. Complaint Counsel further clarify that the correct record cite is RX 109, not 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).

Response to Finding No. 114(c):

This proposed finding is incomplete. The charges for Exclusive Right to Sell listings at Greater Michigan Realty are $599 or $799 at the time the listing is entered in the MLS, plus an additional .5% (of the sales price) commission at closing. (CX 435-001; D. Moody, Tr. 485, 489). Greater Michigan Realty customers must pay a listing price that is 20% higher than a complete Exclusive Agency listing price ($799 compared to $599) merely to avoid one anticompetitive effect of Realcomp's Policies. (CX 435-001).

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.)

Response to Finding No. 115:

Complaint Counsel agree that an anticompetitive effect of Realcomp's Policies is forcing consumers to pay higher brokerage fees by using Exclusive Right to Sell listings in order to obtain the full benefits of the Realcomp MLS. However, the description of Flat-fee (discount) Exclusive Right to Sell contracts is inaccurate because, as Exclusive Right to Sell contracts, they do not reserve to the seller the right to sell their home without a cooperating broker (in addition to being higher-priced for additional services). (CCPF ¶¶ 176, 183). This finding is misleading because the "modestly higher" fees referenced in the finding fails to take into account the offer of compensation that must be paid by the seller even if there is no cooperating broker, because they are using an Exclusive Right to Sell contract. (CCPF ¶ 176). The characterization of these higher brokerage fees as "modestly higher" is also without foundation because there is no evidence that consumers of Exclusive Agency listings, which appeal particularly to cost conscious consumers and those consumers who may not have the equity in their homes to pay for brokerage services, view these higher brokerage fees as being only "modestly higher." (CCPF ¶¶ 194-197, 216-219). Dr. Eisenstadt's conclusion regarding the reduced availability of alternative brokerage arrangements is against the weight of evidence; the evidence and data is overwhelming that the use of Exclusive Agency listings in Realcomp's service area has been reduced since Realcomp fully implemented its Policies and as compared to similar MLSs that do not have a Website Policy. (CCPF ¶¶ 954-1122).

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).

Response to Finding No. 116:

This proposed finding is overly broad and therefore misleading. Mrs. Moody testified that sellers may want to be in two MLSs if they are on the border of two counties, and that this only happens "occasionally." (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).

Response to Finding No. 117:

This proposed finding is irrelevant and misleading. Mr. Moody testified that even if he increased his efforts at search engine optimization of his brokerage firm's website, it would be "tough" to ever make his website as popular as MoveInMichigan.com; that it "would be almost impossible" to make his company's website as popular as Realtor.com; and that search engine optimization is "not even close" to being a replacement for IDX services. (G. Moody, Tr. 846-849; CX 443-004).

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)

Response to Finding No. 118:

This proposed finding is misleading and against the weight of evidence. Numerous studies, since at least 2004, have repeatedly found that the websites visited by the most buyers are MLS websites (such as MoveInMichigan.com), Realtor.com, and agent and broker websites ("IDX" websites). (CCPF ¶¶ 592-598 (explaining the importance to brokers of putting their listings on the sites most visited by potential buyers)). At trial, Mr. Sweeney testified that the effect of a broker not participating in Realcomp's feed of listings to these websites "probably would be business suicide.... Business suicide might have been a little strong, but it would definitely put them at a severe competitive disadvantage." (Sweeney, Tr. 1346-1347; *see also* CCPF ¶ 667). While the value of other websites may be a moving target – indeed, only 10% of all buyers visit real estate websites other than the four categories of websites listed above and newspaper and home magazine websites (which are viewed by 14% and 6% of buyers, respectively) – the importance of MLS websites, Realtor.com and IDX websites has been established by industry studies, consumer survey responses from buyers located in Southeastern Michigan, and Realcomp broker testimony. (CCPF ¶¶ 592-598, 632-636, 649-667, 673-676).

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.)

Response to Finding No. 119:

This opinion by Dr. Eisenstadt is against the weight of evidence. While there are "tens of thousands of real estate Websites . . . and its okay to be on some of those, but the ones you really have to be on to compete effectively are the four major sites where 40 to 50 percent of buyers are going." (Murray, Tr. 238 (referring to MLS websites, Realtor.com and IDX websites)). The importance of the MLS websites, Realtor.com, and IDX websites (which make up the Approved Websites) has been firmly established by industry studies, industry expert opinion, consumer survey responses from buyers located in Southeastern Michigan, and Realcomp broker testimony. (CCPF ¶¶ 592-598, 632-636, 649-667, 673-676). Dr. Eisenstadt is not an expert in the real estate industry. (Eisenstadt, Tr. 1554 (noting that he is not a real estate professional and that most of his experience is in the healthcare industry)). Mr. Murray, an expert in the residential real estate industry and trends in real estate, concluded that there are no effective alternative websites for the Approved Websites because alternative websites charge posting fees or referral fees, do not focus on displaying real estate listings, do not have a presence in Southeastern Michigan, or do not attract a sufficient number of buyers to replace the lost exposure on the Approved Websites. (*See* CCPF ¶¶ 899-907). In addition, Dr. Eisenstadt's assertion has no relevance to assessing the competitive harm caused by Realcomp's policies. The "other" public websites are open to all Realcomp brokers on an equal basis, regardless of listing type or business model.

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.)

Response to Finding No. 120:

This proposed finding is misleading to the extent it suggests that all websites are of equal importance. The unique importance of the MLS websites, Realtor.com, and IDX websites (which make up the Approved Websites) has been firmly established by industry studies, industry expert opinion, consumer survey responses from buyers located in Southeastern Michigan, and Realcomp broker testimony. (CCPF ¶¶ 592-598, 632-636, 649-667, 673-676). Beyond those four categories of websites (which are visited by 40-50% of buyers) and newspaper and home magazine websites (which are visited by 14% and 6% of buyers, respectively), only 10% of buyers report visiting any other website as part of their home search as part of their home search. (CCPF ¶¶ 592-598).

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).

Response to Finding No. 121:

This proposed finding is overly broad and therefore misleading. Although Trulia and Google may be growing in usage, they still do not receive a significant number of visits by buyers in comparison to the Approved Websites, and there is no evidence that consumers in Southeastern Michigan use Trulia and Google. (CCPF ¶¶ 902-903). The only other information in the record regarding websites gaining momentum is that MoveInMichigan.com and the IDX websites are growing in importance. (CCPF ¶¶ 632-636, 649-655). Additionally, there are significant costs associated with a broker having to individually send each listing to a website, and then update each listing every time there is a change in information. (CCPF ¶¶ 905, 907). Realcomp members avoid these substantial costs by having their listings included in the feed that Realcomp sends to its Approved Websites. (Kage, Tr. 931-932; CX 35 (Kage, Dep. at 30)).

(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).

Response to Finding No. 121(a):

Complaint Counsel have no specific response.

(b) Google has publicly announced that it intends to build as large and robust a real estate site as possible. (Murray, Tr. 259).

Response to Finding No. 121(b):

This proposed finding is misleading to the extent it suggests that Google is a substitute for the Approved Websites because Google, as of the time of trial, does "not have much of a Web presence" in real estate. (Murray, Tr. 244, 259; CX 609 (providing web statistics of major real estate websites and not including Google)).

(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).

Response to Finding No. 121(c):

This proposed finding is misleading to the extent it suggests that Trulia is a substitute for the Approved Websites, or is visited by a significant number of buyers. (Murray, Tr. 293-294; CX 609-015). Moreover, there is no evidence that consumers in Southeastern Michigan use this website. (Murray, Tr. 293-294; CX 609-015). Mr. Murray also testified to the financial instability of Trulia and questioned its future viability because Trulia's revenues are still unable to fund its operations, even after a third or fourth round of capital funding. (Murray, Tr. 242; RX 154-A-070; CCPF ¶ 902).

(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).

Response to Finding No. 121(d):

This proposed finding is based on speculation and deserves no weight. At the current time, Google does "not have much of a Web presence" in real estate. (Murray, Tr. 244, 259; CX 609 (identifying web statistics of major websites and not including Google)). In addition, Mr. Moody testified that "it is very difficult" to send customers' listings to Google, and that they must pay additional fees of $75 per listing. (G. Moody, Tr. 885).

(e) MLS systems across Michigan are beginning to put their data onto Google Base and Trulia. (G. Moody, Tr. 888).

Response to Finding No. 121(e):

This proposed finding is irrelevant and misleading because Realcomp, the local MLS for brokers in Southeastern Michigan, does not provide an electronic feed of listing information to Google Base or Trulia. Further, Mr. Moody, who is technically savvy (*see* CCRF ¶ 121(c)), testified that the costs of submitting listings directly to other public websites, such as Trulia, would be "fairly expensive" and would provide only a marginal benefit for his clients. (G. Moody, Tr. 780, 845-846 (testifying that he generally does not send his listings to Trulia because he does not think it would be effective at marketing his firm's listings)).

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.)

Response to Finding No. 122:

This proposed finding is against the weight of evidence. (*See* CCPF ¶¶ 536-676, 868-907, 941-1122; *see also* CCRF ¶¶ 118-121). Dr. Eisenstadt's opinion deserves no weight because countless Realcomp members, as confirmed by industry studies, publications and expert opinion, overwhelming established the importance of Internet marketing generally, and marketing listings on the Approved Websites in particular. (CCPF ¶¶ 580-587, 632-636, 649-667). Indeed, Realcomp's own fact witness at trial, Mr. Sweeney, testified that the consequence of a broker not participating in Realcomp's feed of listings to these websites "probably would be business suicide.... Business suicide might have been a little strong, but it would definitely put them at a severe competitive disadvantage." (Sweeney, Tr. 1346-1347; *see also* CCPF ¶ 667). Advertising listings on the Approved Websites is not only important for the exposure of current listings to potential buyers and sellers' listings quickly, but also for limited service brokers to be able to compete for additional listing agreements. (RX 154-A-072; CCPF ¶¶ 941-953). Unlike Dr. Eisenstadt, who is not an expert in real estate, Mr. Murray, who was qualified without objection as an expert in the real estate industry and trends in real estate, testified that there are no alternate websites that are effective substitutes for the Approved Websites in terms of price (e.g., participating in Realcomp's feed to the Approved Websites is free as compared to being charged posting or referral fees) and exposure to potential buyers. (CCPF ¶¶ 899-907).

I. The Search Function Policy.

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).

Response to Finding No. 123:

This proposed finding is incomplete. Mr. Mulvihill, a Realcomp Governor, is aware of the Search Function Policy but he does not use a computer too much, so he does not know if his assistant searches additional listing types. (CX 41 (Mulvihill, Dep. at 54-55, 62)).

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).

Response to Finding No. 124:

The proposed finding is incomplete. The Search Function Policy caused Full Service/Exclusive Right to Sell listings to be included in the default and Exclusive Agency, Limited Service and MLS Entry Only listings needed to be independently selected. (CX 18-003; Kage, Tr. 965-966).

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).

Response to Finding No. 125:

The proposed finding is misleading. RX 159 only refers to one type of search in the Realcomp MLS. (CCRF ¶ 126).

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).

Response to Finding No. 126:

The proposed finding is incomplete and misleading. The proposed finding implies that Realcomp had a single search screen, with a search-type box that was readily noticed and understood and a default setting that could be changed easily. In fact, Realcomp had multiple search screens, each corresponding to a different type of search, such as a search by MLS number, property address, map location, open houses and tours, and listing history. (CCPF ¶ 948). Each search screen was subject to the search default; unless the default setting was changed, a search on any screen would return only full-service, ERTS listings. (G. Moody, Tr. 865, 867-868.) Each search screen had a different layout. A broker would select one search screen depending on the type of search the broker wanted to run – a search for a particular address, a search for a particular MLS listing number, etc. (G. Moody, Tr. 864.)

Of the various types of searches, the Quick Search was the one type of search for which it was not too difficult to change the default. Among the various boxes for search criteria listed on the Quick Search screen was a box labeled Listing Type; if a broker remembered to look for the box and change the default setting, the broker could search for all listing types by clicking the appropriate box with the mouse. (Kage, Tr. 1039; *see also* DX 5-2.)

In contrast to the Quick Search screen, however, the search screen for Address Searches, for example, did not contain a field for listing type. (Moody, Tr. 864-865; *see also* DX 5-4.) Similarly, there was no indication on the Address Search screen that a search would fail to include Exclusive Agency listings. If a broker understood that the Address Search would return only full-service Exclusive Right to Sell listings, the broker would have to click the additional fields button in order to find the field that would permit the broker to change the default setting. (G. Moody, Tr. 864-865; *see also* DX 5-4.) The Tours and Open Houses Search, the Proximity Search and the Listing History Search were also subject to the default setting, but the search screens for these searches did not contain fields permitting brokers to change the default setting in order to include Exclusive Agency and MLS Entry Only listings in their search results. (G. Moody, Tr. 867-868; *see also* DX 5-5, DX 5-6, DX 5-7, DX 5-8.)

Many brokers did not find Exclusive Agency listings through their searches of the Realcomp MLS. First, data from the Realcomp MLS show that Exclusive Agency listings are not viewed by brokers on the Realcomp MLS as often as Exclusive Right to Sell listings (which are included in the default search). (CCPF ¶¶ 911-922). Second, broker testimony demonstrates that brokers often miss or cannot find Exclusive Agency listings on the Realcomp MLS. (CCPF ¶¶ 931-936). Third, the Realcomp data and broker testimony is consistent with studies showing that default settings do matter to choices made by consumers, even when such default settings are easy to change and consumers are aware of the choices. (CCPF ¶¶ 937-940). This evidence confirms that the Search Function Policy had its intended effect -- Exclusive Agency listings received less exposure on the Realcomp MLS, making it harder for Limited service brokers to compete. (CCPF ¶¶ 941-1068).

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

Response to Finding No. 127:

The proposed finding is incomplete and misleading. (CCRF ¶ 126 (describing the difference between the Quick Search, on the one hand, and the Address Search, the MLS Number Search, the Tours and Open Houses Search, the Listing History Search and others)).

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).

<u>Response to Finding No. 128:</u>

The proposed finding is incomplete and misleading. (CCRF ¶ 126 (describing the difference between the Quick Search, on the one hand, and the Address Search, the MLS Number Search, the Tours and Open Houses Search, the Listing History Search and others)).

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).

<u>Response to Finding No. 129:</u>

The proposed finding is incomplete and misleading. (CCRF ¶ 126 (describing the difference between the Quick Search, on the one hand, and the Address Search, the MLS Number Search, the Tours and Open Houses Search, the Listing History Search and others)).

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

<u>Response to Finding No. 130:</u>

The proposed finding is incomplete and misleading. (CCRF ¶ 126 (describing the difference between the Quick Search, on the one hand, and the Address Search, the MLS Number Search, the Tours and Open Houses Search, the Listing History Search and others)).

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)).

<u>Response to Finding No. 131:</u>

The proposed finding is incomplete, misleading and against the weight of the evidence. The evidence is clear that many Realcomp brokers were not aware that they were only seeing Exclusive Right to Sell listings in the Realcomp MLS. (CCPF ¶¶ 924-936; CCRF ¶ 126). In addition, numerous Limited servicebrokers testified that they received complaints from customers saying that their listings were not showing up on the Realcomp MLS. (CCPF ¶¶ 931-936). Moreover, the fact that Realcomp makes no mention of the search default in its Training Handbook, Policy Handbook or Rules and Regulations, could make it even harder for Realcomp members to become aware of the search default. (Murray, Tr. 191-192; CCPF ¶¶ 799-802; 924-926).

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)).

Response to Finding No. 132:

The proposed finding is incomplete and misleading. (CCRF ¶¶ 126, 131).

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).

Response to Finding No. 133:

Complaint Counsel have no specific response.

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).

Response to Finding No. 134:

The proposed finding is overly broad, incomplete, and misleading. First, Mr. Kermath explained that the Search Function Policy was only part of the problem he encountered in the Realcomp service area: "Well, that's just a part of the issue, it's the various Realtors finding it. The other part is to be in the other various websites." (Kermath, Tr. 772-773). The evidence is clear that access to Realcomp's feed of listings to Approved Websites allows brokers to compete effectively by exposing listings directly to buyers. (CCPF ¶¶ 536-676). Moreover, the evidence is overwhelming that the Website Policy has deterred entry, caused participants to exit the market, has caused other limited service brokers to charge higher prices for their services, and reduced the use of Exclusive Agency listings in the Realcomp service area. (CCPF ¶¶ 861-907; 941-1068; 1114-1122).

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.

Response to Finding No. 135:

Complaint Counsel have no specific response.

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).

Response to Finding No. 136:

The proposed finding is overly broad, incomplete, and misleading. (CCRF ¶ 126 (describing the difference between the Quick Search, on the one hand, and the Address Search, the MLS Number Search, the Tours and Open Houses Search, the Listing History Search and others)). The evidence is overwhelming that the Search Function Policy negatively impacted the ability of limited service brokers to compete by restricting their listings' exposure to cooperating brokers and thereby to home buyers, as well as to compete for new listing agreements. (CCPF ¶¶ 908-1068). This evidence is confirmed by Realcomp's own data, which show that Exclusive Agency listings were viewed less often than are Exclusive Right to Sell listings by brokers on the Realcomp MLS. (CX 498-A-036; CCPF ¶¶ 911-922). Although Realcomp members could override the search default, broker testimony also makes clear that many Realcomp members did not find Exclusive Agency listings in their searches of the Realcomp MLS. (CCPF ¶¶ 923-936). Lastly, studies make clear that defaults affect consumer choices, even when it is possible to override the default. (CCPF ¶¶ 937-940).

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).

Response to Finding No. 137:

The proposed finding is not supported by the evidence. Realcomp had no documents "relating to any comments or concerns about Exclusive Agency listings." (CX 1-005). No current or former Governor testified from personal knowledge to corroborate the concern Ms. Kage claimed at trial as the basis for the Website Policy. (CCPF ¶¶ 1266-1280). In fact, no current or former Governor recalls why the Website Policy was passed. (CCPF ¶¶ 1266-1280). The characterization that sellers "would not be paying a commission" is inaccurate. A seller typically pays a commission to the listing broker in an amount agreed upon between the seller and the listing broker. (CCPF ¶¶ 155-156). The listing broker pays dues and fees to Realcomp for the right to post listings on the Realcomp MLS. (CCPF ¶¶ 300-301). Realcomp rules require a seller to offer compensation to a cooperating broker. (CCPF ¶¶ 350, 356-359). Most sellers with Exclusive Agency Listings pay a commission, [redacted] of the sale price, to a cooperating broker who is a member of Realcomp. (CCPF ¶ 172). The statement by Ms. Kage that "Realtors®, in turn, were paying for the sites" is vague and, to the extent it refers to Realtor.com, factually incorrect. To the contrary, Realtor.com used to pay Realcomp (and other MLSs) royalties in payment for its feed of listing information. (*See* CX 411 (Dawley, Dep. at 49); *see also* CX 611 (excerpt of report used to calculate royalties to Realcomp)).

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).

Response to Finding No. 138:

The proposed finding is incomplete, misleading and contrary to the weight of the evidence. Respondent relies on Mr. Whitehouse, who served on the Realcomp Board of Governors "[b]ack in the mid-'80s," but has not held any position with the organization since then. (CX 421 (Whitehouse, Dep. at 5)). He was not on the Board of Governors, nor was he consulted by the Board, when the Search Function Policy was adopted. (CX 421 (Whitehouse, Dep. at 106; CX 327)). He has no personal knowledge of any reason(s) why the Board may have designed, adopted or implemented the Search Function Policy. (CX 421 (Whitehouse, Dep. at 106, 147-148)). Contrary to the finding proposed by Respondents, Mr. Whitehouse testified that with respect to the MLS search function, "[t]he easiest way is select nothing, fill it in with nothing, and let the agent select what they want." (CX 421 (Whitehouse, Dep. at 144)). In addition, he stated that when representing a buyer in an agency relationship, he "want[s] to look at all listing types." (CX 421 (Whitehouse, Dep. at 145)).

Realcomp's argument ignores the fundamental point – cooperating brokers wanted access to all of the listings. (Murray, Tr. 195-196; CX 43 (Hardy, Dep. at 51, 52-54); CX 415 (Nowak, Dep. at 45); CX 39 (Taylor, Dep. at 123-124); *see also* CX 414 (Niersbach, Dep. at 29)). All listings – Exclusive Agency listings as well as Exclusive Right to Sell listings – offered compensation to cooperating brokers. (CCPF ¶¶ 350, 358). The greater the number of listings that a cooperating broker could search, the greater the likelihood that the cooperating broker could match their buyer with a seller and earn a commission. (CCPF ¶¶ 525, 702, 803, 1133). Ms. Kage testified that the Realcomp Board of Governors adopted the Search Function Policy prior to August 22, 2003. (Kage, Tr. 963). The Board agreed to expedite the implementation of the Search Function Policy when it learned from Ms. Kage that MiRealSource was no longer accepting limited service listings. (Kage, Tr. 962-963; CX 9-003). Actual implementation occurred in November and/or December of 2003. (Kage, Tr. 963).

Realcomp data show that, as of November 2003, approximately 82 percent of listings were reported as "Blank" or "Unknown" listing type. (CCPF ¶ 1076). In August 2003, these data show that 96 percent of listings were reported as "Blank" or "Unknown." (CCPF ¶ 1076). Thus, the claim that "98% - 99% of the listings on the Realcomp MLS were Exclusive Right to Sell Listings" at the time the Board of Governors agreed on the Search Function Policy is inaccurate.

Moreover, the evidence is overwhelming that the Board of Governors did not know why Realcomp adopted the Search Function Policy. (CCPF ¶¶ 1266-1280).

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).

Response to Finding No. 139:

The proposed finding is inaccurate and not supported by the evidence. Dr. Eisenstadt's unfounded assertion that home sellers who enter into Exclusive Agency Listings with Realcomp listing brokers may somehow "free ride" on the advertising activities of other Realcomp members is illogical, contrary to economic theory and unsupported by any credible evidence in the record. (CCRF ¶¶ 242-245). Moreover, Dr. Eisenstadt repeatedly mischaracterizes (or just plain misunderstands) the commercial relationship between such sellers and cooperating brokers. Home sellers who receive services from cooperating brokers pay compensation to those brokers in the form of the offer of compensation reflected in their respective Exclusive-Agency contracts. (CCPF ¶¶ 166-172). If a cooperating broker provides no services to the seller, *i.e.*, is not the procuring cause of the sale, then the seller owes no compensation to that broker. (CCPF ¶¶ 183-187). Dr. Eisenstadt's testimony illustrates how Realcomp's Policies are designed to ensure the payment of traditional brokerage commissions, regardless of whether they have been earned. (CCRF ¶ 186). His testimony fails to establish that cooperating brokers "subsidize" sellers using

Exclusive Agency listings nor that the Policies have anything to do with any such subsidization. (CCRF ¶ 186-192).

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).

Response to Finding No. 140:

The proposed finding is misleading. Dr. Williams testified that in MLSs where the rule exists (meaning the Website Policy in particular, and the access restrictions generally), the share of Exclusive Agency Listings as a percentage of total listings is roughly 5.5 percent lower than in MLSs where there is no rule. (D. Williams, Tr. 1169-1172; illustrated in DX 7-12).

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).

Response to Finding No. 141:

The proposed finding is inaccurate, misleading and contrary to the weight of the evidence. The Minimum Service Definition is not a separate access restriction. Realcomp tied the definition of Exclusive Right to Sell to Full Service, requiring members to perform 5 tasks in order to submit an Exclusive Right to Sell listing. (CCPF ¶¶ 327-336). This definition of Exclusive Right to Sell/Full Service impacted the Website Policy and Search Function Policy. (CCPF ¶¶ 327-336, 810-816, 830-838). Additionally, the evidence is clear that the Website Policy alone has a detrimental impact on Limited service brokers. (CCPF ¶¶ 1085-1122).

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

Response to Finding No. 142:

This proposed finding is inaccurate and misleading. The Minimum Service Definition is not a separate policy. (CCRF ¶ 141). Realcomp defined Exclusive Right to Sell to only include Full Service listings. (CCRF ¶ 141). The evidence is clear that the Website Policy alone had an impact on Limited service brokers using Exclusive Agency listings. (CCRF ¶ 141).

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).

Response to Finding No. 143:

This proposed finding is inaccurate and misleading. (*See* CCRF ¶ 142).

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

Response to Finding No. 144:

The proposed finding is incomplete and misleading. Dr. Williams testified that if Realcomp were to eliminate the Search Function Policy, it would become possible "after some time" had passed to perform the same analysis that he did, and thereby "to quantify what the separate effect was" on competition from the elimination of that policy. (D. Williams, Tr. 1238). Given the existing data from Realcomp, however, it is not possible to make such a determination. (CCRF ¶ 142). The evidence, however, is clear that the Website Policy alone has a detrimental impact on Limited service brokers. (CCPF ¶¶ 1085-1122).

Dr. Williams also testified that data from each of three MLSs (Williamsburg, Green Bay/Appleton and Boulder) that had a Website Policy in effect for some or all of the relevant time period show the Website Policy alone "led to a reduction in the percent of Exclusive Agency contracts." (D. Williams, Tr. 1283-1287; illustrated in DX 7-10, 7-11 and 7-15; CX 524). None of these MLSs had restrictions like Realcomp's Search Function Policy; the restriction imposed in these three MLSs was the Website Policy only. (D. Williams, Tr. 1286).

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

Response to Finding No. 145:

The proposed finding is incomplete and misleading. (CCRF ¶¶ 142, 144). Realcomp's litigation strategy of proposing to rescind the Search Function Policy and eliminate the Minimum Service Definition on the eve of trial, after the bulk of economic analysis by Dr. Williams had already been concluded, has no bearing whatsoever on the validity of his analysis nor on the evidentiary record. (D. Williams, Tr. 1279-1280).

Notably absent at trial was any testimony that Realcomp's Minimum Service Definition resulted in better success for home sellers, or that consumer demand for these additional services was what drove Realcomp to mandate that brokers provide them in order to be considered an Exclusive Right to Sell listing. (CX 29 (noting that "[t]he most frequently asked question" of members to Realcomp staff after imposition of the Minimum Service Definition related to situations where "the seller has agreed to schedule their own appointments," and clarifying that under the new rules, if a seller performs any "duties normally associated with those that fall under the 'full service' umbrella, that listing must be designated as 'Limited Service' – even if the contract is an Exclusive Right to Sell Agreement.")). It is clear from the record that the Minimum Service Definition imposes costs and burdens on limited service brokers in particular, and that its elimination would be an unmitigated benefit to competition and consumers. (Kermath, Tr. 719-720, 736-737 (noting the sole reason for incorporating language regarding five minimum services in listing contract was to comply with the Realcomp rules)).

Dr. Williams explained how the existence of the Minimum Service Definition distorts the normal operation of supply and demand in the market for listing broker services, and thereby harms consumers. (CCPF ¶¶ 1200-1201, 1204-1206, 1232-1233; D. Williams, Tr. 1190, 1213-1217, CX 498-A-044-045, 047-048; illustrated in DX 8). Elimination of this policy, then, would restore consumers' ability to exercise free choice concerning the level of listing services they wish to purchase, and would allow limited service brokers to supply unbundled services to consumers without artificial restrictions on the manner in which they can provide (and price) different levels of brokerage services. (D. Williams, Tr. 1190, 1214-1215). In addition to Dr. Williams's empirical analyses that show consumer demand for unbundled brokerage services is prevalent (*See, e.g.,* CX 524), the record is replete with testimony establishing that a substantial number of consumers in the Realcomp service area would prefer to "self-supply" one or more of the five minimum services in exchange for lower brokerage fees. (D. Moody, Tr. 495; G. Moody, Tr. 827-829 (describing how "the primary reason" home sellers choose Exclusive Agency listings is "they want to retain the right to sell the house on their own," and "they really want to be in control of their own house and they really can't afford to pay a full service realtor's commissions."); Kermath, Tr. 728-729 (Some customers come to AmeriSell after contacting full service brokerages. The "re-occurring theme" these customers relate to Mr. Kermath is "that the seller does not mind paying three percent if the [cooperating] broker brings a buyer, but they don't want to pay six percent just to get into what they perceive [is] the system."); Mincy, Tr. 322 (explaining that MichiganListing.com offers "unbundled services" through its EZ Listing, which "gives the seller an opportunity to do some of the work themselves, save some money on the commission and still offer compensation to an agent if they brought a buyer.")); (*See also* CCPF ¶ 952 (elimination of Minimum Service Definition would allow Mr. Adams's brokerage to serve additional consumers and be more competitive in the marketplace); CCPF ¶ 993 (BuySelf Realty received lots of submissions from customers in Realcomp area in approximately 2003 demonstrating demand for flat-fee services); CCPF ¶ 984).

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).

Response to Finding No. 146:

The proposed finding is inaccurate and misleading. Respondent cites no testimony or document admitted as evidence in this litigation to support this assertion. To the extent Respondent's contention implies that the Complaint challenges only the Website Policy and Search Function Policy, it is inaccurate. The Minimum Service Definition, as numerous witnesses have explained, is incorporated in these policies. (CCPF ¶¶ 808, 1001, 1020, 1034-1036, 1053; *see also* Kage, Tr. 964-966; CX 18-003) (explaining that for a listing to be considered Exclusive Right to Sell by Realcomp, it had to be "full service" and the broker must "be doing all of the services that are described under the limited service definition"); (Kage, Tr. 967-968) (noting that under Realcomp's restrictions, listings that were not considered ERTS/FS were not sent to the Approved Websites and were not included in the search default).

Moreover, the Minimum Service Definition is embodied in the rules that the Complaint challenges. (CX 100-005). Respondent has stipulated that all Realcomp members must abide by its rules and regulations, and agree to comply with those rules and regulations with respect to any listings they submit to the MLS. (JX 1-03-04).

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).

Response to Finding No. 147:

The proposed finding is misleading and inaccurate for the reasons already explained above. (*See* CCRF ¶¶ 140-146).

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)

Response to Finding No. 148:

The proposed finding is contrary to the weight of the evidence. The weight of the evidence shows that Realcomp's Policies are associated with a decrease in the share of Exclusive Agency listings of approximately 5.5 percentage points. (CCPF ¶¶ 1069-1104). As explained below, Dr. Eisenstadt's comparison of just Dayton and Realcomp (pulling Dayton out of a control group of six MLSs) is not sound. (CCRF ¶¶ 151-152). Moreover, Dr. Eisenstadt's comparison of Realcomp with Washtenaw county in the Ann Arbor MLS understates the differences in Exclusive Agency shares. (CCPF ¶¶ 1108-1113). Finally, as explained below, Dr. Eisenstadt's "Probit Regression Analysis" is unreliable. (CCRF ¶¶ 226-230).

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).

Response to Finding No. 149:

The proposed finding misstates the testimony. Dr. Williams testified both in his deposition and at trial, whether the anticompetitive effect is economically significant depends on how they compare relatively with the procompetitive justifications. (D. Williams, Tr. 1275-

1277). One must compare the magnitude of the anticompetitive effects with the magnitude of the procompetitive effects. (D. Williams, Tr. 1276-1277). Here, the evidence shows that there are no procompetitive justifications for Realcomp's Policies. (CCPF ¶¶ 1244-1265).

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

Response to Finding No. 150:

The proposed finding is incomplete. The methodology used to select the control MLSs is described in Appendix C of Dr. Williams's original report. (D. Williams, Tr. 1247; CX 498-A-070).

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).

Response to Finding No. 151:

The proposed finding is inaccurate. The results of the cross-sectional analysis (or "benchmark approach") performed by Dr. Williams are shown graphically in CX 524, which compares the percent of non-ERTS listings in MLSs with and without restrictions on a monthly basis. (D. Williams, Tr. 1165; illustrated in DX 7-11). These results are also summarized in a bar chart, DX 10. (D. Williams, Tr. 1161-1163). The method he used for this analysis is described in his initial report. (CX 498-A-041).

In comparing the percent of non-ERTS listings across MLSs with and without restrictions on a monthly basis, Dr. Williams used a volume weighted average, which resulted in Denver receiving more weight than Dayton in the comparison. (D. Williams, Tr. 1261-1263; CX 498-A-041). Use of a non-weighted average shows an even higher percentage of non-ERTS listings in the other MLSs. The Exclusive Agency shares of the six MLSs are: 1.24%, 3.4%, 5.95%, 6.15%, 14%, and 4.2%. (CCRF ¶ 203). Simply adding these and dividing by six (the number of MLSs) results in an average share of 5.82%, which is higher than the "weighted" average of 5.6%. In other words, giving Denver (a larger MLS with a higher share of Exclusive Agency listings) equal weight to the other MLSs results in a higher average share of non-ERTS listings in MLSs without restrictive policies.

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

Response to Finding No. 152:

The proposed finding is incomplete. During the five year period from 2002 to 2006, the Denver MLS had an average share of approximately 14% non-ERTS listings, while the Dayton MLS had an average share of about 1.24% non-ERTS listings. (illustrated in DX 7-10; DX 9-12; Eisenstadt, Tr. 1425). Any implication that the Dayton MLS, but not the Denver MLS or the four other control MLSs, represents the only appropriate benchmark for Realcomp is misleading. Dr. Williams' analyses controlled for the economic and demographic factors that Dr. Eisenstadt emphasized. (CCRF ¶ 208). As a result, Dr. Eisenstadt's opinion is consistent with Dr. Williams' use of all six control MLSs, including Denver, in the cross-sectional analysis of Realcomp's restrictions on the use of Exclusive Agency listings. (Eisenstadt, Tr. 1427 (noting his "opinion is those different factors should be controlled for in the analysis.")).

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

Response to Finding No. 153:

The proposed finding is misleading. Neither Dr. Williams nor Dr. Eisenstadt performed a "cross-sectional analysis of Boulder" because that exercise is not logically possible. "Cross-sectional analysis" involves comparing economic outcomes between environments where the practices at issue are in effect and environments where those practices are not in effect. (CX 498-A-038). The Boulder MLS, which had a Website Policy in effect similar to Realcomp, cannot provide the basis for a cross-sectional analysis of the effects of that policy. Dr. Eisenstadt performed a time-series analysis of data from the Boulder MLS, and Dr. Williams explained how that analysis confirmed the conclusion that a Website policy reduces the extent to which Exclusive Agency contracts are used. (D. Williams, Tr. 1172-1176; RX 161-037; illustrated in DX 7-15). Moreover, Dr. Eisenstadt has no knowledge concerning the date when the board from the Boulder MLS actually voted to adopt their website policy, as opposed to implementing it. (Eisenstadt, Tr. 1609).

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).

Response to Finding No. 154:

The proposed finding misstates the testimony and is incomplete. Dr. Williams explained that ultimately the concern of antitrust economics is the effect of Realcomp's Policies on consumers. (D. Williams, Tr. 1692). He also agreed that the sale price of the home and selling the home in a timely fashion are relevant to a seller who contracts for brokerage services. (D. Williams, Tr. 1694). But the evidence shows that sellers are not the only consumers affected by Realcomp's Policies, and Dr. Williams has shown that consumers are harmed in a number of ways beyond sales price and time on market. (CCPF ¶¶ 1190-1243).

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).

Response to Finding No. 155:

Complaint Counsel have no specific response.

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).

Response to Finding No. 156:

This proposed finding is incomplete and therefore misleading. Mr. Murray, an expert in the real estate industry, testified that the likely result of less exposure is, among other things, that it will take longer to sell the home, otherwise known as longer Days on Market. (Murray, Tr. 183 ("based on history and experience and the practice of brokerage companies," more exposure increases "the chances [that a broker] is going to get [their] home sold faster and at a better price than otherwise.")). Based on this well-established real estate principle, which Realcomp Governor Robert Gleason agrees with, *see* CCPF ¶ 458, Mr. Murray concluded that one likely result of Realcomp's Website Policy is that it may "cause sellers [with Exclusive Agency listings] to have their homes spend longer times on the market due to their lower exposure to potential buyers." (RX 154-A-072). This conclusion was not based on data or information on days on market in the Realcomp system 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).

Response to Finding No. 157:

The proposed finding is inaccurate. Dr. Williams did not attempt to directly measure the effect of Realcomp's Policies on days on market. But he did control for days on market in his statistical analyses. (CX 560-019 (controlling for changes in house prices and days on market)).

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).

Response to Finding No. 158:

The proposed finding is inaccurate and incomplete. Dr. Williams did not attempt to directly measure the effect of Realcomp's Policies on days on market. But he did control for days on market in his statistical analyses. (CX 560-019 (controlling for changes in house prices and days on market)). Moreover, as Dr. Eisenstadt admitted, home sellers who believe that their homes will sell easily would be more likely to use Exclusive Agency listings. (Eisenstadt, Tr. 1557-1558). He also admitted that he did not control for a number of factors that can affect how quickly a home sells. For instance, he did not control for such factors as whether the home has a remodeled kitchen, a remodeled bathroom, or was recently painted. (Eisenstadt, Tr. 1558-1559). Thus, Dr. Eisenstadt's analysis does not evaluate "comparable" homes. Finally, Dr. Eisenstadt's regression for days on market is essentially the same as the regression that he did for sales price, and it therefore suffers from the same flaws. (CCRF ¶¶ 235-239). For instance, because Dr. Eisenstadt removed the city of Detroit from the analysis, he only analyzed a small sample of "non-ERTS" homes. (CCRF ¶ 235).

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).

Response to Finding No. 159:

The proposed finding is incomplete. Dr. Eisenstadt admitted that home sellers who believe that their homes will sell easily would be more likely to use Exclusive Agency listings. (Eisenstadt, Tr. 1557-1558; *see also* CCRF ¶ 81 (Realcomp changed the way it calculates Days on Market)).

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).

Response to Finding No. 160:

The proposed finding is incomplete. Mr. Mincy testified that he does not compare days on market for his listings. (Mincy, Tr. 462).

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).

Response to Finding No. 161:

The proposed finding is not supported by the evidence. As explained below, Dr. Eisenstadt's sales price regressions are fundamentally flawed both from both a methodological point of view and from an economic theory point of view. (CCRF ¶¶ 235-239).

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)).

Response to Finding No. 162:

The proposed finding is misleading to the extent that it implies that Limited service brokers have been around "forever." Limited service brokers started growing significantly in the early 2000s. (CCPF ¶¶ 214-220). Therefore, although Exclusive Agency listings have been around for a significant period of time, the use of Exclusive Agency listings by Limited service brokers is a fairly new phenomenon. (RX-154-A-015).

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).

Response to Finding No. 163:

The proposed finding is overly broad, incomplete and misleading. First, Realcomp's Website Policy and Search Function Policy deterred BuySelf Realty from entering the market for real estate brokerage services in Oakland, Livingston, Wayne and Macomb counties. (CCPF ¶¶ 972-1006). Mr. Hepp only has a referral business in the Realcomp service area and although that has grown a bit, Mr. Hepp is not able to be a direct competitor in the Realcomp service area because of the Realcomp Policies. (CCPF ¶¶ 973-1006). Second, Realcomp's Website Policy and Search Function Policy restricted AmeriSell Realty's ability to compete effectively in the market for real estate brokerage services in Oakland, Livingston, Wayne and Macomb counties, causing Mr. Kermath to encourage customers to spend more money on Exclusive Right to Sell listings even if they did not need all of those services. (CCPF ¶¶ 871, 894, 935, 1051-1068, 1122, 1243). Third, Realcomp's Website Policy and Search Function Policy restricted MichiganListing.com's ability to compete effectively in the market for real estate brokerage services in Oakland, Livingston, Wayne and Macomb counties, and caused Mr. Mincy to charge higher prices for his Exclusive Agency listings and to encourage customers to choose the more expensive Exclusive Right to Sell listings instead. (CCPF ¶¶ 897, 936, 953, 1009-1030, 1118). Lastly, Realcomp's Website Policy and Search Function Policy restricted Greater Michigan Realty's ability to compete effectively in the market for real estate brokerage services in Oakland, Livingston, Wayne and Macomb counties, by causing Greater Michigan Realty to lose business because of the Realcomp Policies. (CCPF ¶¶ 824, 882, 920, 934, 1032-1049, 1121, 1243).

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).

Response to Finding No. 164:

This proposed finding is irrelevant, argumentative, misleading and without adequate foundation, and therefore deserves no weight. The finding is irrelevant because it is not a reference to Southeastern Michigan, and Mr. Niersbach admits that he has no knowledge of what "the market is like at this time in southeastern Michigan for real estate" or any specific knowledge of competition in Southeastern Michigan. (CX 414 (Niersbach, Dep. at 130, 132-133) (also testifying that he does not have specific knowledge of the MLS rules in operation in Southeastern Michigan). In addition, this statement is based solely on Mr. Niersbach's experience that he has not personally seen limited service brokers approach the National Association of Realtors because they felt they were being treated unfairly by their local associations or MLSs. (CX 414 (Niersbach, Dep. at 126)).

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).

Response to Finding No. 165:

The proposed finding is incomplete, misleading and overly broad. The evidence shows that agents offering Exclusive Agency listings compete with all other members of Realcomp, including traditional full service agents, to obtain new listings in Southeastern Michigan. (CX 421 (Whitehouse, Dep. at 14-15, 21); CX 525 (Adams, Dep. at 44-45); Mincy, Tr. 357, 359; CX 422 (Aronson, Dep. at 18)). Moreover, the evidence shows that Limited service brokers put price pressure on full service brokers. (CCPF ¶¶ 221-226).

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)).

Response to Finding No. 166:

The proposed finding is overly broad, incomplete and misleading. First, the proposed finding implies that the Realcomp Policies only affected one Limited service broker. However, the evidence is clear that other Limited service brokers did not enter the Realcomp service area because of the rules, had to charge higher prices, or had to caution potential customers that they should spend money on services they didn't need or want under an Exclusive Right to Sell listing in the Realcomp area. (CCPF ¶¶ 861-907, 941-1068, 1114-1122). Second, the proposed finding is incomplete and misleading with regard to YourIgloo's decision to leave the Realcomp service area. Mr. Aronson clearly testified that YourIgloo left Michigan because of the Realcomp Policies. (CX 422 (Aronson, Dep. at 112, 119 (Attributes "one hundred percent" of YourIgloo's decision to exit Michigan to the Realcomp Policies))). YourIgloo's decisions to leave two other states had nothing to do with anticompetitive MLS rules, and therefore are irrelevant to this case. (CX 422 (Aronson, Dep. at 31-32)). Moreover, YourIgloo's rationale for no longer being a member of MiRealSource is based on hearsay and does not address YourIgloo's decision to stop being a member of Realcomp. In fact, Virginia Bratt testified initially that she did not know why YourIgloo stopped being a member of MiRealSource. (CX 407 (Bratt, Dep. at 27-28)). She was merely interpreting the MiRealSource meeting minutes, and did not even recall Wayne Aronson's name. (CX 407 (Bratt, Dep. at 65-66)). Additionally, Mr. Aronson testified that YourIgloo's revenue dropped because of the Realcomp Policies. (CX 422 (Aronson, Dep. at 117)). Lastly, having a referral business, where YourIgloo does not provide any real estate brokerage services, does not constitute competing in Southeastern Michigan. YourIgloo clearly exited the market when it no longer offered to provide real estate brokerage services itself. (CX 422 (Aronson, Dep. at 112, 119)).

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).

Response to Finding No. 167:

The proposed finding is incomplete, misleading, and mischaracterizes Dr. Williams' testimony. Dr. Williams testified that at the very least, he read some of the testimony from Gary Moody, Craig Mincy and Jeff Kermath and that he was aware they had testified that their businesses were doing well. (D. Williams, Tr. 1698-1700). In addition, Dr. Williams testified that the Realcomp Policies restrict the ability of Limited service brokers to obtain listings and expand their businesses, and reduced the use of Limited service brokers, even in light of this testimony. (CCPF ¶¶ 941-953, 1069-1122). Dr. Williams' testimony is consistent with the weight of the evidence that Limited service brokers lost a substantial amount of business and otherwise were at a competitive disadvantage because of Realcomp's Policies. (CCPF ¶¶ 861-1068).

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).

<u>Response to Finding No. 168:</u>

This proposed finding is incomplete and therefore misleading. Mr. Murray attributed the growth of Exclusive Agency and other limited service listings to the strong seller's market and the growth of the Internet. (CCPF ¶¶ 214-216). While the attorney questioning Mr. Murray asked about the "hot market particularly on the coast," the underlying studies themselves were in fact based on a national sample and do not support this narrowing of the findings. (RX 154-A-016; CX 534-039, 041).

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).

<u>Response to Finding No. 169:</u>

This proposed finding is incomplete. One study showed that the use of Exclusive Agency listings declined from 15% to 8% in 2006, while another study published in 2006 showed that they remained at 15%. (CX 373-080; RX 154-A-020). Mr. Murray attributes this possible decline in the use of Exclusive Agency listings to having been potentially caused by the shift from a strong seller's market in 2005 to a buyer's market in 2006. (Murray, Tr. 168-169; RX 154-A-020). Moreover, Mr. Murray also testified that he expects to see an increase in the use of Exclusive Agency listings in a poor market, because sellers have less or no equity in their homes.

((RX 154-A-020-021 ("The lack of equity in the housing market in Southeastern Michigan (due to poor economic conditions and low home price appreciation) may therefore provide a fertile ground for the growth of limited service brokers."); Murray, Tr. 169-171).

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).

Response to Finding No. 170:

This proposed finding is incomplete and misleading; the 8% *and* the 15% statistics referenced in CCRF ¶ 169 include all limited service listings, which may include, in some instances, flat fee brokers who offer Exclusive Right to Sell listings. (CX 535-078; CX 534-041). Brokers offering limited service listings, however, most frequently use Exclusive Agency listings. (CCPF ¶ 187).

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

Response to Finding No. 171:

This proposed finding is misleading. This finding merely quotes the title of a slide of a study, which is discussing the potential decline of Exclusive Agency listings in 2006. (CX 535-116). The slide further states that in a slow market, "many people may try alternative methods to avoid paying commissions and perhaps writing checks to cover the difference between what they get for the home and what they owe at closing." (CX 535-116).

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

Response to Finding No. 172:

This proposed finding is misleading. The finding is misleading because there is no evidence that sellers in Southeastern Michigan think that limited service brokers do not compete well on trust or professionalism.

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

Response to Finding No. 173:

The proposed finding is inaccurate, overly broad and contrary to the weight of the evidence. Dr. Eisenstadt testified that he had not seen "any type of projection as to what the future likely market share of these discount brokers is over time." (Eisenstadt, Tr. 1464). That testimony was based on Dr. Eisenstadt's limited review of the record, and not on any industry study, survey or other forecast. (Eisenstadt, Tr. 1464). To the extent the finding may apply to areas outside of Southeastern Michigan, it is overly broad. Competition among real estate brokers – both traditional full-service and emerging limited service brokers – is local in nature. (CCPF ¶¶ 208-210).

Contrary to Respondent's assertion, a variety of exhibits and testimony in the record support the view of Dr. Williams that, in the absence of artificial restrictions on competition, the market share of "discount" or limited service brokers is expected to increase in the future. (D. Williams, Tr. 1096) (noting "consensus" that limited service brokers represent "a relatively new business model" and that model's "growth has been facilitated by the Internet.").

For example, Mr. Murray, the only qualified expert on the real estate industry to testify in this matter, explained numerous reasons why he expects to see continued growth in the limited service brokerage model. (Murray, Tr. 167-171; *see also* CCPF ¶¶ 214-217). Mr. Murray's testimony is supported by several industry publications that project growth in alternative business models. (CX 534-018) (consumer survey noting increase from 18 percent in 2002 to 33 percent in 2005 in the number of sellers "feeling confident that they can [sell their home] themselves or with less assistance for a reduced cost"); (CX 534-040) (same survey explaining that while certain alternative brokerages held 2.3 percent market share, fact that "between 9 and 11 percent of sellers considered" these firms presents "opportunity for them to improve their market share"); (CX 404-003 and -010) (2006 NAR publication observing that "the industry appears to be moving quickly away from a 'one size fits all' service model and entering a new era of specialization," and later predicting, "[i]n the next few years, the real estate brokerage business is likely to be characterized by growing segmentation, with several distinct business models for serving consumers").

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).

Response to Finding No. 174:

The proposed finding is argumentative and misleading. Dr. Eisenstadt's characterization of the exhibit in question, CX 524, is of no probative value because it does not assist the Court in understanding the evidence or determining a fact at issue. In addition, the longer-term trend from 2002 through 2006 in the share of Exclusive Agency Listings is clearly upward. (D. Williams, Tr. 1165-1166; CX 524; CCPF ¶¶ 1094-1096). Even using the arbitrary starting point of September 2003 selected by Dr. Eisenstadt, it is apparent that by September 2006 the share of Exclusive Agency listings is at least one full percentage point higher over that three year period. (CX 524 (showing increase from about 6.0 percent to 7.1 percent Exclusive Agency listings on average in the MLSs without restrictions)).

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).

Response to Finding No. 175:

The proposed finding is not supported by the evidence. Dr. Eisenstadt's "Cost Benefit Analysis" is flawed in several ways. (CCRF ¶¶ 234-39, 241). First, the evidence does not support the conclusion that Realcomp's Policies benefitted sellers in any way. (*See* CCRF ¶¶ 234-239). Second, the evidence demonstrates that Realcomp's Policies harm consumers in a number of ways. (CCRF ¶¶ 184). But Dr. Eisenstadt only calculated the higher brokerage fees paid by those consumers who continue to use Exclusive Agency listing; his calculation therefore does not account for the other harms. (CCRF ¶¶ 241). Moreover, even his calculation of the higher brokerage fees is flawed. (CCRF ¶¶ 241). Dr. Eisenstadt's "Cost Benefit Analysis" therefore substantially understates the harm done to consumers by Realcomp's Policies. (CCRF ¶¶ 241).

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).

Response to Finding No. 176:

The proposed finding is not supported by the evidence. (*See* CCRF ¶ 241). Although Dr. Eisenstadt admitted that the Realcomp Policies forced consumers to switch away from Exclusive Agency listings and to purchase Exclusive Right to Sell listings, he presented no evidence at all as to what types of brokers these consumers switched. Realcomp's own trial witness, Mr. Sweeney, testified that some consumers switch to traditional full service firms such as his own because discount brokers cannot provide exposure for their listings. (Sweeney, Tr. 1326 (sellers switch to full-service brokers because they need "all of the marketing necessary")). Thus, Dr. Eisenstadt's assumption that all sellers would switch to "flat fee ERTS listings" is contrary to the evidence.

Moreover, Dr. Eisenstadt's calculation of the higher brokerage fees paid by consumers due to Realcomp's Policies fails to account for the fact that sellers using Exclusive Agency listings may avoid paying the offer of compensation if no cooperating broker is involved. (*See* CCRF ¶ 241). Further, his calculations substantially understates the harm done to consumers by Realcomp's Policies because he fails to account for harm to other sellers and buyers. (*See* CCRF ¶ 241).

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).

Response to Finding No. 177:

The proposed finding is not supported by the evidence. (CCRF ¶ 176). Moreover, the finding is irrelevant because Complaint Counsel is not seeking nor need to prove damages. In any event, the analogy is fundamentally flawed. It assumes that "a comparable Hyundai" is available to consumers. In actual fact, "a comparable listing agreement" is *not available* to consumers for an extra $200 in the Realcomp service area. An Exclusive Right to Sell listing requires home sellers to pay for the services of a cooperating broker regardless of whether those services are provided. (CCPF ¶¶ 176-182, 1230-1233). In addition, under Realcomp's Minimum Service Definition, home sellers are prohibited from self-supplying any of the five services, which many consumers of Exclusive Agency listings would prefer to handle on their own to maintain more control over the transaction. (D. Moody, Tr. 495 (explaining that Greater Michigan Realty customers "want to be more in control of the selling process" by directly handling communications with Realtors and buyers and negotiating on their own behalf.); *see also* CCRF ¶ 145).

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).

Response to Finding No. 178

The proposed finding is contrary to the weight of the evidence. The evidence shows that limited service brokers using Exclusive Agency listings are a new and important form of competition. (CCPF ¶¶ 1149-1155). These brokers offer consumers unbundled services as well as unbundled commissions. (CCPF ¶¶ 1149-1152). These brokers therefore "compete differently," and the extent to which limited service brokerage activity is curtailed is competitively significant. (CCPF ¶¶ 1190-1199). Thus, from an economic perspective it is appropriate to examine both the effect on limited service brokers in absolute terms as well as the percentage decrease in limited service brokerage activity. (CCPF ¶ 1191). In addition, Dr. Eisenstadt's reasoning is flawed because he equates a static measure (wealth) with a dynamic process (competition). This makes no economic sense.

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).

Response to Finding No. 179:

This proposed finding is overly broad, misleading and against the weight of the evidence. Complaint Counsel agree that Exclusive Agency listings have only a limited presence in Southeastern Michigan, but disagree that this is because Southeastern Michigan is not a robust real estate market at present. The real estate expert and industry publications confirm that strong buyer's markets and markets where sellers may not have much equity in their homes to pay for brokerage services, such as Southeastern Michigan, provide growth opportunities for limited service brokers (and their Exclusive Agency listings). (*See* CCPF ¶¶ 216-219). This proposed finding is also against the weight of evidence. Mr. Sweeney's testimony that he does not perceive Exclusive Agency listings as a threat is contradicted by the testimony of Realcomp member, Doug Whitehouse, as well as by industry studies, industry publications and industry expert opinion that limited service brokers put price pressures on commission rates of full service brokers. (CX 421 (Whitehouse, Dep. at 25); CCPF ¶¶ 221-226). Mr. Sweeney's testimony is also contradicted by his earlier trial testimony that home sellers sometimes ask his full service agents to explain why their fees are higher than limited service brokers, *see* CCPF ¶ 225, and by his own contemporaneous documents, which include internal Weir Manuel guidelines on how to "Protect[] Your Commission" in the face of potential discounting that has become "much more prevalent around the country." (CX 350-008; *see also* CX 350-007). While some of these internal documents may have been written four or five years ago, Mr. Sweeney was quoted extensively in an article about limited service brokers in a Real Estate News online article, dated October 2005, that was entitled, "6% Target/Full service brokers and agents probably feel like they have a target on their back and they may be right." (CX 349-001).

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

Response to Finding No. 180:

This proposed finding is misleading. The use of Exclusive Agency listings by discount brokers has grown substantially since 2002, and although their use may have declined on a national level in 2006, their usage nationally and in markets similar to Southeastern Michigan is still substantially more than in the Realcomp service area. (CCPF ¶¶ 214-220, 1069-1115).

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).

Response to Finding No. 181:

This proposed finding is irrelevant and misleading. It lacks relevance because limited service brokers by definition, provide fewer services to their clients under a business model that gives home sellers a choice "to take on the responsibility for some tasks themselves" and thereby save money on brokerage fees. (CX 373-070 (NAR survey results in 2006 showing that between 9 and 24 percent of sellers performed tasks such as determining the asking price, scheduling showings, negotiating with buyers, coordinating appraisals and inspections, managing the paperwork and attending closings *without assistance* from brokers); Mincy, Tr. 322 (unbundled services model "gives the seller an opportunity to do some of the work themselves, save some money on the commission and still offer compensation to an agent if they brought a buyer."); *see also* CCPF ¶¶ 193-197).

The finding is also misleading for several reasons. First, the exhibit containing the particular slide cited by Respondent in support of this finding does not mention Exclusive Agency listings or "full service brokers." (CX 535, *in camera*; CX 535-109 was made public during Mr. Murray's testimony). Rather, it refers to "alternative models" and "traditional models" generally, without making distinctions in listing type (Exclusive Agency vs. Exclusive Right to Sell). Moreover, the same exhibit goes on to find that [redacted]. (CX 535-230; *in camera*). It also noted:

[redacted]

(CX 535-177, *in camera*).

The insinuation that limited service brokers in Southeastern Michigan who offer Exclusive Agency listings lack "trust and professionalism" and thus do not "compete well" with Realcomp's incumbent brokers is contrary to the weight of the evidence. Mr. Mincy testified that his brokerage, MichiganListing.com, gets referral business from competing full service brokers in Realcomp (Mincy, Tr. 383-384). Ms. Brant, the Executive Vice President of the Livingston County Association of Realtors, where Mr. Mincy's brokerage is a member (and which is a shareholder of Realcomp), testified that "he's a great guy, and he works [together] with our other real estate brokers" without any problems. (CX 408 (Brant, Dep. at 50-51, 53)). Greater

Michigan Realty also gets referral business from "traditional ERTS realtor[s]" in Michigan who "can't provide" the service that the Moodys provide. (G. Moody, Tr. 838-839). Mr. Hepp of BuySelf Realty testified that outside of Southeastern Michigan, where customers have complained about the effect of Realcomp's rules, his brokerage gets referrals from customers where "even [though] the seller doesn't sell their home, but they just appreciated the opportunity that our service provided them, the opportunity to save money. They just really appreciated that. And therefore" recommended his service to "friends [and] family" when they were selling their homes. (Hepp, Tr. 633-634; *see also* G. Moody, Tr. 838-839 (noting that "a majority" of customers are pleased with Greater Michigan Realty's services, despite regular complaints relating to Realcomp's rules, and that the company website publishes "customer testimonials" from satisfied home sellers); RX 30-001 (website testimonial from real estate investor stating that "we deal with a lot of realtors. Greater Michigan Realty is by far the fastest, most economical, no hassle company we've dealt with. The competition is miles behind.")).

Finally, limited service brokers are honest and up-front with their clients about the disadvantages Exclusive Agency listings face because of Realcomp's rules. For example, Mr. Kermath explains on the AmeriSell website four specific ways in which the Website Policy and Search Function Policy affect home sellers. (Kermath, Tr. 741-744 (explaining why customers should upgrade to ERTS or they will be "missing a significant amount of exposure for their listing."); RX 12-007-008).

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).

Response to Finding No. 182:
Complaint Counsel have no specific response.

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).

Response to Finding No. 183:

The proposed finding is contrary to the weight of the evidence. The evidence does not support Dr. Eisenstadt's theory that Realcomp's Policies "enhance efficiency by increasing selling agents' incentives to show properties listed under Exclusive Agency contracts." (*See* CCRF ¶¶ 188, 235-236). In fact, the record demonstrates that Realcomp's Policies do not "enhance efficiency" but harm consumers. (CCRF ¶ 184).

There is no evidence in the record that cooperating agents have higher incentives or are more willing to show homes under Exclusive Agency listings. Realcomp does not cite to a single document nor any broker testimony to support this notion. To the contrary, Mr. Murray testified that brokers working on behalf of buyers generally want to search the most inventory possible so as to increase their likelihood of finding a home that meets their clients' needs. (Murray, Tr. 184, 186; CCPF ¶ 921). Dr. Eisenstadt admitted that he did no survey of brokers to see whether preventing Exclusive Agency listings from going to the Internet gives them a greater incentive to show those listings. (Eisenstadt, Tr. 1553). In fact, Dr. Eisenstadt admitted this was just an unsupported theory of his. (Eisenstadt, Tr. 1553).

Further, even if Realcomp's Policies did increase selling agents' incentives, the Policies would not "enhance efficiency." (CX 557-A-049). Dr. Eisenstadt admits that Realcomp's Policies make it more likely that home buyers pay for the services of a cooperating broker regardless of whether or not one is employed. (CX 557-A-048; CX 133-033). He claims that this prevents a "bidding is an advantage" problem. (CX 557-A-048). As explained below, this claim is not supported by the evidence and is contrary to economic theory. (CCRF ¶ 188). Raising costs by disadvantaging sellers who want to pay for cooperating broker services only when those services have actually been rendered is not procompetitive or efficiency enhancing.

(CX 557-A-049).

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).

Response to Finding No. 184:

The proposed finding is misleading, contrary to the weight of the evidence, and irrelevant.

First, sellers' payment of commissions are not "one-sided costs." The finding ignores a number of ways in which Realcomp's Policies harm consumers. (CCRF ¶ 241). The evidence demonstrates that Realcomp's Policies harm consumers by:

- restraining the ability of limited service brokers to compete (CCPF ¶¶ 861-1068);
- reducing the use of Exclusive Agency listings and limited service brokerage activity (CCPF ¶¶ 1069-1122, 1190-1199);
- limiting consumer choice (CCPF ¶¶1200-1206);
- protecting and maintaining an effective price floor on traditional full-service real estate broker commissions (CCPF ¶¶1207-1227);
- causing consumers to pay for brokerage services they do not want or need (CCPF ¶¶ 1228-1233); and
- reducing the output of brokerage services (CCPF ¶¶ 1234-1243).

Second, evidence does not support the conclusion that Realcomp's Policies somehow benefitted sellers. As explained below, Dr. Eisenstadt's analysis of sales prices is flawed in several respects and unreliable. (*See* CCRF ¶¶ 235-236).

Third, the proposed finding is irrelevant. Conspirators cannot justify an anticompetitive conspiracy that deprives consumers of their choice of product or service asserting that, in their opinion, the remaining products or services in the market are priced reasonably or are good for consumers. (*See* Complaint Counsel's Post Trial Reply Brief, at 6-7).

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).

Response to Finding No. 185:

The proposed finding is contrary to the weight of the evidence and irrelevant. Dr. Eisenstadt's analysis of sales prices is flawed in several respects and unreliable. (*See* CCRF ¶¶ 235-236). Moreover, it is predicated on the theory that less exposure of listings is good for consumers, which is contradicted by the weight of the evidence, including industry studies, industry expert opinion, the testimony of both full and limited service brokers, and the testimony of members of Realcomp's Board of Governors. (*See* CCPF ¶ 454-62, 536-676). Moreover, the finding ignores substantial evidence that Realcomp's Policies harm consumers in a number of ways. (*See* CCRF ¶¶ 184, 241).

The proposed finding is also irrelevant. Conspirators cannot justify an anticompetitive conspiracy that deprives consumers of their choice of product or service asserting that, in their opinion, the remaining products or services in the market are priced reasonably or are good for consumers. (*See* Complaint Counsel's Post Trial Reply Brief, at 6-7).

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).

Response to Finding No. 186:

The proposed finding is inaccurate, misleading, and contrary to the weight of the evidence. The Complaint does not seek "the 'unbundling' of traditional, full-service, Exclusive Right to Sell listings." The Complaint merely seeks to enjoin Realcomp from continuing to restrain competition among real estate brokers through the Website Policy and Search Function

Policy. (*See* Notice of Contemplated Relief). Under the Proposed Relief, Traditional full-service brokers may continue to bundle services and to use Exclusive Right to Sell listing agreements.

The evidence supports the conclusion that the Realcomp Policies have limited the exposure of Exclusive Agency listings to all buyers, whether represented by a Realcomp member broker, a broker who is not a member, or not represented at all. (CCPF ¶¶ 868-907).

The evidence does not support the notion that the Realcomp Policies somehow protect selling agents from having to "subsidize" sellers using Exclusive Agency listings. (CCPF ¶ 1263). These listings do not allow sellers to "sell directly to buyers without using any broker." As Realcomp has stipulated, a seller must have a listing agreement with a Realcomp member to have the seller's listing placed on the Realcomp MLS. (JX 1-04; CCPF ¶ 317). The person marketing the listing is therefore the listing broker, not the seller. Moreover, each listing on the Realcomp MLS, including Exclusive Agency listings, must include an offer of compensation to any cooperating broker who procures a buyer. (CCPF ¶ 350). Thus, a seller using an Exclusive Agency listing must (1) use a listing broker; (2) compensate that listing broker pursuant to the listing agreement; and (3) offer compensation to any cooperating broker who procures a buyer. (JX 1-04; CCPF ¶¶ 151, 317, 345, 350).

Cooperating brokers therefore have precisely what they paid for in their MLS dues – the opportunity to earn a commission by procuring a buyer. (CCPF ¶ 1263). This is the same opportunity that cooperating brokers have with Exclusive Right to Sell listings, which may be sold to unrepresented buyers or buyers represented by non-Realcomp members who find the listing through the Approved Websites. (CCPF ¶¶ 173, 1263; JX 1-05 ("Realcomp does not require that transactions facilitated through the Approved Websites involve a cooperating broker who is a Realcomp member."). Thus, Realcomp cooperating brokers are no more "subsidizing" these listings than someone who pays for telephone service is "subsidizing" calls made by other subscribers of that same network. (D. Williams, Tr. 1648). The chance of a seller selling directly to an unrepresented buyer is the same regardless of the listing type used by the seller. (Sweeney, Tr. 1364).

Moreover, Dr. Eisenstadt's subsidy argument applies to other circumstances where a Realcomp cooperating broker is not used by a home buyer. (CX 557-A-055). In fact, his theory implies that every time that a Realcomp cooperating broker is not compensated in connection with the sale of a home listed in the MLS, cooperating brokers are "subsidizing" home sellers and listing brokers who use the MLS system. (CX 557-A-055). In all such cases, cooperating brokers are not compensated even though they are contributing membership fees to the Realcomp MLS. (CX 557-A-055). Realcomp members seem to have no problem "subsidizing" full service listing brokers' transactions when no Realcomp cooperating broker is involved. (CCPF ¶¶ 175, 1259). This flies in the face of Realcomp's supposed justification. (CCPF ¶ 1259). The only difference is that on a transaction involving an Exclusive Right to Sell listing, the listing broker keeps the offer of compensation. (CX 557-A-055; D. Moody, Tr. 489-491). This demonstrates that Realcomp's Policies are designed to maintain higher brokerage fees. (CCPF ¶ 1224-1227; *see also* CX 38 (Gleason Dep. at 25-26) (Policies designed to "protect our commissions")).

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).

Response to Finding No. 187:

The proposed finding is misleading and inaccurate. A seller using an Exclusive Agency listing offers to compensate any cooperating broker who procures a buyer. (CCPF ¶ 350). But a home seller does not "compete with" cooperating brokers. The only difference between a home seller using an Exclusive Agency listing and one using an Exclusive Right to Sell listing its that the former does not pay for cooperating brokerage services if none are provided. (CCPF ¶¶ 176-187).

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).

Response to Finding No. 188:

The proposed finding is contrary to the weight of the evidence. Other than the theorizing of Dr. Eisenstadt, Realcomp has presented no evidence to support the assertion that buyers have "more incentive to use selling agents when they acquire ERTS properties than when they acquire Exclusive Agency properties." Realcomp cites to no document nor any testimony from brokers or consumers to support this bald assertion.

There is no evidence to support Dr. Eisenstadt's claim that there is some "bidding advantage," which Dr. Eisenstadt admitted was premised on the notion that two buyers will have "the same maximum willingness to pay for a home." (Eisenstadt, Tr. 1534). He claimed that this situation "happens fairly often," but he was forced to admit on cross-examination, that the only basis he had for this assertion was that he sold his house twice and had competing bidders and the conversations with the brokers he used in those transactions. (Eisenstadt, Tr. 1535).

What is more, the evidence shows that Dr. Eisenstadt's theorizing is wrong from an economic perspective. Any "disadvantage" to the buyer using a cooperating broker simply reflects the fact that the buyer must pay for the services of the cooperating broker. (CX 557-A-043-049). The broker-assisted home buyer is not disadvantaged because he or she must pay the commission of the cooperating broker that they hire. (CX 557-A-044). In any situation where a bidder hires professional services, the bidder bears the cost of those services. (CX 557-A-044). In fact, Dr. Eisenstadt admitted that buyers using cooperating brokers receive the benefit of services, such as advice, the broker negotiating on their behalf, and comparing homes. (Eisenstadt, Tr. 1537-1538). He also admitted that buyers pay for these services to the extent that the offer of compensation is built into the sales price of the home. (Eisenstadt, Tr. 1538-1539). However, buyers using brokers are not "disadvantaged," any more than a bidder for commercial property is disadvantaged because the bidder bears the cost of legal and accounting services that the bidder hires. (CX 557-A-045). There is therefore no economic basis for the conclusion that broker-assisted home buyers are at a bidding disadvantage. (CX 557-A-045-046).

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).

Response to Finding No. 189:

The proposed finding is misleading and incomplete. The Realcomp Website Policy limits the dissemination of Exclusive Agency listings to *all* buyers, whether those buyers are using a cooperating broker or not. (CCPF ¶¶ 861-907; CCRF ¶ 183). The Realcomp Search Function Policy limits the distribution of information to buyers *using* cooperating brokers. (CCPF ¶¶ 908-940). Moreover, the distribution of listings through the Realcomp MLS is not "free," it is a service that is provided in exchange for the fees paid by all Realcomp members. (CCPF ¶¶ 765-767). Realcomp members using Exclusive Agency listings pay the same fees as those using Exclusive Right to Sell listings, but the full distribution of listings through the Realcomp MLS is only offered to those members using full service Exclusive Right to Sell listings. (CCPF ¶¶ 301, 765-767,).

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.)

Response to Finding No. 190:

The proposed finding is contrary to the weight of the evidence. The evidence does not support the notion that the Realcomp Policies somehow protect selling agents from having to "subsidize" sellers using Exclusive Agency listings. (*See* CCRF ¶¶ 186, 189; CCPF ¶ 1263). In addition, the finding incorrectly assumes that listing brokers and selling brokers are two distinct groups, which is contrary to the testimony of Mr. Murray, the industry expert, and numerous market participants. (CCRF ¶ 247).

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

Response to Finding No. 191:

The proposed finding is contrary to the weight of the evidence. The Realcomp Policies do not address any artificial disadvantage. (CCRF ¶ 188). Moreover, the Policies would not be "economically efficient," because they would stand the competitive process on its head. (CX 557-A-049). The Policies would disadvantage certain low cost bidders – home buyers that are not using a cooperating broker – to ensure bidding parity with higher cost bidders – buyers using cooperating brokers. (CX 557-A-049). As a general proposition this reasoning makes no economic sense, nor does it make economic sense in the context of this case. (CX 557-A-049). Raising costs to eliminate a cost advantage is simply not procompetitive or "economically efficient." (CX 557-A-049).

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).

Response to Finding No. 192:

The proposed finding is not supported by the evidence. Dr. Eisenstadt calculated the number of listings per broker for a few, hand-selected brokers. (CX 133-067). From this he claims that discount brokers have more listings and therefore should receive fewer services. (CX 133-039-040). This makes no sense because all members of the MLS benefit from increased listings. (CCPF ¶¶ 721-722). It also contradicts Respondent's position below concerning the "reciprocal" benefits of data sharing. (CCRF ¶ 245 (discussing how cooperating brokers and listing brokers benefit)). Moreover, Dr. Eisenstadt admitted that there is no additional marginal cost for the MLS to carry an Exclusive Agency listing or to feed an Exclusive Agency listing out to the Approved Websites. (Eisenstadt, Tr. 1583-1584). Thus, reducing the services for Exclusive Agency listings does not result in any economic cost savings for the MLS that can be passed on to traditional brokers. (CX 557-A-053).

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).

Response to Finding No. 193:

Complaint Counsel has no specific response.

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).

Response to Finding No. 194:

The proposed finding is inaccurate. Dr. Williams concluded that the Realcomp Policies at issue have effected a substantial reduction in the usage of Exclusive Agency contracts, and therefore have had an adverse effect on the extent to which there is competition from limited service brokers. (D. Williams, Tr. 1093-1094, 1178, 1228; *see also* (D. Williams, Tr. 1183-1184 (the Realcomp Policies result in "a large reduction in the extent to which there [are] exclusive agency contracts and the type of competition that's associated with those contracts.")). He explained that the overall effect of these policies is anticompetitive, because they reduce consumer choice, deter entry, prevent brokerage fees from dropping, and force consumers to pay for brokerage services that they do not want or use. (D. Williams, Tr. 1228-1230; CX 557-A-056-057). The statistical analyses he performed showed that the Website Policy in particular, and the Realcomp Policies generally, were associated with a 5.5 percent reduction – in absolute terms

– in the share of Exclusive Agency Listings. (D. Williams, Tr. 1169-1172; illustrated in DX 7-12 and 7-13). In relative terms, the reduction in usage of Exclusive Agency Listings is much greater: between 52 percent and 86 percent, depending on the type of analysis. (D. Williams, Tr. 1180-1184).

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*).

Response to Finding No. 195:

The proposed finding is incomplete and misleading. To the extent the finding refers only to the percent reduction in usage of Exclusive Agency Listings effected by the Realcomp Policies at issue, it would be accurate to find that Dr. Williams based his conclusions on the three pieces of economic analysis that he performed on the relevant data (the time series analysis, cross-sectional or "benchmark" analysis, and the regression analysis), and all but one of the analyses that Dr. Eisenstadt performed (the time series analysis and benchmark analysis, but not Dr. Eisenstadt's regression analysis). (D. Williams, Tr. 1228; illustrated in DX 7-18).

To the extent the finding refers to any other conclusions of Dr. Williams, it is misleading. Dr. Williams testified to a number of conclusions relevant to the outcome of this matter. For example, his conclusion that Realcomp possesses market power was based on extensive analysis of market share data for Southeastern Michigan, and documents and testimony concerning network effects in the input market for MLS listing services (among other evidence). (CCPF ¶¶ 677-764). That conclusion was unrebutted.

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).

Response to Finding No. 196:

The proposed finding is incomplete. Numerous other exhibits and testimony reflect the findings of Dr. Williams' time series analysis. *See generally* (CCPF ¶¶1073-1084).

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).

Response to Finding No. 197:

As an initial matter, the proposed finding mischaracterizes the testimony of Dr. Williams. He stated that "the share of listings is not so much subject to variation in economic conditions" as the absolute number of Exclusive Agency listings. (D. Williams, Tr. 1149). He did not state, as Respondent purports, that his measurement "insulated the calculation from 'market flux.'" Second, opposing counsel's habit of prefacing actual questions with gratuitously self-serving statements does not mean such preamble is evidence. For example, there was no question pending to Dr. Williams, much less a question concerning his qualifications (which speak for themselves), in the portion of the transcript cited by Respondent as the basis for the alleged "admission" in subpart (a) of this finding. (D. Williams, Tr. 1280, lines 23-25). The actual question to Dr. Williams concerned the source of data for the information in CX 373. (D. Williams, Tr. 1281). The record also indicates that Dr. Eisenstadt is not a real estate professional, to the extent such "admissions" may be relevant. (Eisenstadt, Tr. 1555).

Third, the testimony of Mr. Sweeney on this issue, to the extent he was testifying from direct personal knowledge, was that "exclusive agency type firms" are appearing in Southeastern Michigan, "but there's not a surge in growth." (Sweeney, Tr. 1330). The opinions he offered on whether and to what extent sellers "need a full service broker" in the current economic conditions are nothing more than a self-interested sales pitch for his own business model. (Sweeney, Tr. 1326-1327). Mr. Sweeney presented no credible evidence to support his bald assertion that in a declining market, sellers are less likely to choose Exclusive Agency Listings than in a neutral or rising market. He cited no documents, studies, industry publications, or business statistics to substantiate his claim.

Fourth, Mr. Sweeney's opinion on the relative share of Exclusive Agency Listings in declining market conditions is contradicted by other witnesses, who are in better positions to observe the popularity of limited service business models generally (Stephen Murray) and the choices of cost-conscious home sellers specifically (Messrs. Mincy, Moody and Hepp). For example, Mr. Murray, whose expertise in the real estate industry nationally is unchallenged, testified that the "pretty awful" real estate market in southeastern Michigan provides opportunities for limited service brokers because of the likely "fairly high" incidence of "short sales," which refers to when homeowners do not have much equity in their home and would have to issue a check at closing to pay off the remaining balance on the mortgage or closing costs. (Murray, Tr. 169-171; RX 154-A-020-021). His expert opinion is supported by an industry publication from NAR. (CX 533-042) ("higher unemployment rates may increase the demand for a lower cost [brokerage] service . . . if home prices have declined, sellers may prefer the less expensive [limited service brokerage model] . . . .")). In addition, brokers in Southeastern Michigan offering limited services testified that their services often appealed to sellers without equity in their homes. (Mincy, Tr. 382; Hepp, Tr. 598-599; G. Moody, Tr. 882 (limited services help people in "tough economic times"). For example, Mr. Hepp testified that he has received referrals from full-service brokers when a seller had little or no equity in their house and could not pay a 6% commission. (Hepp, Tr. 598-599 (noting that when a seller has little or no equity in their house, the seller would have to come up with cash to pay the commission.)). *See also* (CCPF ¶¶ 216-219).

Finally, Respondent's economic expert presented information in direct contradiction to this finding. Dr. Eisenstadt testified that his regression analysis predicts that as average house prices *increase*, the use of Exclusive Agency Listings would go down. (Eisenstadt, Tr. 1602-1603). Conversely, when sales prices of homes are in "free fall," as Mr. Sweeney claims to be the case in Southeastern Michigan, Dr. Eisenstadt's regression predicts that the use of Exclusive Agency contracts should be going up. (Eisenstadt, Tr. 1602-1603). Moreover, Dr. Eisenstadt's analysis purports to show that home sellers in Southeastern Michigan who use Exclusive Agency Listings realize higher home prices, on average, than sellers using Exclusive Right to Sell listings. (Eisenstadt, Tr. 1546-1548; CX 458-024; *see also* CCRF ¶ 237). This implies that more home sellers would choose Exclusive Agency listings in a declining market, in order to realize a higher sale price for their asset.

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).

Response to Finding No. 198:

The proposed finding is incomplete. Dr. Williams selected the seven control MLSs based on a ranking of all MSAs in the country. (D. Williams, Tr. 1158-1159; CX 498-A-070 (noting that no data was received from the Philadelphia MLS)). The purpose of this ranking was simply to select MLSs from which to obtain data; this is just "the beginning of the analysis." (D. Williams, Tr. 1160. Since he had no data at the time and could not know what variables actually affect the use of Exclusive Agency listings, Dr. Williams had to "exercise some judgment and experience with respect to economics and try to identify variables that may have an effect and use those as part of the criteria to select the sample." (D. Williams, Tr. 1247).

The factors seven factors he used to select the MSAs were: percentage change in the 1 year housing price index (MSA); percentage change in the 5 year housing price index (MSA); median housing price (MSA); percent bachelor's degree (MSA); median household income (MSA); population; and population density. (RX 162). Dr. Williams used these criteria to rank the MSAs. (D. Williams, Tr. 1158-1159). It appeared, however, that some of the MLSs in the ranking may have restrictive policies similar to Realcomp's. (RX 162). Dr. Williams therefore chose the top seven MSAs that did not have restrictive policies. (D. Williams, Tr. 1159).

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).

<u>Response to Finding No. 199:</u>

The proposed finding is incomplete. As Dr. Williams explained at trial, he performed a calculation in which each one of the seven variables was given some consideration and ranked the MLSs based on that calculation. (D. Williams, Tr. 1249-1250). Since the variables were in different units of measure (*e.g.*, dollars, percentages, *etc.*), Dr. Williams calculated a standard deviation of these variables to obtain a common unit of measure. (D. Williams, Tr. 1250). He then calculated the difference between the standard deviation of each variable for each MSA and that of Detroit. (CX 498-A-070). The resulting ranking is therefore based in the sum of the differences in these standard deviations. (CX 498-A-070).

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).

<u>Response to Finding No. 200:</u>

The proposed finding is incomplete. (*See* CCRF ¶¶ 198-199).

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).

<u>Response to Finding No. 201:</u>

The proposed finding is misleading and contrary to the evidence. In his expert report, Dr. Williams explained that giving equal weight to each factor was the prudent approach: "[Dr. Eisenstadt] criticizes the fact that I give equal weight to the seven factors used to select the control sample, apparently not recognizing that the weighting occurred before I or he actually possessed the data. Without the data, there was no way to determine which factors were more or less important, so that equal weighting is the prudent approach." (CX 560-005).

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).

Response to Finding No. 202:

The proposed finding is misleading, misstates the testimony, and is not supported by any evidence. The cited testimony shows only that Pittsburgh, Cleveland and Milwaukee were not part of the control group of MLSs. There is no support in the record for the assertion that these city "intuitively might be thought more similar to Detroit." In addition, the fact that Pittsburgh, Cleveland and Milwaukee do not appear on the list of MSAs Ranked According to Similarity to Detroit (RX 162) means that: (1) the MLSs serving these cities had restrictions similar to Realcomp's restrictions, or (2) these cities were <u>less</u> similar to Detroit than every city in the control group of MLSs <u>and</u> every other city listed in RX 162, or (3) both of the above. (D. Williams, Tr. 1254).

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).

Response to Finding No. 203:

The proposed finding is incomplete. According to Dr. Eisenstadt's calculations, the Exclusive Agency share for [redacted] (rank 6) was [redacted], for Memphis (rank 3) was 5.95%, and for Charlotte (rank 4) was 6.15%. (RX 161-028, *in camera*).

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).

Response to Finding No. 204:

The proposed finding is incorrect. As Dr. Williams pointed out in his expert report, "Dr. Eisenstadt seems troubled by the fact that the criteria used to select the control sample did not perfectly predict the percentage of non-ERTS listings within the control sample. For instance, he states '. . . if one assumes that Dr. Williams correctly identified the economic and demographic factors that determine the share of non-ERTS contracts at the MSA level and then used these characteristics to determine a group of control MSAs, one would expect the shares of non-ERTS listings to be very similar across all six of his control MSAs.' But this is not only unrealistic, it is false. Even if the seven variables used as criteria to select the control sample perfectly predicted the percentage of non-ERTS listings, this does not imply that the percentages would be equal or nearly equal because the values of the seven explanatory variables are not equal." (CX 560-005).

In fact, Dr. Eisenstadt himself acknowledges that the values of the seven variables used as sample selection criteria vary across MLSs in the control sample so it is unclear why he would expect the percentage of Exclusive Agency listings to be "very similar." (CX 560-005 (n.6)). The variation in the share of Exclusive Agency listings actually demonstrates that the sample is not biased. (CCPF ¶ 1088).

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).

Response to Finding No. 205:

Complaint Counsel have no specific response.

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).

Response to Finding No. 206:

The proposed finding is misleading and inconsistent with Realcomp's own expert and findings. In Finding No. 204, Realcomp cites its own expert for the proposition that the seven factors used by Dr. Williams "has not accounted for a host of factors which are important determinants of the level of non-ERTS shares in MSAs that have no restrictions." (CX 458-008). In this finding, however, Realcomp and its expert propose that there is a "strong positive association between the control MSA's similarity to Detroit" based on the seven factors "and its EA share." These two statements are contradictory. As Dr. Williams made clear, the seven factors were a means to select MSAs from which to obtain data. He could not know in advance whether the factors actually affected the share of Exclusive Agency listings because he did not yet have the data. (CX 560-005).

In fact, at trial, Dr. Eisenstadt claimed to find that some of the characteristics used to create the ranking were not statistically significant. (Eisenstadt, Tr. 1577). Further, he did not analyze two of the seven factors, thus he has no idea one way or the other whether these are statistically significant. (Eisenstadt, Tr. 1579). Dr. Eisenstadt, however, did not re-rank the MSAs by removing these factors, and he has no idea how the ranking would change if he were to do so. (Eisenstadt, Tr. 1579-580). Eisenstadt presented no evidence that his finding of a "strong positive relationship" was statistically different from "no relationship at all." The purported "strong positive association" is therefore fictional and contradicts Dr. Eisenstadt's own analyses.

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

207. In addition to Realcomp, Dr. Williams's group of Restriction MLSs 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).

Response to Finding No. 207:

The proposed finding is incomplete and inaccurate. Dr. Williams obtained data from a total of three MLSs -- Boulder, Green Bay/Appleton, and Williamsburg -- that had website policies similar to Realcomp's. (CX 498-041 (n.103)). As Dr. Williams explained at trial, he could not use a similar selection process to the one he used for the MLSs without restrictions because there are too few MLSs with restrictions. (D. Williams, Tr. 1263). To ensure that the MLSs both had website polices and enforced those policies, Dr. Williams obtained data from MLSs that had entered into consent decrees with the Commission. (D. Williams, Tr. 1284-1285; *see also* Complaint, *In the Matter of Information and Real Estate Services, LLC*, FTC Dkt No. C-4179 (2006) (Boulder); Complaint, *In the Matter of Realtors Association of Northeast Wisconsin, Inc.*, Dkt No. C-4178 (2006) (Green Bay/Appleton); Complaint, *In the Matter of Williamsburg Area Association of Realtors, Inc.*, FTC Dkt No. C-4177 (2006)).

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).

Response to Finding No. 208:

The proposed finding is contrary to the weight of the evidence. Dr. Williams performed a total of ten different statistical analyses, each of which demonstrates that the difference in Exclusive Agency shares is not attributable to economic and demographic factors. (CCPF ¶¶ 1098-1104; CX 498-A-041-042, 071 (table); CX 560-011-014, 019-020 (tables)).

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).

Response to Finding No. 209:

Complaint Counsel have no specific response.

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).

Response to Finding No. 210:

The proposed finding is inaccurate. Dr. Williams testified that the average share of Exclusive Agency listings for the MLSs without restrictions was 5.6%. (D. Williams, Tr. 1162).

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).

Response to Finding No. 211:

The proposed finding is incomplete and therefore misleading. Dr. Williams explained that the "weighted" average is simply the share of Exclusive Agency listings divided by the total set of listings obtained from the MLSs without restrictions. (D. Williams, Tr. 1292). The data set he used had a total of over 1.08 million listings. (CCPF ¶ 1090). He further explained that he used a weighted average because Realcomp is a large MLS; thus, to the extent that size of the MLS matters, the bigger MLSs are more comparable to Realcomp. (D. Williams, Tr. 1291-1292).

Further, Dr. Williams controlled for the "closeness of any MSA to Detroit" in his statistical analyses, which included demographic and economic variables used in the selection of the MLSs. (CX 560-011-014, 019-020 (tables)). These analyses demonstrate that, controlling for these factors, the Realcomp Policies are associated with a reduction in the share of Exclusive Agency listing of approximately 5.5 percentage points. (CX 560-011-014, 019-020 (tables)).

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).

Response to Finding No. 212:

The proposed finding misstates the testimony and is misleading. The testimony establishes only that the Denver MLS is bigger than the Dayton MLS, not the "largest of the Control MSAs." (D. Williams, Tr. 1261-1262). Further, the Denver MSA was ranked 6th only for the selection of MLSs from which to obtain data; the ranking was just "the beginning of the analysis." (D. Williams, Tr. 1160). The purpose of the ranking, therefore, is not to compare the MLSs.

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).

Response to Finding No. 213:

The proposed finding is misleading and not supported. First, while the evidence does show that the weighted average gave more weight to the Denver MLS as a whole that to the Dayton MLS as a whole, Dr. Williams' weighted average gave identical weight to each listing in the Denver MLS and each listing in the Dayton MLS. (D. Williams, Tr. 1261-1262). The evidence does not support the contention Dr. Williams's method gave "significantly" more weight to Denver. (D. Williams, Tr. 1261-1262). There is no evidence regarding how much more weight. Second, the "similarity" rankings were simply to select MLSs from which to obtain data; this is just "the beginning of the analysis." (D. Williams, Tr. 1160). The purpose of the ranking, therefore, is not to compare the MLSs.

214. Realcomp's expert, Dr. Eisenstadt, also performed direct comparisons of Realcomp (i.e., the Detroit MSA) to Dr. Williams' Control MSAs. Dr. Eistenstadt 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).

Response to Finding No. 214:

The proposed finding is incomplete and not supported by the evidence. Although Dr. Eisenstadt claimed that his comparison of the Dayton MLS to the Realcomp MLS is valid, he himself claimed to find that some of the characteristics to create the ranking were not statistically significant. (Eisenstadt, Tr. 1577). Dr. Eisenstadt did not analyze two of the seven factors, thus he has no idea one way or the other whether these are statistically significant. (Eisenstadt, Tr. 1579). Dr. Eisenstadt, however, did not re-rank the MSA's by removing these factors, and he has no idea how the ranking would change if he did so. (Eisenstadt, Tr. 1579-1580). The purpose of this ranking was simply to select MLSs from which to obtain data; this is just "the beginning of the analysis." (D. Williams, Tr. 1160). The purpose of the ranking, therefore, is not to compare the MLSs.

Moreover, comparing just the Dayton and Realcomp MLSs make no sense. As Dr. Williams pointed out, an economist normally would not simply make such a comparison. (D. Williams, Tr. 1680-1681). An economist should to look at a bigger sample, not just the "closest" one based on superficial similarities. (D. Williams, Tr. 1680-1681). Looking at the larger sample enables the economist to generalize and have confidence in the results. (D. Williams, Tr. 1681-1682).

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.

Response to Finding No. 215:

Complaint Counsel have refer generally to CCRF ¶¶ 193-225.

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).

Response to Finding No. 216:

The proposed finding is misleading and incomplete. Dr. Williams conducted a total of ten statistical analyses. (CX 498-A-041-042, 071 (table); CX 560-011-014, 019-020 (table)). The first three are contained in Dr. Williams's initial report. (CX 498-A-041-042, -071 (tables)). The remaining seven are contained in Dr. Williams's surrebuttal report. (CX 560-011-014, 019-020 (tables)). The cited testimony of Dr. Williams is referring to all of his statistical analyses, not just the three in his initial report. (D. Williams, Tr. 1168-69; *see also* DX 7-12 (demonstrative used by Dr. Williams entitled "Regression Results – From Williams Surrebuttal Report Table II")).

In his ten statistical analyses, Dr. Williams controls for a wide range of economic and demographic variables, including those that Dr. Eisenstadt claimed should be included. (CX 498-A-041-042, 071 (tables); CX 560-011-014, 019-020 (tables)). In his initial report, Dr. Williams's three regressions control for the year of the listing, the month of the listing, the list price of the home, the number of bedrooms, the square footage of the house, the size of the lot, and population density. (CX 498-A-071 ("Regression 1"; "Regression 2"; "Regression 3")). In his surrebuttal report, Dr. Williams controls for the following variables:

1. percent high school degree (county);
2. percent high school degree (MSA);
3. percent bachelor's degree (county);
4. percent bachelor's degree (MSA);
5. percentage change in the 1 year housing price index (MSA);
6. percentage change in the 5 year housing price index (MSA);
7. median household income (county);
8. median housing price (zip code);
9. median housing price (MSA);
10. percent African American (zip code);

11. percent African American (MSA);
12. percent Hispanic (zip code);
13. percent Hispanic (MSA);
14. number of new housing permits (county);
15. number of new housing permits (MSA);
16. median age (county);
17. median age (MSA);
18. 1 year percentage change days on market (county);
19. 1 year percentage change days on market (MSA);
20. 1 year percentage change number of listings (county);
21. 1 year percentage change number of listings (MSA);
22. number of bedrooms;
23. age of home;
24. year listed;
25. month listed.

(CX 560-019-020).

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).

Response to Finding No. 217:

The proposed finding is misleading and incomplete. The cited testimony of Dr. Williams is referring to all of his statistical analyses, not just the three in his initial report. (D. Williams, Tr. 1168-1169; *see also* DX 7-12 (demonstrative used by Dr. Williams entitled "Regression Results – From Williams Surrebuttal Report Table II")). The three statistical analyses in Dr. Williams's initial report show that Realcomp's Policies are associated with a statistically significant reduction in the share of Exclusive Agency listings of 5.51, 5.47, and 6.15 percentage points. (CX 498-A-042 (¶ 89 & n.104), 071 (table)). In his surrebuttal report, Dr. Williams's analyses controlled for the demographic variables that Dr. Eisenstadt claimed should be included. (CX 560-011-014, 020). These analyses show that Realcomp's Polices are associated with a statistically significant reduction in the share of Exclusive Agency listings of 5.5528 and 5.774. (CX 560-013).

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).

Response to Finding No. 218:

The proposed finding is misleading and contrary to the evidence. First, Dr. Williams in fact considered the economic and demographic characteristics of each local housing market that Dr. Eisenstadt believed should be considered. (CCRF ¶ 216; CX 560-012-014). As Dr. Williams explains in his surrebuttal report, "In order to directly test Dr. Eisenstadt's hypothesis that demographic variables and not the restrictions explain the large, significant difference in the percentage of non-ERTS listings used by home sellers on MLSs with restrictions compared to those without restrictions, I added the demographic variables to my probit model and re-estimated the model using Dr. Eisenstadt's data sample." (CX 560-013). Thus, in his surrebuttal report, Dr. Williams presented (among others) statistical analyses that controlled for following variables: (1) percent high school degree (county); (2) percent bachelor's degree (county); (3) median household income (county); (4) median housing price (zip code); (5) percent African American (zip code); (6) percent Hispanic (zip code); (7) number of new housing permits (county); (8) median age (county); (9) 1 year percentage change days on market (county); (10) 1 year percentage change number of listings (county); (11) number of bedrooms; (12) age of home; (13) year listed; and (14) month listed. (CX 560-019-020). Dr. Williams presented statistical analyses controlling for these factors using both his data set (which included all of the control MLSs) and Dr. Eisenstadt's data set (which excluded the other MLSs with website policies). (CX 560-012-014).

Second, the results of these statistical analyses are consistent with Dr. Williams's original analyses. (CX 560-013-014). Thus, these further analyses demonstrate that Dr. Williams's original analyses were not erroneous. (CX 560-013-014).

Third, as discussed below, Dr. Eisenstadt's statistical analyses contained errors and are unreliable. (*See* CCRF ¶¶ 228-229).

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*).

<u>Response to Finding No. 219:</u>

The proposed finding is misleading and incomplete. Dr. Williams did not use any "Control MSAs" in his "Time Series analysis." Dr. Williams selected control MSAs for his benchmark analyses. (CCPF ¶¶ 1085-1087). He then performed a statistical analyses on the data to confirm that the difference in the level of Exclusive Agency listings observed between the MLSs with restrictive policies and those without is associated with the Realcomp Policies. (CCPF ¶ 1098). Further, Dr. Williams used seven, not eight, factors to rank the MSAs. (CX 560-005). These factors, as Dr. Williams explained at trial, "theoretically may be related to the use" of Exclusive Agency listings, and therefore are "economically plausible criteria." (Williams, Tr. 1158-1160).

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*).

<u>Response to Finding No. 220:</u>

The proposed finding is misleading and contrary to the evidence. Dr. Williams did control for the seven factors used in the selection of the MSAs. (CX 560-011-014). The factors used to select the MSAs were: percentage change in the 1 year housing price index (MSA); percentage change in the 5 year housing price index (MSA); median housing price (MSA);

percent bachelor's degree (MSA); median household income (MSA); population; and population density. (RX 162). In his surrebuttal report, Dr. Williams presents various statistical analyses that controled for 25 variables (CCRF ¶ 216; CX 560-019-020; Eisenstadt, Tr. 1569-1570 (not using population and population density variables because of multicollinearity problem)).

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).

Response to Finding No. 221:

The proposed finding is misleading and contrary to the evidence. There was no "omission." Dr. Williams in fact performed statistical analyses that controlled for factors used in the selection of the control MSAs as well as a number of other factors. (CCRF ¶¶ 216, 220).

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).

Response to Finding No. 222:

The proposed finding is misleading and not supported by the weight of the evidence. Dr. Williams controlled for the economic and demographic variables that Dr. Eisenstadt claimed were affecting the use of Exclusive Agency listings. (CX 560-011-014). In all, Dr. Williams performed ten statistical analyses. (CX 498-A-041-042, 071 (tables); CX 560-011-014, 019-020 (tables)). Dr. Eisenstadt criticizes only the first three of these analyses while ignoring the rest. (CX 560-012-013 ("Dr. Eisenstadt has argued that the probit estimates contained in my April 3rd Expert Report are deficient because the model does not include demographic variables that he argues are important for explaining "the type of listing contract a seller chooses.")). Dr. Williams subsequently performed an additional seven analyses, demonstrating that (1) Dr. Eisenstadt's regressions were unreliable because of a "multicollinearity" problem and (2) when properly controlling for the variables Dr. Eisenstadt claimed were affecting the use of Exclusive Agency listings. The results still showed that Realcomp's Policies are associated with a reduction in the share of those listing of about 5.5 percentage points. (CX 560-011-014, 019-020 (tables); D. Williams, Tr. 1677-1678).

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).

Response to Finding No. 223:

The proposed finding is misleading and incomplete. The cited testimony of Dr. Williams is referring to all of his statistical analyses, not just the three in his initial report. (D. Williams, Tr. 1168-1169; *see also* DX 7-12 (demonstrative used by Dr. Williams entitled "Regression Results – From Williams Surrebuttal Report Table II")). Dr. Williams conducted a total of ten statistical analyses. (CX 498-A-041-042, 071 (tables); CX 560-011-014, 019-020 (tables)). The first three are contained in Dr. Williams's initial report. (CX 498-A-041-042, 071 (tables)). The remaining seven are contained in Dr. Williams's surrebuttal report. (CX 560-011-014, 019-020 (tables)). In his ten statistical analyses, Dr. Williams controls for a wide range of economic and demographic variables, including those that Dr. Eisenstadt claimed should be included. (CCRF ¶¶ 216, 220; CX 498-A-041-042, 071 (tables); CX 560-011-014, 019-020 (tables)).

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

Response to Finding No. 224:

The proposed finding is misleading and incomplete. The proposed finding refers only to the analyses in Dr. Williams's initial report. (CX 458-012 (n.19); CX 560-013 (n.23)). Dr. Williams conducted a total of ten statistical analyses. (CX 498-A-041-042, -071 (tables); CX 560-011-014, 019-020 (tables)). The first three were in his initial report. (CX 498-A-041-042, 071 (tables)). Dr. Williams conducted seven more statistical analyses in his surrebuttal report. (CX 560-011-014, 019-020 (tables)). Moreover, the analyses in his initial report found the variables for the number of bedrooms and the land area of the property (lot size) to be statistically significant. (CX 560-013 (n.23)).

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.

Response to Finding No. 225:

The proposed finding is not supported by the weight of the evidence. Although Dr. Eisenstadt did claim that the statistical analyses in Dr. Williams initial report only was a "restatement of his first comparative analysis," this conclusion is wrong. As Dr. Williams explains, because the statistical analyses in his initial report found variables other than the Realcomp Policies to be statistically significant, the analyses were not redundant with the benchmark analyses. (CX 560-006 (n.7), 013 (n.23)).

Moreover, the finding refers only to the analyses in Dr. Williams initial report. Dr. Williams subsequently performed an additional seven analyses, demonstrating that (1) Dr. Eisenstadt's regressions were unreliable because of a "multicollinearity" problem and (2) that when properly controlling for variables Dr. Eisenstadt claimed were affecting the use of Exclusive Agency listings, the results still show that Realcomp's Policies are associated with a reduction in the share of those listing of about 5.5 percentage points. (CX 560-011-014, 019-020 (tables); D. Williams, Tr. 1677-1678).

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.

Response to Finding No. 226:

The proposed finding is not supported by the evidence. Dr. Eisenstadt did not include in his analyses "a separate independent variable for each of the eight economic and demographic factors that Dr. Williams identified as relevant." The seven, not eight, variables used by Dr. Williams to select the MSAs were: percentage change in the 1 year housing price index (MSA); percentage change in the 5 year housing price index (MSA); median housing price (MSA); percent bachelor's degree (MSA); median household income (MSA); population; and population density. (RX 162). On cross-examination, Dr. Eisenstadt admitted that he excluded from his analyses two of these variables – population and population density. (Eisenstadt, Tr. 1569-1570).

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).

Response to Finding No. 227:

The proposed finding is misleading and not supported by the evidence. The finding accurately states the variables that Dr. Eisenstadt included in his regression analyses, but it incorrectly states that Dr. Williams did not consider these factors. In his surrebuttal report, Dr. Williams presents various statistical analyses that controlled for the following variables:

1. percent high school degree (county);

2. percent high school degree (MSA);
3. percent bachelor's degree (county);
4. percent bachelor's degree (MSA);
5. percentage change in the 1 year housing price index (MSA);
6. percentage change in the 5 year housing price index (MSA);
7. median household income (county);
8. median housing price (zip code);
9. median housing price (MSA);
10. percent African American (zip code);
11. percent African American (MSA);
12. percent Hispanic (zip code);
13. percent Hispanic (MSA);
14. number of new housing permits (county);
15. number of new housing permits (MSA);
16. median age (county);
17. median age (MSA);
18. 1 year percentage change days on market (county);
19. 1 year percentage change days on market (MSA);
20. 1 year percentage change number of listings (county);
21. 1 year percentage change number of listings (MSA);
22. number of bedrooms;
23. age of home;
24. year listed;
25. month listed.

(CX 560-019-020).

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).

Response to Finding No. 228:

The proposed finding is not supported by the weight of the evidence. Dr. Eisenstadt's conclusion that his "additional economic and demographic characteristics in fact should be included as independent variables" is not supported. Dr. Eisenstadt's addition of these variables is problematic for three reasons: (1) Dr. Eisenstadt's variables do not capture the characteristics he claims are important; (2) Dr. Eisenstadt includes duplicative variables for virtually every demographic characteristic; and (3) Dr. Eisenstadt violates a basic tenet of statistical analysis by introducing variables that create a "multicollinearity" problem. (CX 560-006).

1. Dr. Eisenstadt's Variables Do Not Capture the Characteristics He Claims Are Important

Dr. Eisenstadt argues that characteristics of home sellers, as reflected in demographic factors, are important variables for explaining the observed variation in the propensity to use Exclusive Agency listing types. (Eisenstadt, Tr. 1435-1437; CX 560-006).

According to Dr. Eisenstadt, a "seller is going to be interested in knowing about the economic and demographic characteristics of the buyers who exist in the buyer metropolitan area when choosing what type of listing to use." (Eisenstadt, Tr. 1437). According to Dr. Eisenstadt's hypothesis, a seller of a home, when deciding whether to use an Exclusive Agency or an Exclusive Right to Sell listing, is going to take into consideration such factors as the percent African American, percent Hispanic, and the median income for the MSA in which they live. (Eisenstadt, Tr. 1607-1608). There is no evidence in the record to support this hypothesis.

In this case, if demographic variables matter at all, they matter at the level of the individual home seller. (CX 560-006-007). That is, the education of the individual home seller may affect that home seller's choice of listing type. Likewise, if household income matters, it is the household income of the home seller that may affect that home seller's choice of listing type. (CX 560-006-007). The same is true for the race variable; it is the individual home seller's race that matters, if race should be expected to matter at all. (CX 560-006-007).

But even if there were sound reasons to expect that the race or some other demographic characteristic of the home seller should matter, Dr. Eisenstadt admitted that the data he used in his regression does not tell you anything about the characteristics of who actually bought and sold properties using Exclusive Agency listings. (Eisenstadt, Tr. 1605-1607).

Dr. Eisenstadt's approach therefore does not adequately capture the importance of these factors because he does not control for the demographics of the individual home seller. (CX 560-007). For instance, to control for the race of the seller, Dr. Eisenstadt instead includes a variable for the percentage of African-Americans in the entire MSA and the percentage of African-Americans in each zip code within the MSA. (CX 560-007). For example, in Denver-Aurora, Colorado, where the Denver MLS is located the percentage of the population that is African-American is 5.3%. (CX 560-007). Therefore, in his model, the race variable has the same value for every home seller that lists a home between 2002 and 2006 in Denver, regardless of their actual race. (CX 560-007).

The same is true for all of the other demographic variables. (CX 560-007). Within his statistical model, median age is not the age of the home seller. (CX 560-007). The median age variable has the same value for all home sellers in the MSA and the second median age variable has the same value for all home sellers in each county located within the MSA. (CX 560-007).

In short, Dr. Eisenstadt's demographic variables are not providing information about the race, age, household income, or education of the home seller at all. (CX 560-007). His variables capture something else. Because the demographic variables are measured at the MSA, county or zip code levels, they capture the identity of the geographic area of the MLS where the listing occurs. (CX 560-007-008).

2. Dr. Eisenstadt Improperly Included Two Variables for Many Characteristics

Dr. Eisenstadt's regressions include many economic and demographic variables twice. (D. Williams, Tr. 1668; illustrated in DX 12-2). For instance, the regressions contain two variables for the percent of high school education, percent bachelor's degrees, median household income, the percent African American, etc., at both the county and MSA level. (D. Williams, Tr. 1668-69; illustrated in DX 12-2). As Dr. Williams explained, even if you believe that these factors may matter, the fact that Dr. Eisenstadt included two variables for each of these factors does not make sense even on an intuitive common sense level. (D. Williams, Tr. 1668-1669).

In fact, Dr. Eisenstadt's statistical analysis includes duplicate measures of the exact same variable for 9 of his12 demographic and economic variables. (CX 560-008). In general, for nine variables, he includes a measure of the same variable at the MSA level and then includes a second measure of the exact same variable at either the county or zip code level. (CX 560-008). But given that you have taken account of the education level within the county, there is no sound economic reason to include the education level of the larger geographic area, namely the MSA. (CX 560-008).

By way of example, it is similar to knowing and including the education level of the individual home seller and then including the percent of high school graduates in the city where the home seller is located. (CX 560-008). What does including some city-wide measure of education tell us that the individual home seller's education level does not? (CX 560-008). By the same reasoning, what does including an MSA-wide measure of education, income, African-American origin, Hispanic origin or age tell us about the demographic characteristics of home sellers that county level or zip code level measures of these variables do not? (CX 560-008).

Dr. Eisenstadt interprets his statistical model as a model of individual choice of listing type. (CX 560-008). This implies measuring demographic characteristics at the individual level. However, in the absence of individual level data, the best proxy for individual demographic characteristics is the demographic characteristics of the smallest geographic area. (CX 560-008). Once such a measure has been included, it makes no economic sense to include the exact same variable again measured over a broader geographic area since both variables capture the same economic phenomena. (CX 560-008-009).

3. *By Adding Variables for the Same Characteristics at Both the MSA and County or Zip Code Level, Dr. Eisenstadt Created a "Multicollinearity" Problem*

A well known necessary condition of regression analysis is that the independent variables are, in fact, largely independent. (CX 560-009). In the statistical sense, this means that the independent variables are not themselves highly correlated with each other. (CX 560-009). If increases in education tend to be associated with increases in income, then income and education are said to be positively correlated. (CX 560-009). If they moved in opposite directions they are said to be negatively correlated. Whether the correlation between independent variables is positive or negative is less important than the fact that correlation exists. (CX 560-009). If the relationship between economic variables is strong (either positive or negative) such that the correlation is high, the regression technique is unable to separate the effects of the correlated independent variables. (CX 560-009). As a consequence, the coefficient estimates for the correlated variables are inefficient (i.e., the standard errors are highly inflated), and they cannot be reliably interpreted. (CX 560-009). The problem of high correlation between the independent variables is referred to as multicollinearity. (CX 560-009).

By including these economic and demographic variables twice, Dr. Eisenstadt created a "multicollinearity" problem. (D. Williams, Tr. 1669). In this context, multicollinearity means that two of the variables being used to explain the percentage of Exclusive Agency listings are highly correlated, they move together. (D. Williams, Tr. 1669-1670). The result of the fact that the variables move together means that it is virtually impossible to disentangle the separate effects of the two variables. (D. Williams, Tr. 1670).

Multicollinearity increases the variance in the regression parameters. (D. Williams, Tr. 1670). According to Dr. Peter Kennedy's text, A Guide to Econometrics, which is widely accepted in the field of economics, "Having high variances means that the parameter estimates are not precise (they do not provide the researcher with reliable estimates of the parameters) and hypothesis testing is not powerful (diverse hypotheses about parameter values cannot be rejected)." (D. Williams, Tr. 1670-1671; *see also* Eisenstadt, Tr. 1567-1569 (without knowing the source, disagreeing with Kennedy statement)). In other words, multicollinearity reduces the confidence that estimates from the regression are reliable. (D. Williams, Tr. 1671-1672).

To determine whether Dr. Eisenstadt's regressions had a multicollinearity issue, Dr. Williams determined the correlation between the coefficient estimates of the rule variable (the variable as to whether the MLS had a policy restricting exclusive agency listings) and the coefficient estimates of the other explanatory variables. (D. Williams, Tr. 1756; illustrated in DX 12-003 (note correction to title explained at D.Williams, Tr. 1756)). To do this, Dr. Williams used a diagnostic procedure within STATA (a statistics software program), which can determine whether there is collinearity between the explanatory variables. (D. Williams, Tr. 1757-1758). The results of this diagnostic procedure showed high correlation between the coefficient of the rule variable and the coefficients of a number of the other variables used by Dr. Eisenstadt. (CX 560-017 (note corrected title explained at D. Williams, Tr. 1756)).

The high multicollinearity in Dr. Eisenstadt's regressions means that it is impossible to use these analyses to determine the effect of the Realcomp Policies – the statistical procedure is incapable of disentangling the effects of the different variables. (D. Williams, Tr. 1676). Thus, even if one wanted to control for all of these variables, including them all "is going to muck up the results." (D. Williams, Tr. 1676).

The multicollinearity problem exists for several of the MSA-level variables that Dr. Eisenstadt included. (D. Williams, Tr. 1677; CX 560-017 (note corrected title explained at D. Williams, Tr. 1756)). But because Dr. Eisenstadt included two variables for a number of economic and demographic factors (*e.g.*, percent of bachelor's degree at the county level and percent of bachelor's degree a the MSA level), it is impossible to control for these factors at the county level without causing the multicollinearity problem. (D. Williams, Tr. 1677).

Dr. Eisenstadt's regression analyses are therefore unreliable.

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).

Response to Finding No. 229:

The proposed finding is not supported by the weight of the evidence. Dr. Eisenstadt's addition of these variables is problematic for three reasons: (1) Dr. Eisenstadt's variables do not capture the characteristics he claims are important; (2) Dr. Eisenstadt includes duplicative variables for virtually every demographic characteristic; and (3) Dr. Eisenstadt violates a basic tenet of statistical analysis by introducing variables that create a "multicollinearity" problem. (CCRF ¶ 228; *see also* CX 560-006). Moreover, the results make no sense and once corrected show that the Realcomp Policies are associated with a substantial reduction in the percentage of Exclusive Agency listings.

1. The Results of Dr. Eisenstadt's Regression Analyses Do Not Make Sense

A close look at Dr. Eisenstadt's regression analyses using the six control MLSs shows that it does not make sense. (D. Williams, Tr. 1663). For instance, according to Dr. Eisenstadt's regressions, as the housing market improves (*i.e.*, a "hot market"), the percentage of Exclusive Agency listings will go down. (D. Williams, Tr. 1664-1667). When the housing market goes down (*i.e.*, a buyer's market), according to Dr. Eisenstadt's regressions the share of Exclusive Agency listings will go up. (D. Williams, Tr. 1666-1667).

On cross-examination, Dr. Eisenstadt admitted this to be the case. The regression produced a coefficient for the one-year housing price index at the MSA level. (Eisenstadt, Tr. 1600; RX 161-031). This coefficient is negative, indicating that an increase in housing prices would reduce the percentage share of Exclusive Agency contracts. (Eisenstadt, Tr. 1601-1603). According to Dr. Eisenstadt's regression, in a soft housing market, as prices are going down, we should expect to see an increase in the use of Exclusive Agency listings. (Eisenstadt, Tr. 1602-1603).

Dr. Eisenstadt's regressions are therefore directly contrary to the testimony of Realcomp's own witness – Kelly Sweeney – that discount brokers do well in sellers' markets. (Sweeney, Tr. 1326-1327; Murray, Tr. 167-168). Moreover, Dr. Eisenstadt's regressions are directly contrary to Realcomp's theory that one of the reasons why there was a decline in exclusive agency listings in Southeastern Michigan was economic conditions. (D. Williams, Tr. 1667).

In addition, other factors show that Dr. Eisenstadt's results do not make sense. The regression produces coefficients for each independent variable, which supposedly show how a change in the independent variable would change the percentage of Exclusive Agency listings. (Eisenstadt, Tr. 1596-1600). For instance, the regression produced a coefficient of 0.0036828 for the variable percent high school degree at the MSA level. (Eisenstadt, Tr. 1596; RX 161-031). Thus, as Dr. Eisenstadt admitted, holding everything else constant, a one unit increase in this variable (whatever unit used in the regression) would result in a 0.36828 percentage point increase in the use of Exclusive Agency contracts (*e.g.*, from 2.0% to 2.368%). (Eisenstadt, Tr. 1599-1600).

But the regression also produced a coefficient of 0.5462778 for the variable percent African-American at the MSA level. (RX 161-031; Eisenstadt, Tr. 1603-1604). Applying the methodology that Dr. Eisenstadt admitted was correct for percent high school degree at the MSA level, a one unit increase (whatever the unit used) would result in a 54 percentage point increase in the use of Exclusive Agency contracts (*e.g.*, 1% to 55%). When cross-examined on this point, however, Dr. Eisenstadt quibbled about the size of the unit measurement and could not testify as to what was used for this variable. (Eisenstadt, Tr. 1604-1605). The numbers, however, show that his regression result does not comport with reality.

2. Correcting for Dr. Eisenstadt's Errors, the Analyses Show that Realcomp's Policies Reduce the Use of Exclusive Agency Listings

Correcting for the problems in Dr. Eisenstadt's analyses and redoing the analyses demonstrates that the Realcomp Policies are associated with a substantial reduction in the use of Exclusive Agency listings.

Dr. Williams corrected for the multicollinearity problem in Dr. Eisenstadt's analysis. (D. Williams, Tr. 1677-1678). To show the effect of multicollinearity, Dr. Williams initially dropped from Dr. Eisenstadt's model only one variable – Median Household Income (MSA). (CX 560-011). By dropping only this single variable, which the STATA program showed was correlated with the RULE variable, and making no other changes to Dr. Eisenstadt's model, the coefficient estimate for the variable for Realcomp's Policies is a statistically significant -0.02967. (CX 560-011, 019). This implies that the effect of the Realcomp restrictions is to reduce the percentage of Exclusive Agency listings by about 3 percentage points. (CX 560-011). When the Percent of African-American (MSA) variable is also dropped (Model 2), the coefficient estimate for the RULE variable shows an even larger effect of about 3.2 percentage point reduction in non-ERTS listings. (CX 560-011, 019).

Because the best proxy for individual demographic characteristics is the demographic characteristics of the smallest geographic area and the MSA level variable caused the multicollinearity problem, Dr. Williams reran the regressions after excluding all of the demographic variables measured at the MSA level from the statistical model. (CX 560-011). All demographic and economic variables other than those measured at the MSA level were included. (CX 560-011). The result of completely eliminating the multicollinearity problem caused by including the MSA level variables into the statistical model is that the coefficient estimate for the RULE variable equals a statistically significant -0.052. (CX 560-011, 019). This implies that the Realcomp restrictions are associated with about a 5.2 percentage point reduction in the percent share of Exclusive Agency listings. (CX 560-011).

For completeness, Dr. Williams also added median housing price measured at the zip code level-i.e., Median Housing Price (Zip Code). (CX 560-012). Median housing price is the only demographic variable that Dr. Eisenstadt did not duplicate by including it in the model twice. (CX 560-012). He included only median housing price measured at the MSA level ("Median Housing Price (MSA)"). (CX 560-012). Therefore, excluding the MSA level variables in order to correct for the multicollinearity problem eliminates median housing price as an independent variable altogether. (CX 560-012). Dr. Williams collected median housing price data at the zip code level and re-estimated the statistical model. (CX 560-012). Adding this variable does not alter the qualitative conclusion that Realcomp's access restrictions are associated with a statistically significant decrease in the percent of Exclusive Agency listings, even after controlling for all of the demographic variables that Dr. Eisenstadt argues should be included in the statistical model. (CX 560-012, 019).

Using Dr. Eisenstadt's sample, which excludes MLSs with restrictions other than Realcomp, and eliminating the obvious multicollinearity problem by excluding the MSA-level demographic variables, Dr. Eisenstadt's own model shows that Realcomp's restrictions are associated with a statistically significant 5.2 percentage point decrease in non-ERTS contracts. (CX 560-012).

Dr. Williams also reran his own statistical analysis adding the economic and demographic variables that Dr. Eisenstadt believed were significant. (CX 560-013). Dr. Williams did this using both a data set that included the MLSs that had restrictions similar to Realcomp's and a data set that did not include those MLSs. (CX 560-013). Each of these analyses resulted in substantially similar results. (CX 560-013-014). The analyses showed that Realcomp's restrictions were associated with a reduction in non-ERTS listings of 5.5 to 5.8 percentage points. (D. Williams, Tr. 1678-1679; CX 560-013-014, 020).

Based on these statistical analyses, but for the Realcomp restrictions, the expected share of non-ERTS listings in the Realcomp MLS would be approximately 6 to 7%. (D. Williams, Tr. 1679).

Dr. Eisenstadt admitted on cross-examination that, given some assumptions, a five percentage point difference of Exclusive Agency listings between Realcomp and other MLSs that did not have the rule would be indicative of an exercise of market power. (Eisenstadt, Tr. 1493). He also admitted that this exercise in market power – causing consumers to switch from Exclusive Agency to Exclusive Right to Sell listings – would result in a significant increase in the commissions earned by traditional brokers. (Eisenstadt, Tr. 1493-1494). Once corrected, Dr. Eisenstadt's own analyses demonstrate that Realcomp's Policies are an exercise of market power resulting in an increase in commissions earned by traditional brokers. Even if one were to credit Dr. Eisenstadt's regressions, they show that website policies are associated with reducing limited service brokerage activity. For instance, his regressions show that the website policies in Boulder and Williamsburg were associated with reductions in the number of Exclusive Agency listings of 2.7 and 2.0 percentage points respectively. (Eisenstadt, Tr. 1610-1611). In addition, he admitted that the Realcomp Policies were associated with an "expected downward effect" on Exclusive Agency listings. (Eisenstadt, Tr. 1618).

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).

Response to Finding No. 230:

The proposed finding is not supported by the weight of the evidence. Dr. Eisenstadt's regression that included the MLSs with website policies suffers from the same problems as his other regressions. (CCRF ¶¶ 228-229; *see also* RX 161-031-032 (showing same variables used in regressions)). The regression is therefore unreliable. (CCRF ¶¶ 228-229).

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).

Response to Finding No. 231:

The proposed finding is not supported by the weight of the evidence. Dr. Eisenstadt's regression that included the MLSs without website policies suffers from the same problems as his other regressions. (CCRF ¶¶ 228-229; *see also* RX 161-031-033 (showing same variables used in regressions)). The regression is therefore unreliable. (CCRF ¶¶ 228-229).

Moreover, because a clever use of statistics can be used to manipulate data in order to achieve a desired result, it is important to check the credibility of the statistical results against the economic logic that motivates the statistical analysis. (CX 560-014). Dr. Eisenstadt claims that the large, significant difference in the percentage of Exclusive Agency listings is explained entirely by demographic and economic factors. (CX 560-014). But this implies that there is little or no demand for Exclusive Agency listings, which means that there is no procompetitive justification for collective action to impose restrictions aimed at competition from unbundled, discount brokers. (CX 560-015).

In other words, there would be no reason for Realcomp to adopt the Policies, if, in the absence of the Policies, there would be very few Exclusive Agency listings in the Realcomp MLS. Regardless of whether Realcomp's Policies were adopted to reduce the competitive threat to traditional, full-service brokers posed by new-model discount brokers (as argued by Complaint Counsel and demonstrated by other evidence, *see* CCPF ¶¶ 765-1068), or to prevent free-riding (as argued by Realcomp), Dr. Eisenstadt's conclusions are inconsistent with both the large volumes of evidence introduced by Complaint Counsel and with Realcomp's own arguments.

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).

Response to Finding No. 232:

The proposed finding is incomplete and misleading. First, as Dr. Williams explained at trial, it is not possible to directly measure the effect of Realcomp's Policies on brokerage fees because data on brokerage fees is not available. (D. Williams, Tr. 1272). Dr. Williams did, however, explain in detail why the evidence shows that Realcomp's Policies caused consumers to pay more in brokerage fees and likely maintained higher traditional full-service brokerage fees. (CCPF ¶¶ 1207-1233). Not only did Dr. Eisenstadt fail to rebut this evidence, he admitted that the Policies caused consumers to pay higher brokerage fees. According to him, Realcomp's Policies caused some consumers to switch to "flat fee ERTS" listings, which are typically several hundred dollars more than Exclusive Agency listings. (CX 133-029-030). In addition, the price of Exclusive Right to sell contracts, including flat fee Exclusive Right to Sell contracts, required that these consumers pay the full offer of compensation for the services of a cooperating broker, regardless of whether such services were actually provided. (CCRF ¶ 241).

Second, although Dr. Williams did not attempt to directly measure the effect of Realcomp's policies on house prices and days on market, he did control for both of these factors in his statistical analyses. (CX 560-019 (controlling for changes in house prices and days on market)). In addition, Dr. Williams demonstrated the multiple problems with Dr. Eisenstadt's attempt to measure the effect on these factors. (CCRF ¶¶ 158-159, 233-239).

Third, Dr. Williams provided unrebutted evidence that Realcomp's policies harm consumers by limiting consumer choice. (CCPF ¶¶ 1200-1206). In addition, the unrebutted evidence shows that Realcomp's Policies limit output. (CCPF ¶¶ 1234-1243).

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). 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.

Response to Finding No. 233:

The proposed finding is incomplete. Even with these studies that he purported to rely on, Dr. Eisenstadt could not even interpret his own sales price regression. For instance, in his initial report, Dr. Eisenstadt claimed that a coefficient in his regression equation represented "the proportional difference between the average price of the ERTS property sold in Realcomp relative to an ERTS property sold in Ann Arbor." (CX 133-046; Eisenstadt, Tr. 1561). Similarly, he testified at his deposition that this coefficient "measures the proportional amount, higher or lower, by which an ERTS property sells in Realcomp relative to Ann Arbor, after comparing the home characteristics and location characteristics." (Eisenstadt, Tr. 1561). But Dr. Eisenstadt later recanted, admitting that his interpretation was wrong and admitting that he could not give an interpretation of this regression coefficient. (Eisenstadt, Tr. 1562-1563; CX 460-002-003). Thus, the evidence does not support the inference that Dr. Eisenstadt's regressions were based on any reliable model.

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.

Response to Finding No. 234:

The proposed finding is misleading, incomplete, and not supported by the evidence. As discussed in detail below, Dr. Eisenstadt's two "studies" (*i.e.*, regression analyses) of the sales price of homes sold under Exclusive Agency listings are flawed, untrustworthy, and fail to demonstrate what Realcomp claims they demonstrate. (CCRF ¶¶ 235-239).

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 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).

Response to Finding No. 235:

The proposed finding is misleading, incomplete, and not supported by the evidence. Dr. Eisenstadt's regression analyses do not, as Realcomp represents, "compare the home sale prices for residential properties in the Realcomp service area . . . against those for homes in the Ann Arbor MLS." Dr. Eisenstadt admitted that the city of Detroit is in the Realcomp service area (it is in Wayne county), yet he removed all of the Detroit listings from the data for his sales price regressions. (Eisenstadt, Tr. 1543). By removing these Realcomp MLS listings, Dr. Eisenstadt took out of the data about 25,000 to 27,000 listings. (Eisenstadt, Tr. 1544). In addition, when he did his sales price regression, Dr. Eisenstadt took out of the Ann Arbor MLS data all listings for property outside of Washtenaw county. (Eisenstadt, Tr. 1544).

This is a major methodological flaw. (D. Williams, Tr. 1657). Dr. Eisenstadt's regression analyses are not comparing homes in the "Realcomp service area" with "homes in the Ann Arbor MLS." (D. Williams, Tr. 1657). By excluding Detroit from the analysis, Dr. Eisenstadt excluded a large part of the Realcomp MLS. (D. Williams, Tr. 1657). Dr. Eisenstadt thus compared only part of the Realcomp MLS to part of the Ann Arbor MLS. (D. Williams, Tr. 1657).

Dr. Eisenstadt tried to justify excluding Detroit from the Realcomp data so that he could compare suburban areas with suburban areas. (Eisenstadt, Tr.1549). But the relevant economic question is not how suburban areas compare to suburban areas; rather, the question is how the Realcomp MLS compares to the Ann Arbor MLS, and clearly Detroit is part of the Realcomp MLS. (D. Williams, Tr. 1658).

What is more, by removing the Detroit data and all of the data from the Ann Arbor MLS outside of Washtenaw county, Dr. Eisenstadt ended up with a very small sample. After removing all of these data, there remained only 100 or so properties that sold under Exclusive Agency listings in the remaining Realcomp MLS data. (Eisenstadt, Tr. 1546-1547). Dr. Eisenstadt also ended up with only 24 or 25 such properties in the remaining Ann Arbor MLS data. (Eisenstadt, Tr. 1547). Thus, all of Dr. Eisenstadt's empirical results regarding the sale price of homes and Exclusive Agency listings focus on the difference in sales prices between these 24 or 25 properties in Washtenaw county and 100 or so properties listed the Realcomp service area minus the city of Detroit. (CX 557-A-027, 039).

Thus, Dr. Eisenstadt's sales price regression analyses (1) are not addressing the correct issue because they do not compare the Realcomp MLS to the Ann Arbor MLS and (2) are untrustworthy because the result is based on a sample of very few homes.

Moreover, Dr. Eisenstadt could not even interpret his own sales price regression. For instance, in his initial report, Dr. Eisenstadt claimed that a coefficient in his regression equation represented "the proportional difference between the average price of the ERTS property sold in Realcomp relative to an ERTS property sold in Ann Arbor." (CX 133-046; Eisenstadt, Tr. 1560). Similarly, he testified at his deposition that this coefficient "measures the proportional amount, higher or lower, by which an ERTS property sells in Realcomp relative to Ann Arbor, after comparing the home characteristics and location characteristics." (Eisenstadt, Tr. 1561). But Dr. Eisenstadt later recanted, admitting that his interpretation was wrong and admitting that he could not give an interpretation of this regression coefficient. (Eisenstadt, Tr. 1562-1563; CX 460-002-003).

Further, Dr. Eisenstadt's analyses do not "measure the effects of the Realcomp Policies on sales prices of EA-listed properties." On cross-examination, Dr. Eisenstadt admitted that (at most) his sales price regression merely shows a correlation between sales price and the presence of Realcomp's Policies. (Eisenstadt, Tr. 1551-1552). The sales price regression does not show a causal connection. (Eisenstadt, Tr. 1551). To infer a causal connection, there must be an economic theory that connects the higher average sales price to the Realcomp Policies.

(Eisenstadt, Tr. 1551-1552). As described below, Dr. Eisenstadt's theory is contrary to the evidence in this case. (CCRF ¶ 236). Thus, even if the results of the regression were correct, they do not show that Realcomp's Policies benefitted consumers.

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).

Response to Finding No. 236:

The proposed finding is misleading, incomplete, and not supported by the evidence. Dr. Eisenstadt's sales price regressions are untrustworthy because of his methodological flaw. (CCRF ¶ 235). In addition, the sales price regression suffers from an economic flaw. (D. Williams, Tr. 1657, 1659).

As Dr. Williams explained, statistics are only a tool to help us understand the real world and inform our economic opinions. (D. Williams, Tr. 1659). As explained above, Dr. Eisenstadt admitted that this regression analysis shows only correlation, not causation. (CCRF ¶ 235). Thus, it does not show that Realcomp's Policies were the reason for the higher sales prices. (CCRF ¶ 235). The credibility of statistical results must be tested against economic theory, economic intuition, and common sense. (D. Williams, Tr. 1659).

Dr. Eisenstadt's theory is that the 100 Exclusive Agency homes in his sample of Realcomp listings sold for more (on average) than the 24 or 25 homes in his sample of the Ann Arbor MLS because the Realcomp Policies give cooperating brokers an "increased incentive" to show Exclusive Agency listings. (Eisenstadt, Tr. 1553; CX 557-A-038). In other words, Dr. Eisenstadt claims that by limiting the exposure of Exclusive Agency listings, the Realcomp Policies actually help both limited-service brokers and consumers using those listings. (D. Williams, Tr. 1659; CX 557-A-038).

Dr. Eisenstadt admitted, however, that he did no survey of brokers to see whether preventing Exclusive Agency listings from going to the Internet gives them a greater incentive to show those listings. (Eisenstadt, Tr. 1553). In fact, Dr. Eisenstadt admitted this was just an unsupported theory of his. (Eisenstadt, Tr. 1553). But there is no evidence at all to support Dr. Eisenstadt's theory. To the contrary, the evidence refutes his theory.

Dr. Eisenstadt's theory is completely undermined by the evidence in this case. The evidence shows that wide exposure of listing is critical for selling a home. (CCPF ¶¶ 454-462, 536-676). Moreover, there is no evidence that limited service brokers want less exposure for exclusive agency listings. (D. Williams, Tr. 1659). In fact, the evidence uniformly shows that limited service brokers want more exposure for these listings. (CCPF ¶¶ 454-462, 536-676, 881-885). Thus, the brokers who are on the ground, dealing with consumers, trying to attract consumers to their business on a day-to-day basis, directly contradict Dr. Eisenstadt's theory. (D. Williams, Tr. 1660). If Dr. Eisenstadt's theory were correct, limited service brokers would be out advertising that less exposure is good for their listings, and they certainly would not be asking for Realcomp's Policies to be rescinded. (D. Williams, Tr. 1660).

Moreover, Dr. Eisenstadt's theory is also inconsistent with the fact that consumers have demonstrated that they want exposure for their exclusive agency listings by, for instance, paying extra fees so that their listings go to Realtor.com. (CCPF ¶¶ 1156-1173; D. Williams, Tr. 1660-1661). Why would consumers pay extra for Internet exposure that would, under Dr. Eisenstadt's theory, result in a lower selling price? (D. Williams, Tr. 1661).

In addition, Dr. Eisenstadt's theory is inconsistent with the testimony of Realcomp Governors, other full-service brokers, and Mr. Murray, that more exposure for listings means higher prices, faster selling time, etc. (CCPF ¶¶ 454-462; D. Williams, Tr. 1661-1662).

Dr. Eisenstadt therefore expects the Court to believe that his theory is correct while the testimony and evidence from limited service brokers, consumers, Realcomp Governors, full-service brokers, and an expert in the real estate industry are all wrong. (D. Williams, Tr. 1662). Dr. Eisenstadt's theory, however, "defies common sense." (CX 557-A-039).

In the absence of an economic basis for interpreting a correlation as causation, Dr. Eisenstadt's regressions can only show correlation, *i.e.*, that the higher sales price and the Realcomp Policies both happen to exist in those limited parts of the Realcomp service area that Dr. Eisenstadt examined. (CX 557-A-040).

Dr. Williams conducted a detailed examination of the data that suggests Dr. Eisenstadt has merely detected a correlation between sales price and type of listing on Realcomp. (CX 557-A-040). A detailed look at the data show that the characteristics of Exclusive Agency listed homes in Realcomp differ systematically from the characteristics of Exclusive Agency listed homes on the Ann Arbor MLS. (CX 557-A-040). These differences in characteristics are likely to be correlated with housing prices. (CX 557-A-040).

For example, in the Realcomp MLS, Exclusive Agency listed homes are, on average, 10 years newer than Exclusive Right to Sell listed homes, whereas in Ann Arbor, they are roughly the same age. (CX 557-A-040). Also, in the Realcomp MLS, Exclusive Agency listed homes are on average over 200 square feet bigger than Exclusive Right to Sell listed homes, whereas in the Ann Arbor MLS, they are 125 square feet smaller. (CX 557-A-040). The data therefore show that there are systematic differences in the pool of houses that were sold on Realcomp and Ann Arbor. (CX 557-A-040).

These systematic differences explain why the statistical results show that the sale prices are greater for the 100 or so Exclusive Agency homes listed on the Realcomp MLS. (CX 557-A-040). Newer homes and bigger homes typically have higher sales prices and they may differ in terms of other characteristics for which Dr. Eisenstadt does not control, such as being newly renovated or possessing curb appeal. (CX 557-A-040). If there are housing characteristics that systematically differ between Realcomp and Ann Arbor that are not controlled for in Dr. Eisenstadt's statistical model, the effect of these characteristics will show up in the regression analysis as an effect of the Realcomp restrictions, but it would be incorrect to interpret the results in this way. (CX 557-A-040).

In fact, Dr. Eisenstadt admitted that home sellers who believe that their homes will sell easily would be more likely to use Exclusive Agency listings. (Eisenstadt, Tr. 1557-1558). He also admitted that there are unobservable characteristics that could make it more likely that a seller use an Exclusive Agency listing. (Eisenstadt, Tr. 1557). For instance, a seller whose home has greater "curb appeal" may be more likely to use an Exclusive Agency listing. (Eisenstadt, Tr. 1557-1558). He did not control for such factors. (CX 557-A-040).

Dr. Eisenstadt thus did not control for a number of factors that can affect the sales price of a home and how quickly it sells. For instance, he did not control for such factors as whether the home has a remodeled kitchen, a remodeled bathroom, or was recently painted. (Eisenstadt, Tr. 1558-1559).

An alternative interpretation better fits the statistical results. (CX 557-A-040). Because the Realcomp Policies reduce the exposure of Exclusive Agency listings, it would make economic sense to use Exclusive Agency listings on the Realcomp MLS only if the expected savings in brokerage costs are sufficiently large to compensate for the competitive disadvantage created by the Realcomp restrictions. (CX 557-A-040-041). Because the brokerage cost savings are proportional to the price of the home, this implies that it is more likely to make economic sense to use Exclusive Agency listings for higher priced homes on the Realcomp MLS. (CX 557-A-041). In contrast, in the absence of restrictions that reduce the marketability of Exclusive

Agency listings on the Ann Arbor MLS, one would not expect the propensity to use Exclusive Agency listings to favor primarily higher-priced homes. (CX 557-A-041).

This is why Dr. Eisenstadt's statistical results show that houses using Exclusive Agency listings have sale prices that are higher, relative to Exclusive Right to Sell-listed homes, on the Realcomp MLS compared to the Ann Arbor MLS. (CX 557-A-041). Since there is no restriction on Exclusive Right to Sell listings on Realcomp, there is no bias toward listing only higher-priced houses using them. (CX 557-A-041). In addition, the presence of restrictions for Exclusive Agency listings on Realcomp makes these listings economically less viable as a marketing method for lower-priced homes and induces home sellers of lower-priced homes who would have used Exclusive Agency listings but-for the restrictions to use Exclusive Right to Sell listings. (CX 557-A-041). Both consequences of the Realcomp restrictions – the absence of a bias toward higher-priced homes for Exclusive Right to Sell listings and substitution of Exclusive Right to Sell listings for Exclusive Agency listings by sellers of lower-priced homes – imply that the sale prices for homes using Exclusive Agency listings on Realcomp will be greater on average than the sale prices for Exclusive Right to Sell listings on Realcomp. (CX 557-A-041).

In sum, the data suggest that Dr. Eisenstadt's regression is not capturing the effect of listing type on sales price, but rather, the effect of sales price on the propensity to use a Exclusive Agency listing. (CX 557-A-041). The result that, in the Realcomp MLS, Exclusive Agency listed homes tend to be more expensive homes than Exclusive Right to Sell listed homes, whereas in the Ann Arbor MLS they tend to be similar to the average Exclusive Right to Sell listed homes, supports the conclusion that the Realcomp restrictions have anticompetitively restricted the use of Exclusive Agency listings. (CX 557-A-041-042). In particular, the result suggests that Realcomp's Website Policy and Search Function Policy have restricted the use of Exclusive Agency listings by sellers of lower-priced homes. (CX 557-A-042).

In short, Dr. Eisenstadt's theory that cooperating brokers have increased incentives to show Exclusive Agency listings because of the Realcomp Website Policy, which in turn causes the sales price of these homes to increase, is not supported by the evidence. Moreover, given Dr. Eisenstadt's position that the Realcomp Policies have not had an effect on the use of Exclusive Agency listings, it "requires incredibly complicated intellectual acrobatics to, on the one hand, argue that Realcomp's restrictions have no effect and then, on the other hand, argue that the same restrictions have an enormous effect on the sale price of homes." (CX 560-015).

Thus, even if the results of the regression were correct, they do not show that Realcomp's Policies benefitted consumers.

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).

Response to Finding No. 237:

The proposed finding is misleading, incomplete, and not supported by the evidence. Dr. Eisenstadt's sales price regression is fundamentally flawed and untrustworthy. (CCRF ¶¶ 235-236). The finding seeks to imply that home sellers using Exclusive Agency listings in Realcomp benefitted from the Realcomp Policies. As discussed above, this implication is false, misleading, and contrary to the evidence. (CCRF ¶¶ 235-236).

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.)

Response to Finding No. 238:

The proposed finding is misleading, incomplete, and not supported by the evidence. The methodology used by Dr. Eisenstadt for this sales price regression is flawed for the same reasons that his sales price regression using the Ann Arbor MLS data from Washtenaw county. (CX 560-015; CCRF ¶¶ 235-236). When he did his sales price regression using these five other MLSs, Dr. Eisenstadt excluded all of the listings in Detroit from the Realcomp MLS data. (Eisenstadt, Tr. 1550). He did not exclude any cities in any of the other MLSs. (Eisenstadt, Tr. 1550-1551). This raises the same issue as with Dr. Eisenstadt's regression using Ann Arbor – the regression is not comparing the Realcomp MLS to the other MLSs; it is comparing only part of the Realcomp MLS to these other MLSs in their entirety. (D. Williams, Tr. 1658). Moreover, the other flaws with Dr. Eisenstadt's methodology also apply here. (CX 560-015; CCRF ¶¶ 235-236).

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).

Response to Finding No. 239:

The proposed finding is misleading, incomplete, and not supported by the evidence. Dr. Eisenstadt's sales price regression using these MLSs suffers from the same flaws with his regression using selected portions of the Ann Arbor MLS data. (CX 560-015; CCRF ¶ ¶ 235-236).

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).

Response to Finding No. 240:

The proposed finding is misleading, incomplete, and not supported by the evidence. (*See* CCRF ¶ 241).

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).

Response to Finding No. 241:

The proposed finding is misleading, incomplete, and not supported by the evidence. Dr. Eisenstadt's calculation of the increased brokerage fees is both incorrect and substantially understates the harm to consumers caused by Realcomp's Website Policy and Search Function Policy. First, Dr. Eisenstadt's calculation is flawed because his assumption of the impact on the share of Exclusive Agency listings is not supported by the evidence. In his attempt to quantify the impact of the Realcomp Policies on consumers, Dr. Eisenstadt assumed that the Realcomp Policies reduced the share of Exclusive Agency listings by only one percentage point. (Eisenstadt, Tr. 1449-1450). The weight of the evidence shows, however, that Realcomp's Policies reduced the share of Exclusive Agency listings by much more than a mere one percentage point. (CCPF ¶¶ 1069-1113).

Second, even assuming only a one percentage point decline, Dr. Eisenstadt's calculation of the harm to sellers who switch to Exclusive Right to Sell listings misses the fundamental difference between the two listings types – that sellers with Exclusive Agency listings may avoid paying a cooperating broker commission if no cooperating broker is involved. (CCPF ¶¶183-187; *see also* CX 133-033 (Eisenstadt Expert Report stating, "In contrast [to an Exclusive Agency contract], a seller with an ERTS contract pays a selling agent's commission whether or not the buyer is represented by a selling agent."); Joint Glossary at 3 ("selling broker" is type of cooperating broker)). In calculating the impact on consumers who would have preferred to purchase Exclusive Agency listing but because of the Realcomp Policies switched to Exclusive Right to Sell listings, assumed that these consumers each paid only $200 more for a "flat fee ERTS listing." (Eisenstadt, Tr. 1451, 1499). Dr. Eisenstadt, however, failed to account for the fact that sellers using Exclusive Agency listings – unlike those using Exclusive Right to Sell listings – do not have to pay the offer of compensation if no cooperating broker is involved. (CCPF ¶¶ 183-187; CX 560-015). As Realcomp admits, these sellers can "avoid paying a cooperating brokers commission." (Realcomp Post-Trial Brief at 6, 44).

According to Dr. Eisenstadt's own report, brokers offering these "flat fee ERTS listings" include Greater Michigan Realty and Michiganlisting.com. (CX 133-030 (footnote 84); Eisenstadt, Tr. 1515). Ms. Moody testified at trial that under the Greater Michigan Realty Exclusive Right to Sell listings, if there is no cooperating broker involved, the seller must pay the offer of compensation to Greater Michigan Realty. (D. Moody, Tr. 489-490; CCPF ¶¶184, 203). Mr. Mincy similarly testified that under the Exclusive Right to Sell listings at Michiganlisting.com, if there is no cooperating broker involve, the seller must still pay the offer of compensation to Michiganlistings.com. (Mincy, Tr. 371, 373-374). When giving his testimony at trial, however, Dr. Eisenstadt was not aware of this testimony. (Eisenstadt, Tr. 1515-1517).

Dr. Eisenstadt admitted that sellers using Exclusive Agency listings are able to avoid paying the offer of compensation in about 25% of transactions. (Eisenstadt, Tr. 1517-1518; *see also* CCPF ¶ 1155). He also accepted that for over 90% of Exclusive Agency listings the offer of compensation is 3%. (Eisenstadt, Tr. 1519). Thus, under cross-examination at trial, Dr. Eisenstadt calculated (using all his other assumptions) that if the 1% of sellers that he claimed switched to Exclusive Right to Sell listing because of the Realcomp Policies switched to listings with brokers like Greater Michigan Realty, these sellers would end up paying approximately $1.08 million more per year in commissions. (Eisenstadt, Tr. 1517-1521).

Moreover, if Realcomp's Policies caused a mere 0.5% of sellers to switch to using full-service brokers, under cross-examination at trial Dr. Eisenstadt calculated (using all his other assumptions) the impact on these sellers to be approximately $2.2 million per year. (Eisenstadt, Tr. 1500-1511).

Further, Dr. Eisenstadt did not account for those home sellers who could not sell their homes because of limited exposure for Exclusive Agency listings; his calculation of "benefits" only accounts for homes that sold. The evidence consistently shows that Realcomp Policies have limited the selling activity of homes listed under Exclusive Agency contract. (CCPF ¶¶ 1037, 1049, 1055). For instance, Denise Moody testified that Greater Michigan Realty Exclusive Agency listings in other MLSs are more successful in terms of sales than those in the Realcomp MLS. (CCPF ¶ 1037). On the other hand, customers in the Realcomp MLS are more likely to cancel their listing because their home has not sold. (CCPF ¶ 1079). Similarly, Jeffrey Kermath of Amerisell testified that a large percentage of his Exclusive Agency customers will later upgrade to Exclusive Right to Sell listings and obtain more activity. (CCPF ¶ 1055).

Third, Dr. Eisenstadt's calculation fails to account for several other consumer harms caused by Realcomp's Policies. These harms are caused to buyers, sellers who switch to selling without a broker, and sellers who continue to use Exclusive Right to Sell listings.

Realcomp's Policies cause harm to certain buyers. Dr. Eisenstadt admitted that certain buyers "would prefer to purchase non-ERTS homes" and "as a result of the two restrictions [(the Realcomp Policies)], instead they purchase an ERTS property because the non-ERTS properties are somewhat less visible to them through advertising." (Eisenstadt, Tr. 1396-1397). In other words, these buyers "wind up purchasing less preferred properties." (Eisenstadt, Tr. 1396, 1456).

But Dr. Eisenstadt admitted that he did not quantify the effect in dollar terms. (Eisenstadt, Tr. 1456-1457).

Dr. Eisenstadt also admitted that the Realcomp Policies caused some consumers to switch to for-sale-by-owner listings. (Eisenstadt, Tr. 1459). He admitted that this switch could affect the sale price of the sellers' homes. (Eisenstadt, Tr. 1459). But Dr. Eisenstadt did not measure this effect on consumers. (Eisenstadt, Tr. 1459, 1486).

Moreover, Dr. Eisenstadt further admitted that the Realcomp Policies limited consumer choice. (*See also* CCPF ¶¶1200-1206). According to his own testimony, some sellers who would have preferred to use Exclusive Agency listings instead sell by For Sale by Owner. (Eisenstadt, Tr. 1487-1488). He also admitted that because of the Realcomp Policies, some sellers who would have used Exclusive Agency chose instead to purchase Exclusive Right to Sell listings, which are more expensive. (Eisenstadt, Tr. 1488-1489). In other words, because of Realcomp's Policies, consumers were forced to purchase services that they did not want or need. (CCPF ¶¶1228-1233). Lastly, Dr. Eisenstadt admitted that the Realcomp Policies may cause home sellers who use Exclusive Right to Sell listings to pay higher brokerage fees. As he admitted, "These sellers would be adversely affected by Realcomp's restrictions if those practices have the effect of inflating or maintaining listing fees above the competitive level." (Eisenstadt, Tr. 1490). He also admitted that price pressure from discount brokers could drive down traditional listing broker commissions. (Eisenstadt, Tr. 1497-1498). Dr. Eisenstadt, however, did not do any analysis to quantify this effect. (Eisenstadt, Tr. 1489-1490). In fact, the weight of the evidence shows that Realcomp's Policies likely protect and maintain higher broker fees and reduced the output of broker services. (CCPF ¶¶1207-1227, 1234-1243).

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).

Response to Finding No. 242:

The proposed finding is misleading and misstates the testimony. Dr. Williams did testify that there is no free riding problem. (D. Williams, Tr. 1639-1656; CCPF ¶¶1256-1265). His opinions and reasoning are set forth in his testimony and in his expert reports. (CX 498-A-049-055; CX 557-042-049).

Dr. Williams' testimony, however, is not that "an EA listing agent does not 'free ride,'" but that "there's no free riding on the listing broker's services." (D. Williams, Tr. 1642). In other words, Dr. Williams testified that the seller using an Exclusive Agency listing is not free riding on the listing broker. (D. Williams, Tr. 1642; CX 498-A-051; CCPF ¶1258). Free riding occurs when a customer partakes of the services of one seller and then makes a purchase from another seller. (D. Williams, Tr. 1639). The seller is not free riding on any services of the listing broker because the home seller pays the listing broker for those services. (D. Williams, Tr. 1642; CX 498-A-051; CCPF ¶1258)

Nor did Dr. Williams testify that "cooperating agents do not free ride." Rather, Dr. Williams testified that home sellers using Exclusive Agency listings do not free ride on cooperating brokers. (D. Williams, Tr. 1643-1652; CCPF ¶¶1259-1263). As Dr. Williams stated, "the fact that a commission is not paid to the cooperating broker does not constitute a free-rider problem by either the home buyer or the home seller." (CX 498-052). The reason is simple. Home sellers using Exclusive Agency listings are not using any of the services of a cooperating broker unless the cooperating broker procures a buyer, in which case the seller pays for that service through the offer of compensation. (CCPF ¶1262; D. Williams, Tr. 1098; *see also* CCPF ¶ 173). Nor are cooperating brokers somehow "subsidizing" these listings. (CCPF ¶1263; CCRF ¶¶ 186-192).

Dr. Williams also established that home sellers using Exclusive Agency listings do not free ride on the services of the Realcomp MLS. (CCPF ¶1264; D. Williams, Tr. 1652-1656). Realcomp is compensated for its services by member fees, including the listing broker representing the home seller. (CCPF ¶ 1264).

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).

Response to Finding No. 243:

The proposed finding is misleading and misstates the testimony. Dr. Williams did establish that the Realcomp Policies benefit only Realcomp brokers, not consumers. (D. Williams, Tr. 1654-1655; CCPF ¶1265). This is consistent with Dr. Eisenstadt, who admitted that the purpose of Realcomp's Website Policy is merely to "protect members of Realcomp." (Eisenstadt, Tr. 1588).

But Dr. Williams did not testify that "even if a free-rider problems exists, the Realcomp policies do not eliminate the problem." Rather, Dr. Williams demonstrated that Realcomp's supposed justification is pretextual because the same supposed problems exist with Exclusive Right to Sell listings. (D. Williams, Tr. 1643-1652; CX 557-A-054-055; CCPF ¶1259). Under Realcomp's Website Policy, Exclusive Right to Sell listings are placed by Realcomp on public websites, exposing the listing to unrepresented buyers and buyer represented by brokers who are not members of Realcomp. (CCPF ¶1259). Thus, under Realcomp's logic, Realcomp cooperating brokers are "subsidizing" the advertising of these listings, facilitating transactions that do not involve Realcomp cooperating brokers. (CCPF ¶1259; CX 557-A-054-055). But the only difference between an Exclusive Agency and Exclusive Right to Sell listing in this situation is that under an Exclusive Agency listing, the seller will not have to pay the cooperating broker commission if no cooperating broker services are rendered. (CCPF ¶1259; CX 557-A-054-055). Thus, Realcomp's own actions, which fly in the face of its purported justification, demonstrate that its supposed justification is pretextual and does not benefit consumers. (CCPF ¶1259). Forcing home sellers to pay for cooperating broker services when none are rendered is not procompetitive. (CX 557-A-048-049).

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).

Response to Finding No. 244:

The proposed finding is contrary to the weight of the evidence. The evidence shows that Realcomp's Policies harm consumers in a number of ways. (CCPF ¶¶1123-1243). Further, Dr. Eisenstadt's theory that the Website Policy (not the Search Function Policy) enhances the incentives of brokers to show Exclusive Agency listings is not supported by the evidence. (CCRF ¶¶ 183, 236).

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).

Response to Finding No. 245:

The proposed finding is irrelevant and misleading. Dr. Williams demonstrated that Realcomp's data-sharing arrangements are contrary to Realcomp's purported justification for its

Website Policy. (CCPF ¶ 1254; D. Williams, Tr. 1225-1227). That the data-sharing is reciprocal does not change this fact. Moreover, it is misleading for Realcomp to imply that the "reciprocal" nature of data-sharing benefits all "Realcomp brokers" in the same fashion. In actuality, data-sharing benefits listing brokers in Realcomp by providing more exposure of their listings to cooperating brokers *in other MLSs*, and it benefits cooperating brokers in Realcomp who represent buyers seeking to purchase properties located *in other MLSs*. (CX 27-002) (Realcomp data-sharing agreements provide member brokers with "more data and more opportunities to market your listings"). Thus, data-sharing allows cooperating brokers outside of Realcomp to earn commissions on Realcomp listings, and cooperating brokers within Realcomp to earn commissions on listings in other MLSs. The latter benefit has nothing to do with the alleged procompetitive justifications offered by Realcomp for the Website Policy. More importantly, the former benefit is flatly inconsistent with the asserted justification, because it increases the likelihood that non-member cooperating brokers will earn commissions from sales of Realcomp members' listings. (D. Williams, Tr. 1223; CX 271 (data-sharing results in "an increased number of Realcomp listings being searched" by non-members); CX 274-001 (same, with map showing seven partner MLSs whose brokers can now earn commissions on Realcomp listings through data-sharing agreements)).

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).

Response to Finding No. 246:

The proposed finding is incomplete. The evidence does show that the more cooperating brokers, the more valuable is an MLS to listing brokers. (CCPF ¶¶ 721-722). It also shows that the more listing brokers, and therefore the more listings, the more valuable is an MLS to cooperating brokers. (CCPF ¶¶ 721-722).

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."

Response to Finding No. 247:

The proposed finding is not supported by the evidence. First, Dr. Eisenstadt's theory fails to account for the fact that most real estate brokers act as both listing and cooperating brokers. (Eisenstadt, Tr. 1582-1583). Thus, his analogy to a shopping mall is inapt and misleading. Unlike a shopping mall "platform" – which has stores on one side and shoppers on the other – a member of an MLS will typically be on both sides of the "two sided platform" – acting a listing broker for one client and a cooperating broker for another. (*See, e.g.*, CX 43 (Hardy, Dep. at 28 (Century 21 Today (one of the largest brokers in Michigan) works for "buyers and sellers")). The testimony of Mr. Mincy, an experienced real estate professional in Southeastern Michigan, shows how Dr. Eisenstadt's theory doesn't fit the facts of the real estate brokerage business. He explained how brokers often compete with one another to obtain new listings, but once a broker secures a listing, he or she may potentially be in a cooperative relationship with those same or other brokers who are now representing potential buyers. (CCPF ¶ 207). Thus, listing brokers and cooperating brokers are not two distinct groups. They operate as intermediaries between home sellers and home buyers, and their roles may change depending on the situation. (CCPF ¶ 147).

Second, the finding misstates Dr. Eisenstadt's testimony. He simply did not testify cooperating brokers "place less value on the number of EA brokers" because of "higher transaction costs." (Eisenstadt, Tr. 1407). He just claimed, without explanation, that "ERTS listings are more effective." (Eisenstadt, Tr. 1407). Moreover, Dr. Eisenstadt's theory rests on the false assumption that limited service brokers contribute only "an equivalent number" of Exclusive Agency listings to the platform. This directly contradicts information cited by Realcomp in another proposed finding (*See* CCRF ¶ 163 (noting that, on average, limited service brokers have substantially more listings per agent than traditional full-service brokers)). It also ignores the reality that limited service firms can provide unique opportunities for cooperating brokers in Realcomp to earn commissions, which would not otherwise be available. (RX 25-003 (Greater Michigan Realty estimated that in 2004 it "[g]enerated $698,265 in gross commissions" for cooperating brokers statewide); *see also* CCPF ¶¶ 1235-1239 (explaining how limited service firms bring home sellers into the market for brokerage services who would otherwise choose not to purchase any such services)).

Third, Dr. Eisenstadt admitted that more listings attract more cooperating brokers. (CCPF ¶ 722). In his own report he claimed to show that "EA brokers" bring more listings than full service brokers. (CX 133-067). Thus, under Dr. Eisenstadt's own reasoning, "EA brokers" should be more attractive to an MLS.

Fourth, discriminating against Exclusive Agency listings is not equivalent to charging them more rent. Dr. Eisenstadt admitted that there is no additional marginal cost for the MLS to put an Exclusive Agency listing in the feed out to the Approved Websites. (Eisenstadt, Tr. 1583-1584). Thus, as Dr. Williams explained, Realcomp's Policies do not adjust the allocation of costs between different users to "balance" the platform. (CX 557-A-053). Moreover, even if Realcomp wanted to achieve such a result, it could have done so through a less restrictive alternative – charging a per listing fee. (CX 557-A-053-54).

Fifth, there is no evidence to support the contention that "potential buyers who view a property on a public website could be expected to be less likely to use a cooperating agent." The evidence is to the contrary: studies show that buyers who search on the internet are *more* likely to use a cooperating broker. (CCPF ¶¶ 575-579). Dr. Eisenstadt never addressed this fact, and proceeded to theorize based on his invalid assumption concerning buyer behavior.

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.

Response to Finding No. 248:

The proposed finding is not supported by the evidence. As explained above, the evidence shows that the Policies have nothing to do with any "bidding advantage." (CCRF ¶ 188).

Respectfully Submitted,

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Dated: August 20, 2007

CERTIFICATE OF SERVICE

This is to certify that on August 20, 2007, I caused a copy of the Public version of Complaint Counsel's Response to Respondent Realcomp II Ltd.'s Proposed Findings of Fact to be served upon the following persons:

by hand delivery to:

The Honorable Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

and by electronic transmission and overnight courier to:

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