

## Complaint

## IN THE MATTER OF

**REALCOMP II, LTD.**

COMPLAINT IN REGARD TO ALLEGED VIOLATION OF SEC. 5 OF  
THE FEDERAL TRADE COMMISSION ACT; INITIAL DECISION; AND  
OPINION OF THE COMMISSION AND ORDER REVERSING AND  
VACATING THE INITIAL DECISION.

*Docket No. 9320; File No. 061 0088*

*Complaint, October 10, 2006 - Initial Decision, December 10, 2007*

*Opinion and Order, October 30, 2009*

The Commission issued an administrative complaint, alleging that Realcomp II Ltd. restrained competition in the provision of residential real estate brokerage services by combining or conspiring to hinder the ability of real estate brokers in Southeastern Michigan to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing. In his Initial Decision, Chief Administrative Law Judge Stephen J. McGuire dismissed the Complaint after determining that Complaint Counsel had not met its burden of demonstrating that the Realcomp policies unreasonably restrained or substantially lessened competition in the relevant market. Complaint Counsel appealed the Initial Decision. On appeal, the Commission unanimously reversed and vacated the Initial Decision. The Commission ordered Realcomp to cease and desist from adopting or enforcing any policy, rule, practice or agreement to deny, restrict or interfere with the ability of Realcomp Members to enter into Exclusive Agency Listings or Other Lawful Listing agreements with the sellers of properties.

*Participants*

For the *Commission*: Sean P Gates.

For the *Respondents*: Scott L. Mandel, Foster, Swift, Collins & Smith, P.C.

**COMPLAINT**

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. § 41, et seq.) and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Realcomp II Ltd. (hereinafter sometimes referred to as “Respondent” or “Realcomp”), a corporation, has violated and is now violating the provisions of said Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in

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the public interest, hereby issues this complaint stating its charges as follows:

**NATURE OF THE CASE**

This matter concerns a corporation, owned by a group of shareholder Boards of Realtors in Southeastern Michigan, that operates a Multiple Listing Service, which is designed to foster real estate brokerage services by sharing and publicizing information on properties for sale by customers of real estate brokers. Realcomp has adopted policies that limit the publication and marketing of certain properties, based on the terms of the listing contract entered into between a real estate broker and the customer who wishes to sell a property. The policies limit the publication of information about such properties on popular internet real estate web sites, and make it more difficult for brokers to search for such listings on the Realcomp MLS. These policies discriminate against certain kinds of lawful contracts between listing real estate brokers and their customers, and lack any pro-competitive justification. These rules constitute an anticompetitive concerted refusal to deal except on specified terms with respect to key inputs for the provision of residential real estate brokerage services, and violate the antitrust laws.

**RESPONDENT AND ITS MEMBERS**

1. Respondent Realcomp II Ltd. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334. Respondent is owned by several realtor boards and associations. The members of Respondent are real estate brokers doing business in Southeastern Michigan.

2. Respondent is organized for the purpose of serving its members' interests, including their economic interests, by promoting, fostering, and advancing the real estate brokerage services industry in Southeastern Michigan. One of the primary functions of Respondent is the operation of the Realcomp Multiple Listing Service. A multiple listing service ("MLS") is a clearinghouse through which member real estate brokerage firms regularly and systematically exchange information on listings of

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real estate properties and share commissions with members who locate purchasers. When a property is listed on the Realcomp MLS, it is made available to all members of the MLS for the purpose of trying to match a buyer with a seller. Information about the property, including the asking price, address and property details, are made available to members of the MLS so that a suitable buyer can be found.

3. The Realcomp shareholder Boards are affiliated with the National Association of Realtors (“NAR”), thereby requiring Realcomp to abide by the NAR rules. Realcomp has more than 14,500 real estate professionals as members. All of the Realcomp members hold either an active real estate license or an active appraiser license and are active in the real estate profession.

4. The large majority of residential real estate brokerage professionals in Southeastern Michigan are members of Realcomp. These professionals compete with one another to provide residential real estate brokerage services to consumers.

5. Realcomp services the territory within Southeastern Michigan, including Livingston County, Oakland County, Macomb County, St. Clair County and Wayne County. (“Realcomp Service Area”).

### **JURISDICTION**

6. The acts and practices of Respondent, including the acts and practices alleged herein, have been or are in or affecting commerce as “commerce” is defined in the Federal Trade Commission Act, as amended, and Respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

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

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**THE CHALLENGED CONDUCT**

7. Respondent has restrained competition in the provision of residential real estate brokerage services by combining or conspiring with its members or others, or by acting as a combination of its members or others, to hinder unreasonably the ability of real estate brokers in Southeastern Michigan to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing.

8. An Exclusive Right to Sell 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.

9. An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency 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, in which case the listing broker is paid a reduced or no commission when the property is sold.

10. Exclusive Agency Listings are a means by which listing brokers can offer lower-cost, Unbundled Real Estate Services to consumers. Unbundled Real Estate Brokerage Services are lawful arrangements pursuant to which a listing broker will cause the property offered for sale to be listed on the MLS, but the listing broker will not provide some or all of the additional services offered by traditional real estate brokers, or will only offer such additional services as may be chosen from a menu of services for a fee.

11. Brokers offering Unbundled Real Estate Brokerage Services often provide home sellers with exposure of their listing

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through the MLS for a flat fee or reduced commission that is small compared to the full commission prices commonly charged by traditional brokers, often by entering into Exclusive Agency Listings that reserve to the home seller the right to sell the property without owing more to the listing broker.

12. To be listed in the MLS, a home seller must enter into a listing agreement with a listing real estate broker that is a member of the MLS. The compensation paid by the home seller to the listing broker is determined by negotiation between the home seller and the listing broker. Whatever type of listing agreement is entered into between the home seller and the listing real estate broker, the MLS rules require that the home seller must offer to pay a commission to a cooperating real estate broker, known as a selling broker, who successfully secures a buyer for the property. If the home seller fails to pay a commission to a selling broker who secures a buyer for the property, the selling broker may recover the commission due from the listing agent, under rules and procedures established by the MLS.

13. In 2001, Realcomp adopted and approved a rule that stated: "Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis" (the "Web Site Policy").

14. The Web Site Policy prevents information concerning certain lawful residential property listings provided to Realcomp, including "Exclusive Agency Listings," from being transmitted to real estate web sites, based on the contractual relationship between the home seller and the real estate agent the seller employs to promote the property.

15. The Web Site Policy specifically prevents information concerning Exclusive Agency Listings from being published on web sites otherwise approved by Realcomp to receive information concerning Realcomp MLS listings (collectively, "Approved Web Sites"). Such web sites include (1) the NAR-operated "Realtor.com" web site; (2) the Realcomp-owned "Moveinmichigan.com" web site; and (3) Realcomp-member web sites.

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16. In or about the fall of 2003, Respondent changed the Realcomp MLS search screen to default to Exclusive Right to Sell Listings (“Search Function Policy”). In order to view any other listing types, including Exclusive Agency Listings, Realcomp members have to select the additional listing types in the search screen.

**REALCOMP HAS MARKET POWER**

17. The provision of residential real estate brokerage services to sellers and buyers of real property in the Southeastern Michigan and/or the Realcomp Service Area is a relevant market.

18. The publication and sharing of information relating to residential real estate listings for the purpose of brokering residential real estate transactions is a key input to the provision of real estate brokerage services, and represents a relevant input market. Publication of listings through the Realcomp MLS is generally considered by sellers, buyers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for property in the Realcomp Service Area.

19. Participation in Realcomp is a service that is necessary for the provision of effective residential real estate brokerage services to sellers and buyers of real property in the Realcomp Service Area. Participation significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining up-to-date and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services in the Realcomp Service Area.

20. Access to the Approved Web Sites is a service that is necessary for the provision of effective residential real estate brokerage services in the Realcomp Service Area. Home buyers regularly use the Approved Web Sites to assist in their search for homes. The Approved Web Sites are the web sites most commonly used by home buyers in their home search. Many home buyers find the home that they ultimately purchase by searching on one or more Approved Web Sites.

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21. The most efficient, and at least in some cases the only, means for Realcomp members to have their listed properties visible to the public on the Approved Web Sites is by having Realcomp transmit those listings.

22. By virtue of industry-wide participation and control over the ability of real estate brokers to participate in the Realcomp MLS and the ability of home sellers to publicize their homes for sale on Approved Web Sites, Realcomp has market power in the Realcomp Service Area.

### **THE REALCOMP POLICIES HAVE NO EFFICIENCY BENEFIT**

23. There are no cognizable and plausible efficiency justifications for the conduct that constitutes the violation alleged in this Complaint. Such conduct is not reasonably ancillary to the legitimate and beneficial objectives of the MLS.

### **VIOLATION**

24. In adopting the policies and engaging in the acts and practices described herein, Realcomp has combined or conspired with its members or others, or acted as a combination or conspiracy of its members or others, to restrain trade in the provision of residential real estate brokerage services within Southeastern Michigan and/or the Realcomp Service Area.

25. The acts and practices of Realcomp described herein constitute an agreement that only listings based exclusively on traditional contract terms as dictated by Realcomp will be forwarded by the Realcomp MLS to be shown to the general public on Approved websites, and thereby eliminate certain forms of competition. The acts and practices have no cognizable and plausible efficiency justifications and are inherently suspect restraints of trade.

26. The acts and practices of Realcomp described herein constitute a concerted refusal to deal by competitors, except on specified terms, with respect to services that are necessary for the provision of effective residential real estate brokerage services. As such, the acts and practices are inherently suspect restraints of

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trade that have no cognizable and plausible efficiency justifications.

27. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of Realcomp and its members as described herein have been and are unreasonably to restrain competition among brokers, and to injure consumers, in the market for provision of residential real estate brokerage services within Southeastern Michigan and/or the Realcomp Service Area.

28. The policies, acts, practices, and combinations or conspiracies described herein constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

**NOTICE**

Notice is hereby given to the Respondent that the eighth day of January, 2007, at 10:00a.m., or such later date as determined by an Administrative Law Judge of the Federal Trade Commission, is hereby fixed as the time and Federal Trade Commission offices, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580, as the place when and where a hearing will be had before an Administrative Law Judge of the Federal Trade Commission, on the charges set forth in this complaint, at which time and place you will have the right under the FTC Act to appear and show cause why an order should not be entered requiring you to cease and desist from the violations of law charged in the complaint.

You are notified that the opportunity is afforded to you to file with the Commission an answer to this complaint on or before the twentieth (20<sup>th</sup>) day after service of it upon you. An answer in which the allegations of the complaint are contested shall contain a concise statement of the facts constituting each ground of defense; and specific admission, denial, or explanation of each fact alleged in the complaint or, if you are without knowledge thereof, a statement to that effect. Allegations of the complaint not thus answered shall be deemed to have been admitted.

If you elect not to contest the allegations of fact set forth in the complaint, the answer shall consist of a statement that you admit all of the material facts to be true. Such an answer shall constitute



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a waiver of hearings as to the facts alleged in the complaint and, together with the complaint, will provide a record basis on which the Administrative Law Judge shall file an initial decision containing appropriate findings and conclusions and an appropriate order disposing of the proceeding. In such answer, you may, however, reserve the right to submit proposed findings and conclusions under Rule 3.46 of the Commission's Rules of Practice for Adjudicative Proceedings and the right to appeal the initial decision to the Commission under Rule 3.52.

Failure to answer within the time above provided shall be deemed to constitute a waiver of your right to appear and contest the allegations of the complaint and shall authorize the Administrative Law Judge, without further notice to you, to find the facts to be as alleged in the complaint and to enter an initial decision containing such findings, appropriate conclusions, and order.

The ALJ will schedule an initial prehearing scheduling conference to be held not later than 14 days after the last answer is filed by any party named as a Respondent in the complaint. Unless otherwise directed by the ALJ, the scheduling conference and further proceedings will take place at the Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Room 532, Washington, D.C. 20580. Rule 3.21(a) requires a meeting of the parties' counsel as early as practicable before the prehearing scheduling conference, and Rule 3.31(b) obligates counsel for each party, within 5 days of receiving a Respondent's answer, to make certain initial disclosures without awaiting a formal discovery request.

**NOTICE OF CONTEMPLATED RELIEF**

The following is the form of order which the Commission has reason to believe should issue if the facts are found to be as alleged in the complaint. If, however, the Commission should conclude from record facts developed in any adjudicative proceedings in this matter that the proposed order provisions might be inadequate to fully remedy the violation of the FTC Act, the Commission may order such other or further relief as it finds necessary or appropriate.

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**DEFINITIONS**

For the purposes of this Order, the following definitions shall apply:

- A. “Respondent” or “Realcomp” means Realcomp II Ltd., a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334. The term also means the Realcomp Owners, Board of Directors, its predecessors, divisions and wholly or partially owned subsidiaries, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the directors, officers, shareholders, participants, employees, consultants, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate” and “joint venture” refer to any person in which there is partial or total ownership or control by Realcomp, and is specifically meant to include Realcomp MLS and/or each of the Realcomp Websites.
  
- B. “Owners” means the current and future Boards and Associations of Realtors that are the sole shareholders of Realcomp, which included the Dearborn Board of REALTORS, Detroit Association of REALTORS, Livingston Association of REALTORS, Metropolitan Consolidated Association of REALTORS, North Oakland County Board of REALTORS, Eastern Thumb Association of REALTORS and Western-Wayne Oakland County Association of REALTORS at the time of entry of this order.
  
- C. “Multiple Listing Service” or “MLS” means a cooperative venture by which real estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering cooperation and offering compensation in and facilitating real estate transactions.

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- D. “Realcomp MLS” means the Realcomp MLS or any other MLS owned, operated or controlled, in whole or in part, directly or indirectly, by Realcomp, any of its Owners, predecessors, divisions and wholly or partially owned subsidiaries, affiliates, and all the directors, officers, employees, agents, and representatives of the foregoing.
- E. “Realcomp Member” means any person authorized by Realcomp to use or enjoy the benefits of the Realcomp MLS, including but not limited to Members and Subscribers as those terms are defined in the Realcomp Rules and Regulations.
- F. “IDX” means the internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website.
- G. “IDX Website” means a Website that is capable of integrating the IDX listing information within the Website.
- H. “Moveinmichigan.com” means the Website owned and operated by Realcomp that allows the general public to search information concerning real estate listings from Realcomp.
- I. “Realtor.com” means the Website operated by the National Association of Realtors that allows the general public to search information concerning real estate listings downloaded from a variety of MLSs representing different geographic areas of the country, including but not limited to real estate listings from Realcomp.
- J. “Approved Website” means a Website to which Realcomp or Realcomp MLS provides information concerning listings for publication including, but not limited to, Realcomp Member IDX Websites, Moveinmichigan.com, and Realtor.com.

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- K. “Exclusive Right to Sell Listing” means 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 broker, the owner or another broker, or any other definition that Realcomp ascribes to the term “Exclusive Right to Sell Listing.”
- L. “Exclusive Agency Listing” means a listing agreement that authorizes the listing broker, as an exclusive agent, to offer cooperation and compensation on a blanket unilateral basis, but also reserves to the seller a general right to sell the property on an unlimited or restrictive basis, or any other definition that Realcomp ascribes to the term “Exclusive Agency Listing.”
- M. “Services of the MLS” means the benefits and services provided by the MLS to assist Realcomp Members in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents representing home sellers, Services of the MLS shall include, but are not limited to:
1. having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and
  2. having the property publicized through means available to the MLS, including, but not limited to, information concerning the listing being made available on Moveinmichigan.com, Realtor.com and IDX Websites.

**II.**

**IT IS ORDERED** that Respondent Realcomp, its successors and assigns, and its Board of Directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in

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connection with the operation of a Multiple Listing Service or Approved Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement of Realcomp to deny, restrict or interfere with the ability of Realcomp Members to enter into Exclusive Agency Listings or other lawful listing agreements with the sellers of properties, including but not limited to any policy, rule, practice or agreement to:

- A. prevent Realcomp Members from offering or accepting Exclusive Agency Listings;
- B. prevent Realcomp Members from cooperating with listing brokers or agents that offer or accept Exclusive Agency Listings;
- C. prevent Realcomp Members, or the sellers of properties who have entered into lawful listing agreements with Realcomp Members, from publishing information concerning listings offered pursuant to Exclusive Agency Listings on the Realcomp MLS and Approved Websites;
- D. deny or restrict the Services of the MLS to Exclusive Agency Listings or other lawful listings in any way that such Services of the MLS are not denied or restricted to Exclusive Right to Sell Listings; and
- E. treat Exclusive Agency Listings, or any other lawful listings, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to, any policy, rule or practice pertaining to the searching, sorting, ordering, transmission, downloading, or displaying of information pertaining to such listings.

*Provided, however,* that nothing herein shall prohibit the Respondent from adopting or enforcing any policy, rule, practice or agreement regarding subscription or participation requirements, payment of dues, administrative matters, or any other policy, rule, practice or agreement, that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

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**III.**

**IT IS FURTHER ORDERED** that Respondent shall, no later than thirty (30) days after the date this Order becomes final, amend its rules and regulations to conform to the provisions of this Order.

**IV.**

**IT IS FURTHER ORDERED** that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) inform each Realcomp Member of the amendments to its rules and regulations to conform to the provisions of this Order; and (2) provide each Realcomp Member with a copy of this Order. Respondent shall transmit the rule change and Order by the means it uses to communicate with its members in the ordinary course of Realcomp's business, which shall include, but not be limited to: (A) sending one or more emails with one or more statements that there has been a change to the rule and an Order, along with a link to the amended rule and the Order, to each Realcomp Member whose email address is known to Realcomp; (B) mail to any Realcomp Member whose email address is unknown one or more statements that there has been a change to the rule and an Order, along with a link to the amended rule and the Order; and (C) placing on the publicly accessible Realcomp Website ([www.Realcomp.com](http://www.Realcomp.com)) a statement that there has been a change to the rule and an Order, along with a link to the amended rule and the Order. Respondent shall modify its Website as described above no later than five (5) business days after the date the Order becomes final, and shall display such modifications for no less than ninety (90) days from the date this Order becomes final. The Order shall remain accessible through common search terms and archives on the Website for five (5) years from the date it becomes final.

**V.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to any proposed change in Respondent, such as dissolution, assignment or sale resulting in the emergence of a successor corporation or any other

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proposed changes in the corporation which may affect compliance obligations arising out of the Order.

**VI.**

**IT IS FURTHER ORDERED** that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

**VII.**

**IT IS FURTHER ORDERED** that this Order shall terminate ten (10) years from the date the Order is issued.

**WHEREFORE, THE PREMISES CONSIDERED,** the Federal Trade Commission on this tenth day of October, 2006, issues its Complaint against Respondent Realcomp II Ltd.

By the Commission.

**INITIAL DECISION****I. INTRODUCTION****A. Summary of the Initial Decision and Pleadings**

The Federal Trade Commission (“FTC”) issued the Complaint in this matter on October 10, 2006, against Realcomp II, LTD. (“Respondent”), a compendium of several local realtor boards and associations located in Southeastern Michigan. Respondent’s central function is to operate the Realcomp Multiple Listing Service (“Realcomp MLS”), the largest MLS in Michigan, for the benefit of its member brokers. The Complaint alleges that

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Respondent, in violation of Section 5 of the FTC Act, restrained competition in the provision of residential real estate brokerage services by combining or conspiring with its members to hinder, unreasonably, the ability of certain discount real estate brokers to offer residential real estate brokerage services on terms other than those contained in an Exclusive Right to Sell listing. Complaint ¶ 7.

An Exclusive Right to Sell (“ERTS”) listing is the traditional form of a real estate listing and is typically offered through full service brokers who charge commissions. Complaint ¶ 8; Answer ¶ 8. “Full service” listings are generally considered to be those in which the broker agrees to arrange appointments for cooperating brokers to show the property, accept and present offers procured by a cooperating broker, assist the home seller in developing, communicating, and presenting counter offers, and participate on behalf of the seller in negotiations leading to the sale. Traditional ERTS brokers typically charge a percentage of the sale price as a commission (usually 6%), which includes any compensation paid to a cooperating broker (usually 3%), at settlement. In instances where there is no cooperating broker, traditional ERTS brokers typically retain the entire commission. Until recently, Realcomp defined ERTS listings synonymously with full service agreements, such that a listing agreement was required to be full service in order to be categorized as ERTS on the Realcomp MLS.

An alternative form of listing agreement is an Exclusive Agency (“EA”) listing. Complaint ¶ 9; Answer ¶ 9. EA brokers typically provide far fewer services to home sellers than full service ERTS brokers. EA listings are frequently offered on a flat fee basis. The narrowest category of limited service agreement is an “MLS-Entry Only” agreement, in which the broker agrees only to place the property listing on the MLS and otherwise provides no assistance to the home seller. For simplicity of reference in this Initial Decision, the term “EA listing” refers to all types of non-ERTS listings.

The Complaint charges Respondent with unreasonable restraint of trade through two policies which are alleged to limit the publication and marketing of certain properties based on the terms of the listing contract: the “Website Policy” and the “Search



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Function Policy.” Complaint ¶¶ 13-16. Pursuant to the Website Policy, Realcomp transmits only full service, ERTS listings to a network of public real estate websites (“Approved Websites”) and the Internet Data Exchange (“IDX”) of local brokers’ and agents’ websites, which offer additional, direct exposure to prospective home buyers. While limited service, EA listings are entered into the MLS and made available to all members, including discount EA brokers, they are not transmitted by Realcomp to the Approved Websites or the IDX.

Pursuant to the Search Function Policy, the Realcomp MLS search engine automatically defaults to capture only ERTS listings. In order to view other various types of listings, Realcomp members need to take the additional step of clicking their computer mouse on the “additional listings” categories provided in the search screen. In addition to these policies, Realcomp required member brokers using ERTS listings to provide full services to its clients through the imposition of a “Minimum Services Requirement.”

The Complaint alleges that Respondent’s policies, acts and practices discriminate against discount EA listings by limiting the accessibility, transmission and publication of information about such properties on popular Internet real estate websites and by making it more difficult for brokers to search EA listings on the Realcomp MLS. Complaint at 1. The Complaint further charges that Respondent has market power in the Realcomp Service Area of Southeastern Michigan. Complaint ¶¶ 17-22. Finally, the Complaint alleges that there are no efficiency justifications for the challenged conduct. Complaint ¶ 23.

Through its Answer, filed on November 20, 2006, Respondent denies the material allegations of the Complaint and asserts that the Complaint fails to state a claim upon which relief can be granted and is not in the public interest. Answer at 9-10. The Answer also asserts that Respondent lacks market power. Answer at 10. The Answer further avers that the challenged conduct has significant procompetitive justifications that outweigh any alleged anticompetitive effects. Answer at 10.

Upon review of the evidence, nothing short of a plenary market examination allows the Court to confidently draw

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conclusions regarding the principal tendencies and competitive effects of the alleged restraints. Thus, the challenged restraints can be properly scrutinized only under the traditional rule of reason analysis. Applying this standard, the Court examines such factors as the nature of the restraints, market power, evidence of actual effects, and the procompetitive justifications offered by Respondent.

Upon such analysis, with respect to the Website Policy (including the Minimum Services Requirement) the record shows that Complaint Counsel has made a *prima facie* showing as to the anticompetitive nature of the alleged restraints. It has not, however, upon full review of the accepted empirical evidence and Respondent's procompetitive justifications, demonstrated that this policy actually culminated in anticompetitive effects or actionable consumer harm.

As to the Search Function Policy (including the Minimum Services Requirement), Complaint Counsel has not made the initial showing that the nature of the alleged restraint was anticompetitive or unduly hindered consumer choice. As such, the Court need not inquire further as to whether any adverse competitive effects may have resulted from such policy.

The record in this case illustrates that much of the economic evidence presented is unreliable due to deficiencies in methodology and/or flaws in analytic interpretation. Such evidence therefore is of little probative value to the Court. The remaining empirical and factual evidence demonstrates that, despite Realcomp's market power and the implementation of the Website Policy, discount EA brokerage services continue to be widely available in the established, relevant market. As such, there is insufficient evidence that consumer welfare has in fact, been unduly diminished, or otherwise significantly harmed as a result of the challenged policy. Such evidence does *not* reliably demonstrate that the Realcomp Website Policy: (1) has eliminated or limited consumer choice of a desired product; (2) has excluded discount EA listings from substantial exposure on the Realcomp MLS or other public websites; (3) has unreasonably impeded the ability of discount brokers to compete in Southeastern Michigan; or (4) has forced discount brokers to exit the market or deterred market entry. As such, Complaint Counsel has not demonstrated

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that Realcomp unreasonably restrained competition, thereby resulting in significantly increased economic costs for consumers. Absent such empirical and factual proof, the Court cannot conclude that the Realcomp Website Policy substantially lessened competition in violation of Section 5.

What the evidence does show is that despite the Website Policy, discount brokers offering EA listings have been able to market their products and compete successfully in the Realcomp Service Area, without having to labor under an unreasonable competitive disadvantage. Similarly, consumers have been able to freely select from among a myriad of choices of brokerage services available in the geographic market. Discount listings are sufficiently accessible on the Realcomp MLS, which continues to be the most important marketing vehicle for listing such information and offers substantial, if not near maximum exposure to prospective home buyers. Additional exposure on Realtor.com is available through the dual-listing of EA listings or by data-exchange agreements between Realcomp and other MLSs, at a nominal cost to brokers and home sellers alike. In selecting from a host of both bundled and unbundled real estate services, the evidence indicates that consumers in the Realcomp Service Area are able to choose a brokerage service product that best fits their needs. Many such choices are readily available in the Realcomp Service Area, including certain flat fee ERTS listings, which offer full exposure to the Approved Websites and the IDX. Thus, under the rule of reason analysis, Complaint Counsel has not shown sufficient competitive effects to establish an antitrust violation as a result of the Realcomp Website Policy.

Given Respondent's market power, even should the Court's analysis necessarily *presume* anticompetitive effects as a result of utilizing an abbreviated review standard, there is sufficient evidence of Respondent's plausible procompetitive justifications to establish the "reasonable necessity" of its Website Policy. Under such analysis, weighing the totality of the empirical and record evidence, including the net effects of Respondent's policy and justifications, there is insufficient evidence of actual anticompetitive effects to demonstrate a substantial lessening of competition or an unreasonable restraint of trade.

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Thus, Complaint Counsel having ultimately failed to meet its burden of establishing a violation under Section 5 of the FTC Act, the Complaint is DISMISSED.

**B. Settlement**

On July 30, 2007, the Parties filed a Joint Stipulation Regarding Respondent's Search Function Policy. The Joint Stipulation bars Realcomp from treating EA listings in a less advantageous manner than ERTS listings with respect to the Search Function Policy in the Realcomp MLS. Moreover, it eliminates Realcomp's Minimum Services Requirement for ERTS listings. It does not, however, address Realcomp's Website Policy which remains in dispute. At the request of the parties, the Court, apart from its findings on liability, incorporates the stipulated relief into the Initial Decision, which shall be binding on the parties. This Joint Stipulation is attached to this Initial Decision as Attachment # 1.

**C. Procedural Background**

The final prehearing conference in this case was held on June 14, 2007, with trial commencing on June 19, 2007. Over 800 exhibits were admitted and eight witnesses testified at trial. The testimonial portion of the trial concluded on June 28, 2007. On July 31, 2007, the parties filed concurrent post-trial briefs, proposed findings of fact, and conclusions of law. The parties filed concurrent responses to each other's briefs and proposed findings on August 16, 2007 and August 17, 2007. Closing arguments were heard on September 6, 2007.

The hearing record was closed pursuant to Commission Rule 3.44(c) by Order dated September 7, 2007. Rule 3.51(a) of the Commission's Rules of Practice states that an Initial Decision shall be filed "within ninety (90) days after closing the hearing record pursuant to § 3.44(c) . . . or within such further time as the Commission may by order allow upon written request from the Administrative Law Judge." 16 C.F.R. § 3.51(a). Ninety days from the close of the record is December 10, 2007.

Rule 3.51(a) also states that an Initial Decision shall be filed within one year "after the issuance of the administrative

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complaint, except that the Administrative Law Judge may, upon a finding of extraordinary circumstances, extend the one-year deadline for a period of up to sixty (60) days.” 16 C.F.R. § 3.51(a). The Complaint in this matter was issued on October 12, 2006. One year from the issuance of the Complaint was October 11, 2007. By Order dated October 10, 2007, extraordinary circumstances were found to extend the one-year deadline for a period of up to sixty days, until December 10, 2007.

#### D. Evidence

This Initial Decision is based on the exhibits properly admitted in evidence, the transcripts of trial testimony, the briefs, proposed findings of fact and conclusions of law, and replies thereto submitted by the parties. Citations to specific numbered findings of fact in this Initial Decision are designated by “F.”<sup>1</sup>

Under the Commission’s Rules of Practice, a party or a non-party may file a motion seeking *in camera* treatment for material, or portions thereof, offered into evidence. 16 C.F.R. § 3.45(b). The Administrative Law Judge may order that such material be placed *in camera* only after finding that its public disclosure will likely result in a clearly defined, serious injury to the entity requesting *in camera* treatment. 16 C.F.R. § 3.45(b). Pursuant to Commission Rule 3.45(b), several orders were issued granting *in camera* treatment to material that met the Commission’s strict

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<sup>1</sup> References to the record are abbreviated as follows:

- CX - Complaint Counsel’s Exhibit
- RX - Respondent’s Exhibit
- JX - Joint Exhibit
- Tr. - Transcript of Testimony before the Administrative Law Judge
- Dep. - Transcript of Deposition
- CCFF - Complaint Counsel’s Proposed Findings of Fact
- CCRFF - Complaint Counsel’s Response to Respondent’s Proposed Findings of Fact
- CCB - Complaint Counsel’s Post Hearing Brief
- CCRB - Complaint Counsel’s Post Hearing Reply Brief
- RFF - Respondent’s Proposed Findings of Fact
- RRFF - Respondent’s Response to Complaint Counsel’s Proposed Findings of Fact
- RB - Respondent’s Post Hearing Brief
- RRB - Respondent’s Post Hearing Reply Brief

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standards. In addition, when the parties sought to elicit testimony at trial that revealed information that had been granted *in camera* treatment, the hearing went into an *in camera* session.

In instances where a document or trial testimony had been given *in camera* treatment, but the portion of the material cited to in this Initial Decision does not require *in camera* treatment, such material is disclosed in the public version of this Initial Decision, pursuant to Commission Rule 3.45(a) (the AU “may disclose such *in camera* material to the extent necessary for the proper disposition of the proceeding”) and *In re General Foods Corp.*, 95 F.T.C. 352, 356 n.7 (1980) (“Recognizing that in some instances the ALJ or Commission cannot know that a certain piece of information may be critical to the public understanding of agency action until the Initial Decision or the Opinion of the Commission is issued, the Commission and the ALJs retain the power to reassess prior *in camera* rulings at the time of publication of decisions.”). *In camera* material that is used in this Initial Decision is indicated in bold font and braces (“{ }”) in the *in camera* version; it is redacted from the public version of the Initial Decision, in accordance with 16 C.F.R. § 3.45(f).

This Initial Decision is based on a consideration of the whole record relevant to the issues and addresses the material issues of fact and law. All findings of fact in this Initial Decision are supported by reliable, probative, and substantial evidence, as required by 16 C.F.R. § 3.51(c)(1); see *In re Chicago Bridge & Iron Co.*, 2005 WL 120878, Dkt. No. 9300, at 2 n.4 (Op. of FTC Comm’n January 6, 2005) (also available at <http://www.ftc.gov/os/adjpro/d9300/index.htm>). Administrative Law Judges are not required to discuss the testimony of each witness or all exhibits that are presented during the administrative adjudication. *In re Amrep Corp.*, 102 F.T.C. 1362, 1670 (1983). Further, administrative adjudicators are “not required to make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’” *Minneapolis & St. Louis Ry. Co. v. United States*, 361 U.S. 173, 193-94 (1959). Proposed findings of fact not included in this Initial Decision were rejected, either because they were not supported by the evidence or because they were not dispositive or material to the determination of the allegations of the Complaint or the defenses thereto.

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**II. FINDINGS OF FACT****A. Industry Background****1. Types of Real Estate Brokers**

1. Nationwide, the provision of residential real estate brokerage services was at least a 65 billion dollar industry in 2005. (RX 154-A-006).
2. Both real estate agents and brokers are involved in buying and selling real estate. (Murray, Tr. 147).
3. A real estate broker is a licensed real estate professional who acts as a representative for either home buyers or home sellers, and who is authorized to engage in the sale of real estate and to provide services in connection with such sales. (JX 1-02). A broker can own and operate their own real estate firm, referred to as a “brokerage.” (Mincy, Tr. 312; Murray, Tr. 146).
4. A real estate agent is a licensed real estate professional who works for, or under the supervision of, a real estate broker. (JX 1-02; *see also* Murray, Tr. 146).
5. To be licensed as a real estate broker in Michigan, a person must have at least three years of experience in the real estate industry with a certain sales record, a state issued license, 90 hours of education, and must pass a broker’s exam. (Mincy, Tr. 312; CX 498-A-008).
6. A transaction coordinator is someone who processes the paperwork for a real estate transaction, but who does not have a fiduciary obligation to either the home seller or the home buyer. (RX 154-A-011; CX 42 (Nead, Dep. at 10-11); CX 205-064).
7. Michigan law requires brokers to explain the type of agency relationship they have with their client. (Mincy, Tr. 354).

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8. Real estate brokers tend to specialize in the provision of either residential or commercial brokerage services. (CX 531-009; CX 415 (Nowak, Dep. at 15-16)). The commercial brokerage industry is substantially different than the residential brokerage industry. (Murray, Tr. 176-77; RX 154-A-006; CX 415 (Nowak, Dep. at 15-16)).
9. Brokers belonging to Realcomp tend to specialize in residential real estate services. (Mincy, Tr. 312-13; CX 40 (Elya, Dep. at 8); CX 410 (Cooper, Dep. at 17); CX 41 (Mulvihill, Dep. at 6); CX42 (Nead, Dep. at 17-18)).
10. Sellers of residential properties can either hire a real estate broker to handle parts or all of the transaction, or they can sell their property themselves, which is commonly referred to as “For Sale By Owner,” or “FSBO.” (Murray, Tr. 149; CX 373-007). Home sellers often choose the FSBO method because they want to save the cost of a commission. (RX 154-A-007-008; CX 373-088).
11. Selling a home as a FSBO can be challenging. (RX 154-A-008; Murray, Tr. ISO; *see also* CX 373-089 (listing tasks FSBO sellers reported as “the most difficult” to perform in selling their home, including “understanding and preparing the paperwork” and “attracting potential buyers”)).
12. Home sellers often use a real estate broker because they “consider selling their home or buying a home one of the most stressful things they ever do.” (Murray, Tr. ISO; RX 154-A- 008; CX 536-007).
13. The vast majority of home sellers choose to hire a real estate broker to assist with some or all of the tasks associated with the typical residential real estate transaction. In 2006, between 80-88% of home sellers nationwide used a real estate broker to sell their property. (Murray, Tr. 149-50; CX 373-071 (finding



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that 84% of all home sellers nationwide, and 81% of home sellers in the Midwest, used a broker to sell their home)). “The share of home sellers who used an agent or broker has risen over time from about 80 percent in the late 1990s to 84 percent [in 2006].” (CX 373-072; CX 406 (Bishop, Dep. at 106)).

14. The Multiple Listing Services, or “MLS,” is a database of information about properties for sale (exclusive of FSBO properties) that can be viewed and searched by all other local brokers who practice in the area and participate in the MLS. (RX 154-A-009).
15. The MLS is “[a] facility for the orderly correlation and dissemination of listing information among [p]articipants so that they may better serve their clients and customers and the public . . .” (CX 220).
16. The National Association of Realtors® (“NAR”) is the national trade association for real estate professionals. Approximately 89% (800 out of 900) of MLSs in the United States belong to NAR. (CX 414 (Niersbach, Dep. at 7-8,73); CX 411 (Dawley, Dep. at 14- 15)).
17. 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 and agree to abide by NAR’s code of ethics. (CX 414 (Niersbach, Dep. at 8-9, 11, 36-39)).
18. A typical residential real estate transaction, *i.e.*, one involving the use of real estate brokers, will involve two brokers: a “listing broker,” who works with home sellers; and a “cooperating broker,” who works with home buyers. (RX 154-A-008-009).
19. Brokers typically do not specialize as either listing brokers or cooperating brokers. (Murray, Tr. 148; RX 154-A-011). In its 2005 Member Profile, NAR found that only 11% of brokers who specialized in residential real estate brokerage services worked exclusively with

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buyer clients and only 9% worked exclusively with seller clients. (CX 531-024).

**a. Listing Brokers**

20. A listing broker is the broker hired by the seller as its agent to sell the home. (JX 1-02).
21. There is a wide variety of services that a listing broker may provide to a home seller. These include: determining the initial asking price of the home; showing the property to prospective buyers; presenting and explaining purchase offers to the seller; putting the “listing” (a collection of information about the seller’s property, such as the number of bedrooms and baths) on the MLS; marketing the listing on the Internet; holding open houses; putting a for sale sign in the yard; and helping the home seller with the “closing,” *i.e.*, when the title of the home transfers from the home seller to the home buyer. (Murray, Tr. 145, 148-49; CX 373-070; CX 78-002-006; CX 534-054; RX 154-A-006).
22. The state of Michigan does not require that a listing broker provide a minimum set of services to a home seller. (CX 410 (Cooper, Dep. at 12)).
23. The services provided by a listing broker vary from listing broker to listing broker, and are determined by agreement with the home seller. (Murray, Tr. 149).

**(i) Listing Agreements**

24. The agreement between a listing broker and home seller, called a listing agreement, is a contract spelling out the nature of their relationship concerning the sale of the home. (JX 1-02).
25. The listing agreement typically includes 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

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cooperating broker who brings the buyer who purchases the home. (JX 1-02; Murray, Tr. 156; *see also* F. 40-46 (defining offers of compensation)).

26. Under the listing agreement, the listing broker owes a fiduciary duty to his or her client, the home seller. (CX 410 (Cooper, Dep. at 13)).
27. A listing agreement is valid regardless of the level of services that a listing broker provides to the home seller. (CX 29; CX 36 (Kage, IHT at 139-40)).

**(ii) Commission Structure**

28. Under the listing agreement, listing brokers may be compensated in a variety of ways, including a flat fee paid up-front at the time the listing agreement is signed, a commission based on a percentage of the selling price of the home to be paid at closing, or some combination of the two. (Murray, Tr. 150-51).
29. Home sellers and listing brokers are free to negotiate the compensation paid by the seller for brokerage services to the listing broker. (Sweeney, Tr. 1358; CX 410 (Cooper, Dep. at 13)).
30. Even though the home seller typically is responsible for the payment of the brokerage commission, the home buyer bears part of the cost of the brokerage fee to the extent that some or all of the commission is passed on in the sale price of the home. (CX 498-A-011).

**b. Cooperating Brokers**

31. A cooperating broker is a broker who works with buyers interested in purchasing a home. (JX 1-02). Cooperating brokers assist the buyer by searching the MLS for homes that fit their criteria, going out to tour homes and neighborhoods, and, once their buyer finds the right home and reaches an agreement on the

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purchase of that home, assist the buyer in the closing of the home. (Murray, Tr. 151).

32. There are two types of cooperating brokers: selling brokers and buyer's brokers. (Murray, Tr. 152).

**(i) Selling Brokers**

33. A selling broker is a cooperating broker who works with a buyer, but whose fiduciary duty is to the home seller in the real estate transaction. A selling broker acts as a "sub-agent" of the listing broker. (JX 1-02-03; Murray, Tr. 152).

**(ii) Buyer's Brokers**

34. A buyer's broker is a cooperating broker who represents the interests of the buyer, and not the seller, either through an agency disclosure or a "buyer's agency agreement." (JX 1-03). A buyer's broker works practically, as well as legally, for the buyer. (Murray, Tr. 152; RX I54-A-010; CX 38 (Gleason, Dep. at 14-16)).
35. Buyer's agency agreements can be exclusive, which means that the buyer's broker is paid regardless of whether the broker actually helped the buyer find and purchase the home that was ultimately bought. (RX J54-A-010-011). For example, even if the buyer found a property on an Internet site, went directly to the seller, and purchased the home without the assistance of the buyer's broker, the buyer's broker would be entitled to compensation. (CX 42 (Nead, Dep. at 113-17)).
36. Buyers benefit from entering into a buyer's agency agreement because they then have their own legal representative to help them find the right home and negotiate on their behalf. (Murray, Tr. 152-53).
37. Brokers benefit from entering into a buyer's agency agreement because the agreement may call for the

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payment of their commission. (RX 154-A-010-01 I; Murray, Tr. 153; Sweeney, Tr. 1359-60; CX 40 (Elya, Dep. at 11-12)).

38. Buyer's agency agreements are common nationwide. (CX 373-051). In its annual Profiles of Home Buyers and Sellers, NAR found that between, 2003 and 2006, 63-64% of home buyers nationwide worked with an agent who represented only their interests. (CX 373-051; CX 372-047; CX 371-045).
39. Buyer's agency agreements are widely used by Realcomp members in Southeastern Michigan. (Sweeney, Tr. 1335, 1360; CX 410 (Cooper, Dep. at 14); CX 42 (Nead, Dep. at 11-12); CX 40 (Elya, Dep. at 10-11); CX 416 (Rademacher, Dep. at 23); CX 415 (Nowak, Dep. at 7-8); CX 421 (Whitehouse, Dep. at 146); CX 39 (Taylor, Dep. at 31-33); Mincy, Tr. 350; CX 413 (Kersten, Dep. at 27-28). One Realcomp member's agents enter into buyer agency agreements with over 80% of the buyers represented by that firm. (Sweeney, Tr. 1360).

**(iii) Offer of Compensation**

40. The cooperating broker is typically paid by the home seller through the listing broker. (Murray, Tr. 153-54). The listing broker makes an offer to compensate, known as an offer of compensation, to any cooperating broker who is a procuring cause of the sale, *i.e.*, finds the buyer that purchases the home. (JX 1-02; Murray, Tr. 153-55; RX 154-A-010).
41. The commission paid by the home seller to the listing broker therefore contains two components: the compensation paid by the seller to the listing broker for the listing broker's services; and the offer of compensation paid by the seller to the listing broker that is then offered by the listing broker to potential cooperating brokers through the MLS. (CX 498-A-043).

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42. The offer of compensation is unconditional except that the cooperating broker must be the procuring cause of the sale. (JX 1-02; Murray, Tr. 155).
43. The listing broker, and not the home seller, is responsible for paying the offer of compensation to a cooperating broker that is the procuring cause of the sale. (CX 42 (Nead, Dep. at 103-04); CX 37 (Bowers, Dep. at 46); CX 43 (Hardy, Dep. at 115-16); CX 84-001-002; CX 456-006-007).
44. Brokers representing buyers under a buyer's agency agreement may be compensated by the buyer or by the offer of compensation, or both, depending on the terms of their agreement with the buyer. (RX 154-A-010; Murray, Tr. 153-54; Mincy, Tr. 351-52).
45. Every listing in the Realcomp MLS must have an offer of compensation associated with it. (JX 1-03; CX 100-010).
46. In the Realcomp Service Area, the offer of compensation to a buyer's agent is usually 3% of the sale price of the house. (CX 498-A-011).

**c. Brokers Sometimes Represent Only One Side of the Transaction**

47. It is not common for listing brokers to deal with unrepresented buyers. (Sweeney, Tr. 1361).
48. However, listing brokers sometimes do sell property directly to a buyer who is unrepresented by a cooperating broker. (JX 1-05; Sweeney, Tr. 1361, 1364; CX 413 (Kersten, Dep. at 9, 45-46)). *See also* CX 40 (Elya, Dep. at 55-56 (Realcomp Governor stating that he deals with unrepresented buyers when acting as a listing broker, that he does not turn the buyer away nor tell them to hire a broker, and that he closes real estate transactions with unrepresented buyers)).

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49. It is not uncommon for cooperating brokers representing buyers to complete a transaction with a FSBO seller. (RX 154-A-007). In cases where the FSBO seller did not know their buyer, nationwide, 26% of FSBO sellers reported in 2006 that the buyer was represented by a broker. (CX 373-089). This also occurs in Southeastern Michigan. (CX 415 (Nowak, Dep. at 9-10); CX 409 (Burke, Dep. at 42); CX 413 (Kersten, Dep. at 45); CX 40 (Elya, Dep. at 58-59)).

**2. Types of Listing Agreements**

50. There are two different types of listing agreements: Exclusive Right to Sell and Exclusive Agency. (Murray, Tr. 157).

**a. Exclusive Right to Sell Agreements**

51. An Exclusive Right to Sell listing (“ERTS”) is a listing agreement whereby the home seller 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. (CX 32-003 (Answer)).
52. Traditionally, brokers using an Exclusive Right to Sell listing provide a full set of real estate brokerage services. (RX 154-A-011; *see also* F. 64-66).
53. Traditionally, the listing broker is paid by the home seller a commission that is based on a percentage of the sale price of the home and 6% is common. (CX 498-A-010; CX 373-081; RX 159-A-011).
54. Typically, in an Exclusive Right to Sell listing, where the listing agreement calls for a 6% listing commission and an offer of compensation of 3%, if a broker brings a buyer, the seller pays the 6% listing commission and the listing broker keeps 3% and pays the cooperating

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broker the 3% offer of compensation. (Murray, Tr. 157-58).

55. Where there is no cooperating broker, the seller still pays the 6% listing commission and the listing broker will keep the entire 6% commission. (Murray, Tr. 157-58).
56. If the home seller finds the home buyer on his or her own (such as through a relative or a friend) rather than through the marketing efforts by the listing broker, the listing broker is still entitled to the entire negotiated commission. (Murray, Tr. 157-58; CX 498-A-015).
57. There are also in the Realcomp Service Area flat fee ERTS listings. In the flat fee ERTS listings offered by AmeriSell Realty, the seller pays the listing agent a flat fee of \$200 more than a non-ERTS listing and a 3% offer of compensation if a broker brings a buyer. (Kermath, Tr. 729-31, 782, 791; RX 12; Eisenstadt, Tr. 1451-52, 1474).

**b. Exclusive Agency Agreements**

58. An Exclusive Agency ("EA") listing is a listing agreement whereby the listing broker acts as an exclusive agent of the home seller in the sale of a property, but reserves to the seller 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. (CX 32-004 (Answer); JX 1-07).
59. Exclusive Agency contracts allow sellers to save the cost of an offer of compensation to a cooperating broker -- money that under a traditional Exclusive Right to Sell listing would be paid to the listing broker -- if the seller sells the property to an unrepresented buyer themselves. (Mincy, Tr. 365; D. Moody, Tr. 489-90; CX 422 (Aronson, Dep. at 6); CX 205-063).



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60. Typically in an Exclusive Agency listing agreement, where the listing agreement calls for a payment of an up-front \$500 flat fee to the listing broker and a 3% offer of compensation, if a broker brings a buyer, the seller pays the up-front fee and the offer of compensation. But if the buyer went directly to the seller and there was no other broker involved, the seller will have paid the up-front \$500 flat fee, but would not owe any other additional commission. (Murray, Tr. 158-59).
61. For example, one EA broker advertises the potential savings of his EA listings using an example of the sale of a \$300,000 home. (Minc, Tr.374; illustrated in DX 4). Under a traditional full service listing at 6% commission, a seller would pay a commission of \$18,000, even if there is no cooperating broker involved in the transaction. (Mincy, Tr. 375-76; illustrated in DX 4). In contrast, under his EA listing, the seller would only pay \$495 if there is no cooperating broker involved, a savings of \$17,505. (Mincy, Tr. 375-76; illustrated in DX 4).
62. Exclusive Agency contracts are often used by brokers offering an a la carte, or unbundled, menu of brokerage services to the home seller. (RX 154-A-012-013; Murray, Tr. 159, 166).
63. Realcomp members that offer unbundled brokerage services use Exclusive Agency contracts and often charge their clients a flat fee, payable at the time of listing. (Mincy, Tr. 369-71; Kermath, Tr. 729-31; RX 1-001-002; D. Moody, Tr. 483-85; CX 435-001-002; CX 422 (Aronson, Dep. at 10-11)).

### **3. Brokerage Models**

#### **a. Traditional Full Service Brokerage Model**

64. Prior to the advent of widespread Internet usage in the late 1990's and early 2000's, most residential real estate transactions were done through traditional

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brokerages that provided a full set of services to home sellers and home buyers. (RX 154-A-015). The vast majority of these transactions were done using Exclusive Right to Sell contracts. (RX 154-A-015; CX 32-003-004 (Answer)).

65. Brokers in Southeastern Michigan use Exclusive Right to Sell contracts to provide full service brokerage services to their seller clients. (CX 40 (Elya, Dep. at 6,57); CX 421 (Whitehouse, Dep. at 14); CX 43 (Hardy, Dep. at 23-24,58); CX 38 (Gleason, Dep. at 37); CX 415 (Nowak, Dep. at 8, 12); Sweeney, Tr. 1319, 1322; CX 39 (Taylor, Dep. at 18); Mincy, Tr. 315-16, 320, 371).
66. 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 home 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; *see also* CX 100-005).
67. Full service listing brokers in Southeastern Michigan typically charge commission rates around 6%. (CX 42 (Nead, Dep. at 8-9); CX 301-004; CX 421 (Whitehouse, Dep. at 15- 16); CX 43 (Hardy, Dep. at 37-38); CX 40 (Elya, Dep. at 6-7); CX 413 (Kersten, Dep. at 30-31)).
68. However, AmeriSell Realty offers an ERTS listing for a flat fee of \$200 more than a non-ERTS listing. (Kermath, Tr. 729-31, 782, 791; RX 12; Eisenstadt, Tr. 1451-52, 1474).

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**b. Discount, Limited Service Brokerage Model**

69. Brokers offering unbundled services (“limited service brokers”) offer a low cost alternative to consumers of residential real estate brokerage services. (RX 154-A-015; Murray, Tr. 166).
70. The types of unbundled services offered by limited service brokers varies and there is often a menu of services or service packages from which home sellers can purchase only those services that they feel they require. (CX 498-A-013; RX 154-A-015; CX 533-040).
71. A limited service listing, under Realcomp’s rules, is a listing agreement under which the listing broker will provide at least one, but not all, of the following services to the home 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; *see also* CX 100-005).
72. In effect, the limited brokerage service model allows home sellers to purchase a subset of the full range brokerage services (such as listing in an MLS), while self-supplying other services. (CX 498-A-014). For instance, a home seller may wish to list their home on the MLS, but show the property, hold open houses, negotiate with buyers, or close the transaction on their own without broker assistance. (CX 498-A-014; RX 154-A-012-013 (providing example that a broker may offer services separately for sale, such as listing the home on the MLS for \$500, helping run an open house for \$100, etc.)).

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73. Limited service brokers meet a “consumer demand for lower cost brokerage services where consumers are willing to carry out some of the home selling tasks themselves that otherwise would be performed by real estate professionals.” (CX 533-041 (noting that this consumer demand has been identified by “established franchisers and start-up companies alike”); RX 154-A-019 (“Limited Service Brokers are fulfilling a consumer demand for lower cost services”); Mincy, Tr. 381 (starting limited service brokerage in Southeastern Michigan when he realized that some consumers felt comfortable doing some real estate services themselves and therefore did not want to pay for those services); CX 534-012 (Consumers using limited service brokers “are making conscious tradeoffs of price for service.”)).
74. Realcomp members who offer low cost, unbundled services cater to cost-conscious home sellers who might otherwise have sold their properties as FSBO and who are comfortable performing some of the tasks associated with the real estate transaction themselves, such as holding open houses or negotiating their own contract. (D. Moody, Tr. 494-95; Mincy, Tr. 378, 381; CX 526 (Groggins, Dep. at 11)).

**(i) Unbundling of Services**

75. Limited service brokers compete by unbundling listing services - they offer to supply home sellers with only part of the full range of brokerage services. (Williams, Tr. 1096-97). As a result of this unbundling of brokerage service, limited service brokers allow home sellers (and indirectly home buyers) to avoid commission costs and thereby reduce the costs of selling a home. (CX 498-A-014; CX 533-041).
76. Some home sellers benefit from using Exclusive Agency arrangements, particularly if the seller has the time, expertise and wherewithal to do parts of the transaction themselves. (Sweeney, Tr. 1322-23, 1348; CX 349-001-002). Sellers using a limited service

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broker could save significantly on the price of a commission. (Sweeney, Tr. 1348; CX 350-003).

**(ii) Unbundling of Commissions**

77. Limited service brokers also compete by unbundling the commission structure. (Williams, Tr. 1097). Under a traditional Exclusive Right to Sell listing contract, the listing broker's commission is bundled with the cooperating broker's commission. (Williams, Tr. 1097).
78. Under an EA contract or a flat fee ERTS contract consumers of brokerage services only pay the commission for the cooperating broker if the cooperating broker procures the buyer. (Williams, Tr. 1098; Mincy, Tr. 365-66; CX 439; D. Moody, Tr. 489-90; CX 422 (Aronson, Dep. at 6); CX 205-063; RX I; Kermath, Tr. 729-31, 791).

**4. Competition Among Brokers****a. Competition and Cooperation Between Brokers**

79. Real estate brokers compete to obtain listings (to represent home sellers) and to represent home buyers. (Mincy, Tr. 360-61; CX 410 (Cooper, Dep. at 63) (brokers compete to obtain listings)).
80. Realcomp members, including its Realcomp Board of Governors, compete with one another to offer residential real estate brokerage services to consumers. (CX 32-002; CX 43 (Hardy, Dep. at 24-27); CX 211; CX 41 (Mulvihill, Dep. at 48-49)).
81. Brokers offering limited services and brokers offering traditional, full services also compete with one another for new listings. (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)).

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82. Although brokers compete with one another to secure new listings, once a broker secures that listing, he or she may then potentially be in a cooperative relationship with those same or other brokers who are representing buyers. (Mincy, Tr. 361-63).

**(i) Competition is Local in Nature**

83. In its 2006 Profile of Real Estate Firms, NAR found that, “[g]iven the localized nature of many real estate activities, 59 percent of firms report that they primarily serve clients in a particular geographic area.” (CX 370-026; CX 406 (Bishop, Dep. at 34-35)).
84. Buyers tend to look for homes to purchase in specific, concentrated geographic areas. NAR found, in its 2006 Profile of Home Buyers and Sellers, that the median distance that buyers moved - from their previous residence to the home they purchased -- was 13 miles nationally, and 12 miles in the Midwest. (CX 373-025; *see also* CX 406 (Bishop, Dep. at 62)).
85. Brokers in Southeastern Michigan compete in often narrow geographic markets. (CX 410 (Cooper, Dep. at 64,61-62) (agreeing that “competition in the real estate industry is local in nature”); CX 40 (Elya, Dep. at 15) (“All real estate is local.”); CX 43 (Hardy, Dep. at 20) (Home sellers are more comfortable dealing with a local Realtor); CX 39 (Taylor, Dep. at 6) (Most house sales are within a 3 or 4 mile radius of his office); CX 41 (Mulvihill, Dep. at 10-11) (Selling homes within a 25 mile radius of his office)).

**(ii) Competition for Referrals**

86. Referrals are important for brokers when competing for business representing buyers or sellers. (CX 373-054, 077; CX 372-043, 065; CX 371-042, 061). “[R]ecommendations from friends or family and use of the agent in a previous transaction were two of the chief ways sellers chose an agent . . .” and over 50% of all buyers nationwide between 2003 and 2006 used

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an agent they found through a referral from a friend, a neighbor, or a relative, or who the buyer knew personally or from a previous transaction. (CX 373-054, 077; CX 372-043, 065; CX 371-042, 061; CX 406 (Bishop, Dep. at 97-98, 107-08)).

87. For both limited and full service brokers in Southeastern Michigan, a good reputation and a consequent stream of referral business from satisfied customers is important to compete for new business. (Sweeney, Tr. 1318 (Referrals are “the most important” source of new business); CX 42 (Nead, Dep. at 19) (80% of her business is from past clients or referrals); CX 40 (Elya, Dep. at 26) (50% of his business comes from referrals and repeat customers); CX 302-001 (referrals account for 60-70% of Mr. Whitehouse’s business)).

**b. Competition From Limited Service Brokers**

88. NAR found in 2003 that limited service brokerages have “the potential to change the competitive landscape of residential real estate brokerage.” (CX 533-040). NAR reasoned that, even though limited service brokers “may not currently command significant market share . . . their significance goes beyond their size. They may be serving a customer need that is not currently being served by the dominant players. In addition, they may play a larger role in selected markets or may serve a particular consumer segment better than the dominant models.” (CX 533-038).
89. However, agents offering EA listings do not provide the same level of personal service, and do not compete well with traditional models for trust and professionalism. (Murray, Tr. 292; CX 535-109). Albert Hepp does not meet any Michigan customers face-to-face. (Hepp, Tr. 695). Jeff Kermath rarely meets customers face-to-face. (Kermath, Tr. 799-800). Generally, Denise Moody does not physically meet her customers. (D. Moody, Tr. 570-71).

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**(i) Growth of the Limited Service Brokerage Model**

90. In 2003, limited service brokerages were estimated to have a 2% market share nationwide. (RX 154-A-016). In 2005, limited service brokerages had grown to 15% nationwide. (RX 154-A-016; Murray, Tr. 166-67; CX 534-039, 041).
91. But, between 2005 and 2006, alternative service brokers declined nationally 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. 289-91; CX 535-116).
92. The growth of limited service brokers nationally from 2003 to 2005 is attributed in part to the rise of the Internet, which made it more efficient for brokers to reach potential buyers and to perform their services on behalf of sellers. (Murray, Tr. 167; RX 154- A-017 ("The Internet afforded Limited Service Brokers the ability to reach greater real estate professional and housing consumer audiences . . . [which] in turn, enabled firms to establish a real estate brokerage at lower costs than before."); CX 498-A-013 (Internet has contributed to the entry of several new models of real estate brokerage services); CX 375-029 ("The rise of the Internet has seen the emergence of [limited service brokers] as a significant competitor to full service brokerages.")).
93. The growth of limited service brokers nationally from 2003 to 2005 is also attributed in part to extraordinarily hot markets on the east and west coasts. (Murray, Tr. 167).
94. A strong housing market ("seller's market") makes some sellers think that they can sell their homes without the full range of brokerage services, while also creating a greater price differential between traditional full service brokers and limited service brokers, and



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thus may lead to an increase in limited services brokerages. (Murray, Tr. 168-69; 154-A-016-017).

95. A poor housing market (“buyer’s market”) can impact the use of limited service brokers in two opposite ways. F. 96-97.
96. First, the preponderance of evidence indicates that the use of limited service brokers can be expected to decline in a buyer’s market because where both the value of a home and the seller’s equity is constantly declining, more home sellers will want the professional marketing services of a full service broker. (Murray, Tr. 168-69; Sweeney, Tr. 1307, 1326-29)).
97. Second, limited evidence suggests that the use of limited service brokers can be expected to increase in a buyer’s market because of the high potential of “short sales,” where people, who may not have equity in their homes to afford a traditional commission and “are generally going to look for the lowest cost they can to get their homes sold.” (Murray, Tr. 169-71 (explaining that lack of home price appreciation, people taking out a hundred percent financing, and no equity in the home will lead people to look for the “lowest-cost alternative they can to sell their home because, whatever it is, they’re going to write a check to get out of their house”); RX 154-A-020-021.)
98. Brokers in Southeastern Michigan offering limited services also testified that their services often appealed to home sellers without equity in their homes. (Mincy, Tr. 382; Hepp, Tr. 598-99; G. Moody, Tr. 882 (limited services help people in “tough economic times”).

**(ii) Price Pressure on Commissions**

99. Limited service brokerages put price pressure on full service brokerage commissions. (Murray, Tr. 174; RX I54-A-0 18; CX 403-007, 009; CX 533-026 (noting that traditional brokerage firms “often are challenged

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by larger [firms) that provide a broader range of services, or by emerging firms who provide a-la-carte services at a lower price.”)).

100. In its 2003 *Change is Relentless* paper, NAR found that, “[a] growing percentage of consumers are asking agents to reduce their commissions. This has been sparked by awareness of discounted online and limited-service models, and remains a challenge for full service agents.” (CX 403-007; *see also* Murray, Tr. 175-76).
101. Seller awareness of limited service brokers has been growing steadily, which impacts competition between limited service brokers and full service brokers because “if more sellers are aware that there are alternatives that are lower cost, the more sellers are going to at least investigate it and see if that fits them.” (Murray, Tr. 174-75; RX 154-A- 019- 020; CX 403-007 (“Pricing pressures. A growing percentage of consumers are asking agents to reduce their commissions. This has been sparked by awareness of discounted online and limited-service models, and remains a challenge for full-service agents.”)).

##### **5. The Multiple Listing Services**

102. Cooperation among brokers operating in almost every local marketplace around the country is facilitated through the local MLS. (RX 154-A-029). A primary role of the MLS is to “provide a method for the [member] brokerage firms to cooperate with each other to better serve the buyers and sellers. This has included sharing information on properties that they have listed for sale . . . and creating rules governing how they will work and operate which includes the ability of one broker to offer compensation to another broker.” (CX 414 (Niersbach, Dep. at 23-24); CX 380-011).
103. A purpose of the MLS is to facilitate cooperation between participants. (CX 42 (Nead, Dep. at 134 (The

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MLS is “there to enhance the sharing of information.”); CX 43 (Hardy, Dep. at 140-41 (The “real reason [for the MLS] is to accumulate and disseminate information between participants.”))).

104. In addition to serving as a database of properties for sale, the MLS facilitates an orderly and efficient marketplace by providing systematic and enforceable rules governing the sale of listed properties. (RX 154-A-025-026; CX 375-021 (“Agents can conduct business confidently [through the MLS] because they are reasonably assured that transactions follow established rules.”); CX 414 (Niersbach, Dep. at 27)).
105. MLSs, such as Realcomp, that are affiliated with NAR must follow the mandatory provisions of NAR’s MLS Policies and Rules if they wish to remain compliant with NAR. (CX 414 (Niersbach, Dep. at 36-37)).

**a. The Closed MLS Database**

106. The general public cannot list their home in the MLS - or search the MLS for a home without using a real estate broker who is a member of the MLS. (JX 1-04;.RX 154-A-025).
107. FSBO sellers are generally not allowed to list their properties in their local MLS. (RX 154-A-007).
108. FSBO sellers are not allowed to list their properties in the Realcomp MLS. (JX 1-04, 08).

**(i) Disseminating Information Among Brokers**

109. The listing in the MLS will include details about the home, such as the number of bedrooms, baths and square footage, as well as the offer of compensation to any cooperating broker who is the “procuring cause” of a sale of the property, the type of listing agreement, and the level of services being provided by the listing broker. (Mincy, Tr. 327-35; CX 426; Murray, Tr. 155, 162-63; RX 154-A-009).

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110. In its Consumer Services White Paper, NAR found that, “[t]he most emphasized function of the MLS is the listings service: a central repository for ads for salable properties. These ads (listings) are submitted by a specific real estate agent or broker and serve as a way to notify other real estate professionals and the home buying public about the availability of a home.” (CX 375-021; CX 456-004).

**(ii) Means to Make Offers of Cooperation**

111. The MLS is the only mechanism of which NAR is aware “that provides a platform and rules or procedures for brokers to cooperate with each other.” (CX 414 (Niersbach, Dep. at 48)). MLS functions include rules enforcement and a means of agreeing on compensation among MLS participants. (CX 375-021).
112. The ability to include an offer of compensation, which is enforceable through binding arbitration, separates the MLS from all other aggregations of home listing information. (RX 154-A-026).
113. One of “the most important features that separate the MLS from mainstream advertising options [has] to do with . . . the inclusion of a blanket unilateral offer of compensation to Realtors for every listing in the MLS. While other advertising options may do a good job of providing exposure, their business models do not include protecting [realtors’] compensation.” (CX 220).

**b. Dissemination of Listings to Public Websites**

114. In addition to operating a closed database of information about properties for sale that are listed by its members, MLSs also disseminate listing information to certain public websites that can be searched by members of the public. (Murray, Tr. 145-46, 206-07; RX 154-A-034-035).

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115. Through public websites that are fed listing information by MLSs, home buyers have access to information regarding the thousands of listings by MLS members and have the ability to search them based on a variety of criteria, such as price, location, type of dwelling (single-unit, multi-unit, etc.), and characteristics of the property. (CX 498-A-012; RX 154-A-039).
116. MLSs do not provide all of the listing information that is on the MLS in their feed to public Internet websites, such as information about offers of compensation and agent remarks. (RX 154-A-035; CX 40 (Elya, Dep. at 81-82)). For example, members of the public searching Realcomp listings online do not typically know what type of listing agreement -- whether an Exclusive Agency or Exclusive Right To Sell listing -- is in place between the home seller and their listing broker. (JX 1-04).

**(i) Public Websites**

117. Many MLSs, including Realcomp, disseminate listing information to Realtor.com, the official consumer website for the National Association of Realtors. (CX 412 (Goldberg, Dep. at 25, 35); Murray, Tr. 206-07). Realtor.com is operated by Move, Inc., pursuant to an operating agreement with the National Association of Realtors. (CX 412 (Goldberg, Dep. at 6-7, 22-26); CX 360 (Operating Agreement)).
118. Many MLSs, including Realcomp, also operate their own public websites, known as MLS public websites. (RX 154-A-047-048; Murray, Tr. 207-08). For example, Realcomp provides an exclusive feed of listing information to MoveInMichigan.com, which Realcomp owns and operates, based on listings in the Realcomp MLS database. (RX 154-A-049; Murray, Tr. 207-08).

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**(ii) Internet Data Exchange (IDX)**

119. The majority of MLSs, including Realcomp, also provide listing information to the public websites of their broker members, known as “IDX websites.” (Murray, Tr. 208-10). IDX (Internet Data Exchange) is a set of rules and policies that set forth how a local brokerage firm may receive and display on the broker’s own website the listings of other MLS members. (Murray, Tr. 208-10; RX I 54-A-059-060; CX 414 (Niersbach, Dep. at 50,55)).
120. Through the IDX, broker websites are able to display listing information from their local MLS database so that consumers can go to the broker’s website and search for available properties of all participating MLS members. (Murray, Tr. 208-10; CX 405 (Baczkowski, Dep. at 85)). In essence, MLSs provide a feed of MLS property listings (referred to as an “IDX feed”) that enables MLS members, with the consent of listing brokers, to display MLS listing information on their own broker websites. (Murray, Tr. 208-10; RX 154-A-059-060; CX 414 (Niersbach, Dep. at 50))).
121. For the 91% of firm websites nationwide that contain searchable property listings, the IDX feed is how those firms obtain listings other than their own. (RX 154-A-060). For example, a customer in Southeastern Michigan can visit Remax.com, one of the large franchise brokerage websites, and view properties in Southeastern Michigan that are listed by all different brokers, such as Century 21, Town & Country, and Weir Manuel, in Realcomp’s MLS that participate in the IDX feed. (Murray, Tr. 209-10; RX 154-A-060-062).

**B. The Southeastern Michigan Residential Real Estate Market**

122. 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).

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123. Southeastern Michigan has been in a buyer's market with respect to its residential real estate, for the past three years. (Murray, Tr. 267; Mincy, Tr. 454; G. Moody, Tr. 879-80; Hepp, Tr. 699).
124. For the last three years, the Detroit area has been one of the worst buyer's market in the country for residential real estate. (Murray, Tr. 268).
125. The Southeastern Michigan residential real estate market is currently 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)).
126. The Southeastern Michigan residential real estate market is considerably worse than the national market, and has been for about three years, attributable to the loss of 350,000 jobs in the last several years. (Sweeney, Tr. 1306).
127. The Southeastern Michigan residential real estate market 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)).
128. Homes in Southeastern Michigan have been consistently losing value. (Sweeney, Tr.1309).
129. The state association has seen a decline overall throughout the state of Michigan in the number of brokers, with agents leaving the real estate business. (Kage, Tr. 1027).
130. One agent estimated that real estate agents are down in volume approximately 20%. (CX 525 (Adams, Dep. at 11)).
131. Unlike in robust real estate markets, Exclusive Agency listings have not made significant in-roads in the Southeastern Michigan market. (Sweeney, Tr. 1326, 1330 (While discount broker firms have emerged in

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Southeastern Michigan, there has not been a surge in growth)).

**C. Respondent: Realcomp II Ltd.****1. Realcomp's Corporate Structure**

132. Realcomp is a corporation organized, existing, and doing business under, and by virtue of, the laws of the state of Michigan. (JX 1-06).
133. Realcomp's office and principal place of business is located at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334. (JX 1-06).
134. Realcomp was founded in November 1993 and started doing business in January 1994. (CX 36 (Kage, IHT at 10)). Realcomp started out with about 7,000 members and presently has approximately 13,800 members. (Kage, Tr. 1026; CX 36 (Kage, IHT at 10)).
135. Realcomp was formed in 1993 after seven boards and associations of Realtors merged to form Realcomp. (Kage, Tr. 900-01; CX 54; CX 56; CX 88).

**a. Realcomp's Ownership**

136. Realcomp is currently owned by seven shareholder Realtor boards and associations. (Kage, Tr. 900).
137. The seven shareholder owner boards of Realcomp are: 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 the Western-Wayne Oakland County Association of Realtors. (JX 1-03).
138. Each Realcomp shareholder owner board is comprised of competing Realtor members. (Kage, Tr. 900-01; CX 32-002 (Answer)).



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139. A Realcomp shareholder must be a Realtor board or association that is a member in good standing of the National Association of Realtors. (JX 1-03).

**b. Realcomp's Governance**

140. The business and affairs of Realcomp are conducted by its Board of Governors who are selected by the shareholder boards and associations. (JX 1-03; CX 59-010).
141. Each Realcomp Governor must be a Realtor. (Kage, Tr. 901). One of the Governors from each shareholder must be "actively practicing real estate." (CX 59-011).
142. The Realcomp Board of Governors is made up of Realtors from numerous full service brokerage firms, including Century 21, SKBK Sotheby's, Coldwell Banker, Re/Max, and Realty Executives, which compete with one another for business in Southeastern Michigan. (JX 1-10; CX 211; CX 35 (Kage, Dep. 19-20); CX 43 (Hardy, Dep. at 23-24); CX 42 (Nead, Dep. at 7-8); Mincy, Tr. 320; CX 40 (Elya, Dep. at 6)).
143. Each shareholder owner of Realcomp selects their representatives on the Realcomp Board of Governors. (CX 36 (Kage, IHT at 12); JX 1-03). Each board member serves a three year term. (CX 36 (Kage, IHT at 13)).
144. The role of the Board of Governors is to be knowledgeable about the challenges and issues, provide oversight of the organization and focus on the best interests of Realcomp. (CX 217).
145. The Realcomp Board of Governors is ultimately responsible for the actions of Realcomp and its employees. (CX 42 (Nead, Dep. at 56-57)).
146. The Realcomp Board of Governors approves any changes to the Realcomp Policy Handbook. (CX 35 (Kage, Dep. at 15-16); CX 90).

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147. The Realcomp Board of Governors has the authority to set and approve the MLS rules, to authorize the officers to engage in activities to make the MLS work, and to make sure that the rules are effective for members. (CX 38 (Gleason, Dep. at 19); CX 36 (Kage, IHT at 11-12, 25); CX 415 (Nowak, Dep. at 31)).
148. The Board of Governors needs shareholder approval for certain actions. (CX 38 (Gleason, Dep. at 19)).
149. Karen Kage is the CEO of Realcomp. (Kage, Tr. 897). She has held this position since 1998 and has worked for Realcomp since 1993. (Kage, Tr. 898; CX 36 (Kage, IHT at 7, 9)). Her responsibilities as CEO include staffing, enforcing policies and rules, working within the Realcomp budget, and attending committee and Board of Governors meetings. (Kage, Tr. 898-99; CX 36 (Kage, IHT at 7)).
150. Karen Kage prepares the information packets for the Realcomp Board of Governors, including any proposed changes to the Realcomp Rules and Regulations that come out of the Realcomp MLS User Committee meetings. (CX 36 (Kage, IHT at 26-27)).
151. The MLS User Committee discusses issues regarding the MLS Rules and Regulations and can then make recommendations to the Realcomp Board of Governors. (Kage, Tr. 901). Karen Kage attends most MLS User Committee meetings. (Kage, Tr. 902).
152. As CEO of Realcomp, Karen Kage needs to be familiar with the Realcomp Rules and Regulations. (CX 36 (Kage, IHT at 25-26)). She stays current with the changes to the MLS Rules and Regulations. (CX 36 (Kage, IHT at 25-26)).
153. The Board of Governors decides whether or not to adopt recommendations from the MLS User Committee. (Kage, Tr. 902; CX 92).

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154. The Board of Governors passes a motion with the approval of the majority of the Governors. (CX 59-018; CX 54-027). If the Board of Governors adopts a recommendation from the MLS User Committee, then the Realcomp Rules and Regulations are changed accordingly. (Kage, Tr. 902-03).
155. The October 2006 Realcomp Rules and Regulations are the current Rules and Regulations and were approved by the Realcomp Board of Governors. (CX 35 (Kage, Dep. at 7-8); CX 100; Kage, Tr. 973).
156. Realcomp members have to abide by the Realcomp Rules and Policies. (CX 35 (Kage, Dep. at 16); CX 90).

**c. Realcomp's Membership**

157. Realcomp currently has over 2,200 real estate office members in Southeastern Michigan. (Kage, Tr. 903).
158. Realcomp currently has about 14,000 members, consisting of both real estate brokers and real estate agents, who "compete with one another to provide residential real estate brokerage service to customers." (CX 32-002 (Answer); Kage, Tr. 903).
159. Realcomp is the largest MLS in Michigan; it has the most members of any MLS in Michigan and accounts for almost half of all Realtors in the state. (Kage, Tr. 993; JX 1-06; CX 223).
160. Realcomp advertises to the public that it is the largest MLS in Michigan. (Kage, Tr.911).
161. Realcomp has told its members that "the goal of the Realcomp Board of Governors is to continue to merge with neighboring MLSs in order to bring you more information and eliminate the need for yet another property search database." (CX 31).

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162. A Realcomp member is any person authorized by Realcomp to access, use or enjoy the benefits of the Realcomp MLS in accordance with Realcomp's bylaws, policies, rules and regulations. (JX 1-03).
163. Realcomp's membership is open to any real estate broker who is a member of one of the shareholder boards. (Kage, Tr. 900-01; CX 410 (Cooper, Dep. at 26-28). Any Michigan licensed real estate broker can join NAR and one of the shareholder boards, and in turn join Realcomp. (Williams, Tr. 1100; CX 414 (Niersbach, Dep. at 9)).
164. Realcomp permits agents who offer discount services to be members of Realcomp. (JX 1-07-08).
165. All Realcomp members are NAR members. (JX 1-03; CX 100-003).
166. Each Realcomp member is required to hold an active real estate license, an active appraiser license, or both. (JX 1-06).
167. Some of the Realcomp members are appraisal companies, which also have agents. (Kage, Tr. 903; CX 127; CX 138).
168. Each broker member has to agree to abide by the Realcomp Rules and Regulations, and the policies and procedures in the Realcomp II Ltd. Policy Handbook. (JX 1-03; CX 212; CX 35 (Kage, Dep. at 20-22)).
169. Realcomp fines brokers for violating any of the Realcomp Rules or Policies. The fines are assessed to the broker, not the agent, because the broker is responsible for all listings from his or her office. (CX 36 (Kage, IHT at 105-06)).
170. Realcomp is organized for the purpose of serving its members' interests. (JX 1-06).

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**2. Realcomp's Association With the National Association of Realtors**

171. NAR handles policies, procedures and lobbying on behalf of its over 800 MLS board and association members. (Kage, Tr. 900).
172. Realcomp has been affiliated with NAR since its inception. (Kage, Tr. 972).
173. Each of the Realcomp shareholder owner boards is affiliated with NAR. (Kage, Tr. 900-01). Realcomp is affiliated with NAR by virtue of its ownership by NAR-affiliated Associations of Realtors. (CX 36 (Kage, IHT at 10-11)).
174. Realcomp's bylaws require that Realcomp abide by NAR's rules, so Realcomp adopts NAR changes into its own rules and then sends a communication out to Realcomp members letting them know of the rule changes. (Kage, Tr. 971-72; CX 36 (Kage, IHT at 27-28)).

**3. The Realcomp MLS Member Services**

175. Realcomp services the territory within Southeastern Michigan, including Livingston county, Oakland county, Macomb county and Wayne county. (JX 1-06).
176. Every Realcomp member pays the same basic fees to become a member: office fee of \$75.00 per quarter per participating office and usage fee of \$99.00 per quarter, per Realcomp participant. (Kage, Tr. 903-04; CX 222-002).
177. All members of Realcomp, including members who offer alternative business models, pay the same dues to Realcomp. (Kage, Tr. 903-04; CX 35 (Kage, Dep. at 22); CX 210).

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178. Realcomp sends a monthly magazine, Real Solutions, to its members to update them on the services offered by Realcomp. (CX 42 (Nead, Dep. at 53-54); CX 279 (marked as CX 105 at deposition)).

**a. The Realcomp MLS Database**

179. The main service that Realcomp offers its members is the MLS. (Kage, Tr. 907).

180. The Realcomp MLS online system (“Realcomp Online”) is available 24 hours a day. (Kage, Tr. 907). The Realcomp MLS online system enables members with Internet access to access the Realcomp MLS online from any computer. (Kage, Tr. 907-08).

181. Realcomp permits agents to enter non-ERTS listings into the Realcomp MLS. (JX 1-07).

182. The Realcomp MLS allows members to upload up to six photos per listing and each listing to include a virtual tour, which is like a rotating 360-degree photo of the home, enabling consumers or agents to get a better idea of all the rooms in the home. (Kage, Tr. 909).

183. Realcomp enables its members to email MLS listing information to consumers, and these emails include Google Maps, which are popular among consumers. (CX 237-001; CX 35 (Kage, Dep. at 107-09)). Realcomp has touted this new feature to its members. (CX 237-001; CX 35 (Kage, Dep. at 107-09)).

184. Realcomp wants the information in the Realcomp MLS to be accurate at all times and to be of the highest possible quality. (Kage, Tr. 908; CX 35 (Kage, Dep. at 29-30, 35-36)).

185. The most important features that separate the Realcomp MLS from mainstream advertising options are: (1) the accuracy and timeliness of the property database that is created and maintained by Realtors for

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Realtors, and (2) the “inclusion of a blanket unilateral offer of compensation to Realtors for every listing in the MLS. (CX 220; CX 35 (Kage, Dep. at 34-38)).

**(i) Requirements for Dissemination of Listings Among Members**

186. A home seller has to have a contract with a Realcomp member listing agent in order to get their listing onto the Realcomp MLS. (CX 36 (Kage, IHT at 37); Kage, Tr. 972; JX 1-04; CX 35 (Kage, Dep. at 97-98)).
187. Realcomp requires its members to input all of their listings into the Realcomp MLS, unless a seller chooses not to have their listing in the MLS. (CX 100-004; CX 36 (Kage, IHT at 28); CX 35 (Kage, Dep. at 8)).
188. Any listing submitted to the Realcomp MLS “is subject to the rules and regulations of the Service upon signature of the seller(s)/lessor(s)” (CX 100-004; CX 35 (Kage, Dep. at 8-9); Kage, Tr. 973).
189. Realcomp does not require that brokers who list properties pursuant to any listing agreement on the Realcomp MLS be compensated at all, whether by commission or otherwise. (JX 1-04; Kage, Tr. 976; CX 42 (Nead, Dep. at 105-07)).
190. There is no requirement under the Realcomp rules for a member to have a cooperating broker who is a Realcomp member. (Kage, Tr. 979; JX I-OS). A Realcomp member who has a listing in the Realcomp MLS can sell houses to a non-represented buyer, or to a buyer represented by a broker or agent who is not a Realcomp member. (Kage, Tr. 979).
191. When a Realcomp member inputs a listing into the Realcomp MLS, the member must fill in the listing type field with either Exclusive Right to Sell, Exclusive Agency, Limited Service or MLS Entry Only. (CX 36 (Kage, IHT at 35); Kage, Tr. 973-74).

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192. The listing type field became a mandatory field for Realcomp participants in late 2003. (Kage, Tr. 974). The listing type is shown in bold in the right hand corner of each Realcomp listing, making this information readily available to Realcomp members. (CX 248; CX 35 (Kage, Dep. at 129-30)).

**(ii) Offers of Compensation**

193. On each listing filed with the Realcomp MLS, the listing broker must make a unilateral offer of compensation to any Realcomp member who acts as a cooperating broker and procures a buyer who purchases the listing property. (JX 1-03). Offers of compensation to cooperating brokers are made through the Realcomp MLS, and are not displayed on public websites. (JX 1-07).
194. The most common offer of compensation to cooperating brokers in the Realcomp MLS is 3% of the sale price. (CX 42 (Nead, Dep: at 104-05)).
195. Under the Realcomp rules, the listing agent does not input the amount of compensation that he or she is receiving into the Realcomp MLS. (Kage, Tr. 975).
196. Realcomp does not set the commission rates for its members. (Kage, Tr. 976).
197. The compensation paid by a home seller to a Realcomp member listing broker is determined by negotiation between that home seller and that listing broker. (JX 1-04).

**(A) The Unilateral Offer**

198. Listing commissions are a requirement of the Realcomp MLS. A commission amount must be entered into at least one of the following commission fields: Sub Agency (SAC), Buyer Agency (BAC), or Non Agency (NAC). (CX 219-001; CX 35 (Kage, Dep. at 33-34)). This enables Realcomp members to



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know what commission is due to them if they are the procuring cause of the sale of the home. (CX 219-001; CX 35 (Kage, Dep, at 33- 34)).

199. The Realcomp MLS Rules and Regulations have a provision laying out the rules regarding compensation. (CX 100-010-011; Kage, Tr. 975). The compensation provision requires Realcomp members to enter the offer of compensation to any Realcomp participant who brings in the buyer. (CX 100-010-011). This provision in the Realcomp Rules and Regulations gives a mechanism for the selling agent to attempt to get the commission they earned if there were any problems. (CX 36 (Kage, IHT at 97-98)).
200. Under both an ERTS listing and an EA listing, there is always an offer of compensation to the cooperating broker who brings in the buyer. (CX 36 (Kage, IHT at 79)).
201. Realcomp has no rules specifying the minimum services that a cooperating broker must perform (other than performance as the procuring cause of sale) to be entitled to compensation in the event of a consummated transaction. (JX 1-05).

**(B) Protections for Cooperating Brokers**

202. Under the Realcomp rules, the listing broker must stand behind an offer of compensation; the listing broker is a guarantor of the offer. (CX 43 (Hardy, Dep. at 115-16); CX 42 (Nead, Dep. at 103-04); CX 421 (Whitehouse, Dep. at 136-37)).
203. Under the Realcomp rules, a listing broker and a cooperating broker are free to negotiate a new commission. (Kage, Tr. 979-80; JX 1-05).
204. The cooperating broker can rely on the offer of compensation. (CX 37 (Bowers, Dep. at 41)). Even if the listing broker decides to discount the total commission paid by the home seller, the cooperating

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broker is still entitled to the offer of compensation put on the Realcomp MLS. (CX 37 (Bowers, Dep. at 41)).

205. If a cooperating broker is not paid a commission that is rightfully due to him or her, the cooperating broker can file a grievance or arbitration through their shareholder board to resolve the issue. (CX 36 (Kage, IHT at 97-98)).
206. Realcomp does not handle commission disputes. (CX 36 (Kage, IHT at 85)).
207. The Realcomp Board of Governors does not get reports on grievance and arbitration proceedings from the Realcomp shareholder owner boards. (CX 36 (Kage, IHT at 86)).
208. NAR's Code of Ethics governs grievances against Realcomp members. (CX 42 (Nead, Dep. at 138); CX 126).
209. Selling agents may protect themselves and ensure that they receive a commission by entering into a contract with a buyer client that requires the home buyer to compensate the agent even if the agent is not the procuring cause of sale. (CX 42 (Nead, Dep. at 113-14)). Thus, even if the buyer found a property on Realtor.com or another Internet site, went directly to the seller, and purchased the home without the assistance of the agent, the agent would be entitled to compensation even though the agent was not the procuring cause of the sale. (CX 42 (Nead, Dep. at 114-17)).

**b. The Realcomp Feed of Listing Information to Approved Websites**

210. One of the services that Realcomp offers its members is Internet advertising to "Approved Websites." (Kage, Tr. 925).

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211. “Approved Websites” are those websites to which Realcomp provides information concerning Realcomp MLS listings for publication including, MoveInMichigan.com, Realcomp IDX participant websites, and Realtor.com. In addition, Realcomp’s information concerning Realcomp MLS listings appears on ClickOnDetroit.com which frames MoveInMichigan.com. (Kage, Tr. 925-26; JX 1-04).
212. Realcomp highlights its service of Internet advertising to its current and potential members: “FREE Internet Advertising - Brokers have the option of automatically advertising their office’s active listing inventory through Realcomp II Ltd. on the Realtor.com and MoveInMichigan.com websites. Once Broker approval is received, the Broker’s office inventory is exported to both Websites on a daily weekday basis.” (CX 222-006; CX 35 (Kage, Dep. at 44-45); CX 224-002-003).
213. To send listings to MoveInMichigan.com, Realcomp IDX participant websites, and Realtor.com, Realcomp creates a feed of data each day which they put on a file transfer protocol site, so that Realcomp members can “call in and grab the data and then load it onto their system.” (Kage, Tr. 928).
214. Realcomp assembles the MLS data from all brokers that have requested their listings be included. (Kage, Tr. 929).
215. Realcomp does not require that brokers whose listings are transmitted by Realcomp to the Approved Websites be compensated at all, whether by commission or otherwise. (JX 1-04).
216. Realcomp does not require that transactions facilitated through the Approved Websites involve a cooperating broker. (JX 1-05).
217. Realcomp does not identify the type of listing agreement in place between a home seller and a

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Realcomp member listing broker when transmitting listings to the Approved Websites. (JX 1-04).

**(i) Public Websites**

218. The Internet is important to the marketing and sale of homes. The “majority of home buying and selling now begins on the Internet, “so” if you miss that consumer connection, you miss a lot of potential commissions and fees.” (CX 221-001; CX 35 (Kage, Dep. at 38-39)).
219. Realtors benefit from having their listings shown on the Realcomp Approved Websites. (CX 254-002 (“If you consider the fact that the majority of home buyers and sellers want to be able to search for homes on the Internet before they buy or sell, it makes sense for Realtors to not only have Websites, but to also have their listings on those Websites and to provide listing search capabilities.”), CX 35 (Kage, Dep. at 146-47).
220. The majority of home buyers and sellers want to be able to search for homes on the Internet before they buy or sell. (Kage, Tr. 925).
221. One of the pros of marketing properties through the Internet is “additional exposure for sellers” (CX 53).
222. Realcomp advertises the importance of MoveInMichigan.com, ClickOnDetroit.com and Realtor.com. (CX 98).
223. MoveInMichigan.com, ClickOnDetroit.com, Realtor.com, and Realcomp IDX websites provide value to MLSs and their member brokers. (CX 221-003).
224. One of the services that Realcomp provides its members is taking all of a broker’s listing data and sending it in one feed, “rather than each office having to have the technology within their own office to provide that service.” (CX 36 (Kage, IHT at 50)).

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225. Realcomp started giving its members the option of having MLS listing information on public real estate websites at the request of its broker members. (CX 36 (Kage, IHT at 50)).
226. When a listing is added or updated in the Realcomp MLS, the listing is automatically updated on Realtor.com, MoveInMichigan.com, ClickOnDetroit.com, and all of the IDX websites. (Kage, Tr. 931-32; CX 35 (Kage, Dep. at 30)).

**(A) Realtor.com**

227. Realcomp sends MLS listing information to Realtor.com, a national publicly accessible website affiliated with NAR, that contains for sale listings. (CX 36 (Kage, IHT at 46); Kage, Tr. 949; CX 20; CX 21). Realtor.com contains listing information from anywhere in the country. (Kage, Tr. 949).
228. Realcomp has an agreement with Realtor.com to allow Realcomp's MLS listings to be included on Realtor.com. (CX 19-CX 21).
229. The majority of Realcomp members send their listings to Realtor.com through the Realcomp MLS. (Kage, Tr. 931; CX 36 (Kage, IHT 47)).
230. In January 2007, Realcomp had 1,723 offices representing 13,184 Realcomp members participating in Realtor.com. (CX 33-014; CX 228-007; CX 35 (Kage, Dep. at 79-83)).

**(B) MoveInMichigan.com**

231. MoveInMichigan.com is a Realcomp-owned and operated publicly accessible website for showing Realcomp members' property listings for sale. (Kage, Tr. 932; CX 36 (Kage, IHT at 48)). MoveInMichigan.com is a valuable portal for any Michigan home buyer or seller, because it allows

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- consumers to search for Realcomp real estate listings in Southeastern Michigan. (CX 36 (Kage, IHT at 71); CX 15; CX 222-009).
232. Realcomp unveiled MoveInMichigan.com in August 2002, telling members that it was an “additional value-added service and expanded Internet exposure!” (CX 102).
233. Realcomp controls all of the content on MoveInMichigan.com. (Kage, Tr. 932).
234. Realcomp highlights the importance of MoveInMichigan.com to its members and potential members: “This public Website allows consumers to search for Michigan real estate that has been listed by Realcomp II Ltd. Subscribers . . . This value-added service is offered to Realcomp II Ltd. Subscribers free of charge.” (CX 222-009; CX 224-002-003; CX 272; CX 15).
235. Realcomp describes MoveInMichigan.com to consumers as “one of the most comprehensive real estate listing sites in all of Southeastern Michigan.” (CX 15).
236. Realcomp highlighted to its members that Open Houses added to the Realcomp MLS would automatically be added to MoveInMichigan.com: “Open Houses display complete with a photo, property details, a map, driving directions and more.” (CX 266-001-003).
237. ClickOnDetroit.com is a Michigan website owned by a local TV station. (Kage, Tr. 936; CX 36 (Kage, IHT at 48)).
238. ClickOnDetroit.com frames the MoveIn Michigan.com website, allowing consumers to see all of the listings available on MoveInMichigan.com through the ClickOnDetroit.com website. (CX 36 (Kage, IHT at 49)).

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239. All of the Board of Governors were in agreement that Realcomp should enter into an exclusive advertising agreement with ClickOnDetroit.com. (CX 41 (Mulvihill, Dep. at 29, 32-33); CX 179).
240. Realcomp highlights the importance of ClickOnDetroit.com to its current and potential members:

MoveInMichigan.com is the exclusive provider of data for WDIV's real estate page on ClickOnDetroit.com. This public website operated by WDIV Channel 4 is the #1 local website in Southeast Michigan receiving over 3.3 million clicks a month. The ClickOnDetroit.com website actually frames specific functions of Realcomp's MoveInMichigan.com website, sending consumers searching for Realtors, properties and Open Houses to you and your listings.

(CX 222-009-010; *see also* CX 224-002-003; CX 35 (Kage, Dep. at 52-55, 157-67); CX 259-CX 263; CX 272; Kage, Tr. 937).

**(ii) The Realcomp IDX**

241. Realcomp member IDX websites are important websites for listing brokers and home sellers intending to reach home buyers directly. (CX 557-A-027; CX 373-046).
242. The Realcomp IDX is the Internet Data Exchange service that affords Realcomp members the option of authorizing the display of their active listings on other Realcomp members' websites. (JX 1-07; CX 36 (Kage, IHT at 51); Kage, Tr. 947). Home sellers have a choice of whether or not they want their listings included in the Realcomp IDX feed. (CX 35 (Kage, Dep. at 11-12); CX 100-024).

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243. Realcomp broker members can use the Realcomp IDX feed to populate their own websites. (Kage, Tr. 947-48).
244. Realcomp broker members can then allow their agents to “frame” the broker website. (Kage, Tr. 945; CX 13-002).
245. “Framing” means displaying third-party information (such as MLS listing data) within a company’s or individual’s proprietary border. (Kage, Tr. 947).
246. Agents can frame the MLS listing information received by their broker. (Kage, Tr. 946 (“If a consumer accesses an agent’s website, and there’s an option there that says search for property, the consumer could choose that option and what would open up would be a new box that would be actually the broker’s website that would then have that listing data in it.”)).
247. Realcomp highlights the importance of Internet advertising to its current and potential members: “Internet Data Exchange (IDX) - IDX is an optional service that enables Realcomp II Ltd. Broker participants to display their active listings on Realtor Websites affiliated with Realcomp II Ltd.’s IDX program.” (CX 222-009; CX 35 (Kage, Dep. at 47); CX 224-002-003).
248. The inclusion of photos in Realcomp’s IDX feed is a significant benefit to Realcomp members: “IDX now includes the availability of multiple property photos. The ability to display multiple photos on listings being advertised through Internet Data Exchange has long been awaited and is now available.” (CX 259-002; CX 35 (Kage, Dep. at 159-60); Kage, Tr. 949; CX 13-003).
249. The majority of Realcomp member brokers participate in the IDX. (Kage, Tr. 931; CX 245). As of January 2007, 82% of agents were licensed to brokers



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who said they would participate in the Realcomp IDX. (Kage Tr. 948-49).

**c. Other Realcomp MLS Member Services****(i) Data-Sharing**

250. One of the ways Realcomp is able to have so many MLS properties in its database is through data-sharing agreements. (Kage, Tr. 914).
251. Data-sharing agreements enable Realcomp members to see listings from other multiple listing services in the area without having to pay double dues. (Kage, Tr. 914; CX 36 (Kage, IHT at 14-15); CX 42 (Nead, Dep. at 58-59)).
252. Data-sharing increases the number of potential cooperating brokers for Realcomp listings. (Kage, Tr. 914-15).
253. Realcomp has data-sharing arrangements with the Flint Association of Realtors, Lapeer and Upper Thumb Association of Realtors, Ann Arbor Area Board of Realtors, Jackson Association of Realtors, Lenawee Association of Realtors, Monroe Association of Realtors, and the Down River Association of Realtors. (CX 36 (Kage, IHT at 182-83, 185); Kage, Tr. 916-17; CX 26).
254. The Flint Association of Realtors and the Lapeer and Upper Thumb Association of Realtors have combined their services, and together have one MLS. (CX 36 (Kage, IHT at 183)).
255. Realcomp has an agreement to exchange passwords with the Jackson Association of Realtors, Lenawee Association of Realtors, Monroe Association of Realtors, and the Down River Association of Realtors, enabling members of Realcomp and each of these Associations to access each others' MLS databases

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without paying duplicate dues. (CX 36 (Kage, IHT at 184-86,190-91); CX 26).

256. Through the data-sharing agreements in which passwords are exchanged, Realcomp members have access to additional listings that are not included in the over 548,000 MLS properties in the Realcomp MLS database. (Kage, Tr. 920-21).
257. Realcomp highlights its data-sharing agreements to potential members. (CX 222-007; CX 255-001).
258. Realcomp's data-sharing agreements increase the number of potential viewers for each Realcomp listing. (CX 271 (it is "an increased number of Realcomp listings being searched."); CX 257; CX 35 (Kage, Dep. at 150-51, 188)).
259. Realcomp's data-sharing agreements increase the amount of data available to Realcomp members at no additional cost. (CX 224-002).
260. Realcomp's data-sharing agreements resulted in an overall cost savings of \$420,000 per year in 2003 for Realcomp subscribers through the data-sharing agreements. (CX 279-002).
261. Data-share partners who take advantage of Realcomp's Listing Submission Service have to agree to abide by the Realcomp Rules and Regulations. (CX 273; CX 35 (Kage, Dep. at 192); CX 40 (Elya, Dep. at 48-49)).
262. One of the reasons that Realcomp signed data-sharing agreements with eight other MLSs was to help Realcomp members avoid paying duplicate MLS fees. (CX 274-CX 276, CX 278; CX 35 (Kage, Dep. at 192-99); JX 1-06).
263. Realcomp's data-sharing arrangements were also motivated, at least in part, by a desire to increase the number of listings available to Realcomp members. (JX 1-06).

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264. Realcomp does not send Ann Arbor's listings to Realtor.com and Ann Arbor does not send Realcomp's listings to Realtor.com. (CX 36 (Kage, IHT at 188)).
265. Realcomp charges its data-share participants that submit listings directly to Realcomp \$125 per listing if they want "Publication on MLS, IDX database, Internet, Open Houses if applicable & Home Preview Channel." (CX 273-001).

**(ii) New Technologies**

266. Realcomp offers its members ShowingAssist, which improves how home showings are scheduled, confirmed and recorded. (CX 214-002; CX 225; CX 35 (Kage, Dep. at 55-58)).
267. Realcomp offers its members Realcomp Mobile, which enables members to access the Realcomp MLS on any hand-held device that has Internet access. (Kage, Tr. 957; CX 377).
268. Realcomp gives its members the opportunity to advertise their listings on the Home Preview Channel, a cable television channel in Michigan that showcases real estate properties. (Kage, Tr. 953; CX 222-008; CX 35 (Kage, Dep. at 46, 184-85)).

**(iii) Information Provided**

269. Realcomp puts out a Statement of Real Property Information Services, aimed at giving information about Realcomp to potential members. (Kage, Tr. 911-12; CX 627).
270. In January 2007, and in May 2007, Realcomp put out a Statement of Real Property Information Services on the Realcomp website. (CX 222; CX 627).
271. As of May 2007, the Realcomp MLS included 548,441 MLS properties. (Kage, Tr. 912-13).

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272. Realcomp offers its members a public record database which contains information on every single parcel of land within a particular county so that members can see taxes, dimensions, mortgage, and other information. (Kage, Tr. 954; CX 61).
273. The Realcomp public record database contains over 6,799,000 public records. (CX 222-004; Kage, Tr. 955).
274. In January 2007, Realcomp advertised that it was “the ONLY Multiple Listing Service in Michigan that offers integrated MLS and PRO information . . . at NO ADDITIONAL COST to the MLS Subscriber.” (CX 222-004; Kage, Tr. 955).
275. Realcomp members can use the public record database, in conjunction with the MLS database, to determine comparables for a particular property. (Kage, Tr. 955-56).
276. Realcomp members also have access to historical sales information and information about the prices of comparable homes. (CX 42 (Nead, Dep. at 37-38). There is no other good source of information regarding comparable active listings. (CX 42 (Nead, Dep. at 39-40)).

**D. Adjacent Multiple Listing Services**

277. MiRealSource is the MLS located to the east of Realcomp. (CX 36 (Kage, IHT at 17)). MiRealSource also serves Southeastern Michigan. (JX J-08; Kage, Tr. 1057-58; CX 407 (Bratt Dep. at 8-9, 73-74).
278. There are numerous members of MiRealSource who are also members of Realcomp, because of the overlapping areas in Macomb county and parts of Oakland county. (CX 36 (Kage, IHT at 17); CX 55).
279. Realcomp and MiRealSource have had numerous discussions over several years about the possibility of

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merging to create one MLS. (CX 36 (Kage, IHT at 17-18); CX 14-001; CX 45, CX 51).

280. Realcomp and MiRealSource have discussed data-sharing and merger possibilities in part so that their members could stop paying double MLS dues. (CX 36 (Kage, IHT at 192, 198); CX 50-CX 51; CX 55; JX 1-06).
281. The Ann Arbor MLS focuses on Washtenaw county, and does not service Oakland, Livingston, or Macomb counties. (Hepp, Tr. 655, 658-59).

**E. Relevant Market****1. Product Markets**

282. A relevant product market is the set of products or services, if any, that constrain the ability of the supplier of the product in question to behave anticompetitively. (CX 498-A-021).
283. The standard economic framework for defining relevant antitrust markets is to identify the smallest group of products for which a “hypothetical monopolist” of such product could profitably impose a “small but significant and nontransitory increase in price” (SSNIP). (CX 498-A-021).
284. The assessment of whether a hypothetical monopolist would be able to profitably increase its prices above competitive levels involves an examination of the extent to which consumers could substitute to other products or services in response to such a price increase. (CX 498-A-021).
285. There are two relevant product markets in this case. The first market is for residential real estate brokerage services, which is the output market. (F. 287-97; Williams, Tr.1102; CX 498-A-021). The second market is for multiple listing services, which is the

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input market. (F. 298-315); Williams, Tr. 1102-03; CX 498-A-021).

286. Realcomp's members are in the real estate brokerage services market. (Williams, Tr.1107). Realcomp competes in the multiple listing services market. (Williams, Tr.1107).

**a. Real Estate Brokerage Services: the Output Market**

287. The relevant output product market is the supply of real estate brokerage services to home sellers and buyers of residential real estate. (CX 498-A-022). For the majority of home sellers and buyers, there are no reasonable substitutes to real estate brokerage services. (CX 498-A-022).
288. For a home seller, the only alternative to selling a home using a real estate broker is to sell the home on his or her own, which is typically referred to as for-sale-by-owner ("FSBO"). (CX 498-A-022). For the majority of home sellers, selling FSBO is not a reasonable substitute for using a real estate broker due to the significant advantages of using a real estate broker for selling a home. (CX 498-A-022).
289. One primary benefit of using a real estate broker is the ability to list the home in an MLS. (CX 498-A-022; F. 102-04). FSBO properties cannot be listed in an MLS because only members of the MLS, which must be real estate brokers, are permitted access to the MLS. (CX 498-A-022; F. 106-08).
290. The vast majority of home sellers hire the services of a listing broker to assist in the sale of their home. (CX 498-A-022). In 2006, FSBO transactions comprised only about 12% of real estate transactions. (CX 498-A-022; CX 373-083).
291. The vast majority of houses sold by real estate brokers are listed on an MLS. (CX 498A-022; CX 373-080)

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(showing 88% of home sellers using agents had homes listed on MLS)).

292. Selling FSBO is not a viable substitute for most home sellers because a significant portion of FSBO properties are sold to persons known by the home seller. (CX 498-A-022- 023). In 2006, of the 12% of houses sold by homeowners without the assistance of a broker (*i.e.* FSBO sales), approximately 40% were sold to persons known to the home seller such as family members or friends. (CX 498-A-023; CX 373-072).
293. In 91% of all residential real estate transactions, the home seller did not know the home buyer. (CX 498-A-023; CX 373-072). In these instances, only 4% of home sellers sold the property without a real estate broker. (CX 498-A-023; CX 373-072).
294. These statistics show that listing a home in an MLS is particularly important. (CX 498-A-023). Because FSBO sellers cannot list on the MLS, most home sellers will not perceive FSBO as a viable substitute for brokerage services. (CX 498-A-023).
295. A hypothetical monopolist of real estate brokerage services would be able to profitably increase commissions significantly above competitive levels. (CX 498-A-023). Such a price increase would be profitable because the vast majority of home sellers would not be willing to switch to selling their homes on their own (FSBO) in response to a price increase by a hypothetical monopolist of brokerage services. (CX 498-A-023).
296. Applying the standard market definition framework, a relevant product market is real estate brokerage services and does not include FSBOs. (CX 498-A-023).
297. Respondent's expert did not contest Complaint Counsel's expert's conclusion that the relevant output

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market in this case is the market for real estate brokerage services. (CX 557-A-008).

**b. Multiple Listing Services: the Input Market**

298. The relevant input market is the supply of multiple listing services to real estate brokers, which is the market in which Realcomp competes. (F. 299-315; CX 498-A-023; Williams, Tr. 1107).
299. There are various outlets where a real estate broker can list a property for sale (*e.g.*, print classified ads), but only an MLS uniformly provides for an offer of compensation to a cooperating broker. (CX 498-A-023-024; F. 111-13). Without access to the MLS, cooperating brokers would be required to directly contact (*e.g.*, by phone, fax, or email) the listing broker or home seller, significantly increasing the time involved in searching on behalf of home buyers. (CX 498-A-024).
300. Because the MLS is an important input for cooperating brokers searching on behalf of home buyers, the MLS is also an attractive venue for listing brokers to advertise houses being sold. (CX 498-A-024).
301. The greater the number of cooperating brokers using the MLS to search for homes, the shorter the expected time required to sell a home and/or the higher the expected offer price and thus the greater the value of the MLS to listing brokers. (CX 498-A-024).
302. The greater the number of listing brokers that list homes on the MLS, the greater the number and variety of homes available to cooperating brokers to choose from, which makes it more likely that cooperating brokers will quickly find a match for a home buyer and hence the greater the value of the MLS to cooperating brokers. (CX 498-A-024).
303. Multiple Listing Services exhibit “network effects.” (Williams, Tr. 1108; CX 498-A-024).



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304. “Network effects” are a type of demand-side economies of scale that occur when the value of a product or service to a customer depends on the number of other customers who also use the product or service. (CX 498-A-019).
305. Network effects exist where the value or quality of a service to one user increases as the number of other users of the same service increases. (Williams, Tr. 1108; CX 498-A-024). The classic example of network effects is a telephone network - the value of the telephone network increases as more users join the network, allowing a user to be able to call more persons. (Williams, Tr. 1108).
306. An MLS exhibits network effects from both sides of the market. (Williams, Tr. 1109).
307. From a home seller’s (or listing broker’s) point of view, the MLS is more valuable the more home buyers (or cooperating broker’s) are viewing the MLS. (Williams, Tr. 1109-10). The value of the MLS to listing brokers increases as the number of cooperating brokers increases because (a) the expected selling price increases with the number of home sellers that demand the house and/or (b) the time required to sell the house at a given asking price decreases. (CX 498-A-024).
308. From the home buyer’s (or cooperating broker’s) perspective, the MLS becomes more valuable as more home sellers (or listing brokers) have listed their properties on the MLS. (Williams, Tr. 1109-10). The value of the MLS to cooperating brokers searching for homes increases as the number of listings increases because (a) the closeness of the match between home characteristics will be greater for a given amount of time devoted to search and/or (b) the expected amount of time required to achieve a given match will decrease. (CX 498-A-024).
309. These forces reinforce one another such that both listing brokers and cooperating brokers will achieve

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greater efficiencies in the provision of brokerage services if they use an MLS. (CX 498-A-024).

310. The implications of network effects for brokers is that a broker that does not have access to the MLS is likely to be at a disadvantage vis-a-vis brokers with access. (Williams, Tr.1110). Because efficiencies grow with the number of users, other sources of listing services with fewer users are not economically viable substitutes for an MLS. (CX 498-A-024-25).
311. Listing brokers who do not have access to the MLS, and thus are required to advertise their listing by means other than an MLS, can expect that fewer cooperating brokers will see the property such that, at a given asking price, the likelihood of a sale will be lower and, if a sale occurs, the expected time to sell will be longer, all else equal. (CX 498-A-025).
312. Cooperating brokers who are unable or unwilling to use the MLS will need to contact listing brokers or home sellers directly to learn the compensation offer and at the same time may need to search over multiple sources in order to identify the same number and type of houses being offered for sale that are available on the MLS. (CX498-A-025). As a result, search costs, including time costs, would increase significantly compared to the search costs of using the MLS. (CX 498-A-025).
313. Brokers without full access to an MLS would therefore be at a significant competitive disadvantage. (CX 498-A-025).
314. Consistent with these benefits of using an MLS, the overwhelming majority of real estate brokers are members of an MLS and list all homes for sale in an MLS. (CX 498-A-025).
315. Applying the standard economic framework for defining relevant markets, the net result is that a hypothetical monopolist of MLS listing services would

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be able to implement a “small but significant and non-transitory increase in price” for access to the MLS because few brokers could withdraw from participating in an MLS even if the fees or other costs associated with participation substantially increased. (CX 498-A-025).

**2. Geographic Market**

316. The relevant geographic market defines the geographic scope of competition within a relevant product market. (CX 49S-A-025).
317. In defining the relevant geographic market, the objective is to identify the smallest geographic area in which a “hypothetical monopolist” could profitably impose a SSNIP above competitive levels. (CX 498-A-025). This assessment involves an examination of whether consumers could substitute to suppliers in other geographic areas in response to such a price increase. (CX 498-A-025).
318. In the case of multiple listing services, the scope of the geographic market will largely be determined by degree of substitutability between neighborhoods for home buyers. (CX 498-A-026). Suppose that a hypothetical monopolist of multiple listing services in a particular geographic area, implements a supracompetitive price increase for all houses listed in that MLS that are located in that area. (CX 498-A-026). For brokers representing home buyers and sellers in that particular area, MLSs prevalent in adjoining geographic areas are not effective substitutes to the hypothetical monopolist of MLS services in that particular area because a listing in an adjacent MLS will not be seen by the majority of cooperating brokers and home buyers searching for a home in that particular area. (CX 498-A-026).
319. Under the scenario in F. 318, listing brokers representing the sellers of homes located in the relevant geographic area cannot substitute away from

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MLS listing services in that area. (CX 498-A-026). Any broker representing the seller of a home located in that particular area would face the supracompetitive price for MLS listing services for houses located in that area. (CX 498-A-026). The higher cost of MLS listing services in the relevant area will be passed on in the form of higher brokerage fees for brokerage services supplied in that particular area. (CX 498-A-026).

320. Under the scenario in F. 318, for cooperating brokers working with home buyers in the relevant area, MLSs in adjacent geographic areas are not effective substitutes because the vast majority of homes for sale in the relevant area will be listed in the MLS of the hypothetical monopolist in the relevant area. (CX 498-A-026).
321. Network effects make the geographic markets for MLS listing services local in nature. (CX 498-A-026). As explained by Karen Kage, “location, location, location remains a guiding principle in real estate.” (CX 221-001).
322. The National Association of Realtors reports that real estate markets are local in nature. (CX 137-007).
323. Realcomp Governors admit that real estate markets are local in nature. (CX 40 (Elya, Dep. at 15)).
324. Home buyers can defeat an increase in the price of brokerage services in the relevant area only by buying a house in a neighborhood other than that particular area where the supracompetitive listing fees apply. (CX 498-A-026). If, for example, many home buyers consider an adjacent neighborhood a substitute for the relevant area in terms of house location, then that area is not the relevant geographic market. (CX 498-A-026). If, however, most home buyers are unwilling to purchase a house in a neighborhood other than the given area where supracompetitive MLS listing fees lead to elevated brokerage fees, then that particular

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area is a relevant geographic market for MLS listing services. (CX 498-A-026).

325. Applying the hypothetical monopolist framework generally to various subsets of an MLS service area, starting with any local geographic area (*e.g.*, neighborhoods or groups of neighborhoods), the relevant geographic markets will be determined by the degree of substitutability between neighborhoods for home buyers. (CX 498-A-026-027).
326. The main counties that Realcomp services are Livingston, Wayne, Macomb, and Oakland. (Kage, Tr. at 1059).
327. Data from Realcomp shows that {■■■■■■■■} of the listings on Realcomp are in those four counties. (Williams, Tr. 1113, *in camera*; CX 498-028, *in camera*; CX 499, *in camera*; illustrated in OX 6-001, *in camera*). Each of the other counties in which Realcomp has listings account for {■■■■■■■■■■} of Realcomp's listings. (Williams, Tr. 1113, *in camera*; CX 498-028, *in camera*; CX 499, *in camera*; illustrated in DX 6-001, *in camera*).
328. The relevant geographic market in this case are four counties in Michigan: Wayne, Oakland, Livingston, and Macomb. (Williams, Tr. I 106).

### 3. Network Effects and Barriers to Entry

329. The network effects inherent in MLSs suggest that market share is a good indicator of market power because the value of the MLS increases with the number of users. (Williams, Tr. 1110; CX 498-A-027).
330. Because of network effects in MLS listing services, the value of an MLS with a high market share in a given geographic market will be much greater to brokers (and home buyers and sellers) than the value of an MLS with a small market share. (CX 498-A-027). The greater the market share, the bigger the network

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effects and then the more likely the MLS is going to have much greater value to users. (Williams, Tr. 1110).

331. Network effects in the market for multiple listing services therefore create barriers to entry. Because of network effects, competitors cannot easily expand their share of listings. (CX 498-A-027).
332. Network effects create barriers to entry because such a shift in shares would require that both cooperating brokers and listing brokers simultaneously switch to the competing MLS. (CX 498-A-027-028). A listing broker has little incentive to list a property in an MLS with a small market share in a given area because there will be few cooperating brokers searching such an MLS for homes in that area. (CX 498-A-027). Similarly, a cooperating broker has little incentive to search an MLS with a small share of listings. (CX 498-A-027-028).
333. Successful entry by a rival MLS is improbable because of high collective switching costs. (CX 498-A-029).
334. Because of network effects, an individual listing broker has little or no unilateral incentive to switch to an alternative MLS in response to, *e.g.*, an increase in listing fees by the MLS, because there would be few, if any, cooperating brokers working with home buyers using the alternative MLS. (CX 498-A-030).
335. Because of network effects, an individual cooperating broker has little or no incentive to switch in response to an increase in the price of MLS listing services because there would be few, if any, listings to search. (CX 498-A-030).
336. Consequently, brokers on both the selling and buying sides will not perceive an alternative MLS as an economically viable substitute to the hypothetical MLS monopoly. (CX 498-A-030).

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337. MiRealSource is not an effective substitute for Realcomp. From 2002 to 2006, MiRealSource had {■■■■■■■■■■} listings in each area of Livingston county, most of Wayne county, and the majority of Oakland county. (Williams, Tr. 1123-24, *in camera*; CX 559, *in camera*; CX 557-017-018, *in camera*). In contrast, Realcomp had {■■■ ■■■} listings in almost all of Wayne, Oakland, and Livingston counties and in a majority of Macomb county. (CX 559, *in camera*). And, Realcomp had {■■■■■■■■} listings in substantial portions of each of these counties. (CX 559, *in camera*).
338. {■■■■■■■■■■■■■■■■} of MiRealSource members are also members of Realcomp. (CX 557-017, *in camera*). This suggests that for these brokers that are dual members, MiRealSource is *not* an effective substitute to Realcomp in certain geographic areas. (CX 557-A-017). If MiRealSource and Realcomp were effective substitutes in all areas where these brokers operate, then such dual membership would not be necessary. (CX 557-A-017).

#### 4. Realcomp's Market Shares

##### a. Market Share of New Listings

339. To calculate Realcomp's market share, Complaint Counsel's expert, Dr. Darrell Williams, used the listing data from Realcomp, MiRealSource, and all of Realcomp's data-sharing partners. (Williams, Tr. 1111). Dr. Williams first calculated Realcomp's share of "new listings" -- homes that were newly listed during a particular month. (CX 498-A-028; *see also* Williams, Tr. 1114, *in camera*). New listings include all listing types (*e.g.*, Exclusive Right to Sell and Exclusive Agency listings). (CX 498-A-028; *see also* Williams, Tr. 1120, *in camera*).
340. Realcomp's market share in terms of new listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 to 2006 was {■■■■}. (Williams, Tr. 1114,

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*in camera*; CX 498-028, *in camera*; CX 505, *in camera*; illustrated in DX 6-003, *in camera*).

341. Since competition is likely to occur at the county level, and may even occur in more local areas, Dr. Williams also calculated market shares on a county basis. (CX 498-A-028-029). These calculations show that Realcomp's market share in terms of new listings in Wayne county is{■■■■},in Oakland County it is {■■■■}, in Livingston county it is {■■■■}, and in Macomb county it is{■■■■}. (Williams, Tr. 1115, *in camera*; CX 498-028, *in camera*; CX 506, *in camera*; see also CX 501-05, *in camera*; illustrated in OX 6-004, *in camera*).
342. Viewing Realcomp's market share in terms of new listings on a zip code basis demonstrates that Realcomp has a large market share in each county. (Williams, Tr.1115-16, *in camera*; CX 498-028, *in camera*; CX 507, *in camera*; illustrated in DX 6-005, *in camera*). Realcomp has an over {■■} market share of new listings in almost all of Wayne county and the vast majority of Oakland and Livingston counties. (Williams, Tr. 1115-16, *in camera*; CX 498-028, *in camera*; CX 507, *in camera*; illustrated in DX 6-005, *in camera*).

**b. Market Share of Unique Listings**

343. Market shares based on new listings, however, may understate the extent to which the Realcomp MLS is important to brokers. (CX 498-A-028; see also Williams, Tr. 1116, *in camera*). Particularly in areas in which two MLSs overlap, brokers may list on both MLSs. (CX 498-A-028; see also Williams, Tr. 1116-17, *in camera*). For instance, at the border of Macomb and Oakland counties, Realcomp has a lower share of new listings because Realcomp and MiRealSource overlap in that area. (Williams, Tr. 1117, *in camera*).
344. If there were 100 total listings and each was listed on both Realcomp and MiRealSource, Realcomp's share



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of new listings would only be 50% even though 100% of the listings are on Realcomp. (CX 498-A-029; *see also* Williams, Tr. 1117-18, *in camera*; illustrated in DX 6-006, *in camera*). The fact that 100% of the listings in that area are on the Realcomp MLS indicates that the Realcomp MLS is very important for the purpose of marketing the homes. (CX 498-A-029; *see also* Williams, Tr. 1118, *in camera*).

345. Because the share of new listings may understate the importance of the Realcomp MLS, Dr. Williams also calculated Realcomp's share of "unique" listings -- the share of all listed homes that are listed on Realcomp (whether or not listed on another MLS). (CX 498-A-028-029; Williams, Tr. 1118-19, *in camera*). Unique listings include all listing types (*e.g.*, Exclusive Right to Sell and Exclusive Agency listings). (CX 498-A-028-029; *see also* Williams, Tr. 1120, *in camera*).
346. Realcomp's market share in terms of unique listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 to 2006 was {■■■■■}. (Williams, Tr. 1120-21, *in camera*; CX 498-029, *in camera*; CX 512, *in camera*; illustrated in DX 6-008, *in camera*).
347. Realcomp's market share in terms of unique listings in Wayne county is {■■■■■}, in Oakland county it is {■■■■■}, in Livingston county it is {■■■■■}, and in Macomb county it is {■■■■■}. (Williams, Tr. 1121, *in camera*; CX 498-029, *in camera*; CX 513, *in camera*; *see also* CX 508-012, *in camera*; illustrated in DX 6-009, *in camera*). These shares demonstrate the importance of the Realcomp MLS to brokers listing homes in those four counties. (Williams, Tr. 1121).
348. Viewing Realcomp's market share in terms of unique listings on a zip code basis demonstrates that Realcomp has a large market share in each county. (Williams, Tr.1121-22, *in camera*; CX 498-029, *in camera*; CX 514, *in camera*; illustrated in DX 6-010, *in camera*). Realcomp has an over {■■■■■} market share of the new listings in almost all of Wayne

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county, Oakland, and Livingston counties. (CX 507, *in camera*; illustrated in DX 6-010, *in camera*).

**F. The Nature of the Challenged Restraints****1. The Challenged Restraints****a. The Website Policy**

349. The Website Policy refers to rules adopted and approved by Realcomp that prevent Exclusive Agency, Limited Service and MLS Entry Only listings from being sent to the “Approved Websites.” (JX 1-07; CX 100-005; Kage, Tr. 974-75).
350. The Approved Websites are: Realtor.com; MoveInMichigan.com; and the Internet Data Exchange (“IDX”). (CX 32-006 (Answer); Kage, Tr. 925-26).
351. 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). *See also* F. 227-30).
352. MoveInMichigan.com is a website that Realcomp owns and operates for the purpose of providing information on properties, brokers and agents. ( Kage, Tr. 932-33; CX 258). ClickOnDetroit.com frames MoveInMichigan.com. (Kage, Tr. 925-26, 947). *See also* F. 231-40.
353. Through the IDX, broker websites are able to display listing information from their local MLS database so that consumers can go to the broker’s website and search for available properties of all participating MLS members. (Murray, Tr. 208-10; CX 405 (Baczkowski, Dep. at 85). *See also* F. 241-49).
354. Realcomp provides listing information to the public websites of its broker members, known as “IDX websites.” (Murray, Tr. 208-10). Eighty-two percent of Realcomp’s members authorized their listing data to be

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included in the IDX feed. (Kage, Tr. 948-49). 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).

355. The Website Policy was adopted in 2001 (Kage, Tr. 958-59), 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. 964-65; CX 18).
356. The current Realcomp Rules and Regulations were adopted in October 2006. (CX 100-001).
357. Realcomp enforces the Website Policy through the October 2006 Rules and Regulations. (Kage, Tr. 988-89).
358. The October 2006 Realcomp Rules and Regulations state: “Exclusive Agency, Limited Service and MLS Entry Only Listings will not be distributed to any Real Estate Internet advertising sites.” (CX 100-005; CX 35 (Kage, Dep. at 9); Kage, Tr. 974-75). Realcomp enforces this rule. (CX 100-013-016; CX 35 (Kage, Dep. at 9); CX 90).
359. The October 2006 Realcomp Rules and Regulations continue to state: “Listing information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis.” (CX 100-025; CX 35 (Kage, Dep. at 13-14); Kage, Tr. 984-86). Realcomp enforces this rule. (CX 100-025; CX 35 (Kage, Dep. at 13-14); CX 90).
360. The October 2006 Realcomp Rules and Regulations further state: “Non-MLS listings shall not be commingled with MLS listings on the Participant’s Internet Website.” (CX 100-026; CX 28-00 I). The rule “means properties that are not listed through an MLS [such as For Sale By Owner listings] cannot be co-

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mingled with the Realcomp listings,” on a broker’s website. (CX 35 (Kage, Dep. at 14-15); Kage, Tr. 986).

**b. The Search Function Policy**

361. The “Search Function Policy” refers to the default setting adopted by Realcomp in 2003, whereby all searches on the Realcomp MLS automatically are configured to include only Full Service/Exclusive Right to Sell listings and unknown listings. (CX 32-006 (Answer); CX 18-003; Kage, Tr. 965-66; CX 415 (Nowak, Dep. at 44); CX 36 (Kage, IHT at 72).
362. When agents enter into Realcomp Online, the Quick Search page comes up and displays the “Listing Type” choices. (Kermath, Tr. 749; RX 42-002).
363. Prior to April 2007, in order to see all of the available listing types in the Realcomp MLS (ERTS, EA, MLS Entry Only, and unknown), Realcomp members needed to specifically select the different listing types they wished to see or to select the button labeled “select all listings.” (Kage, Tr. 1042; CX 36 (Kage, IHT at 73-74)).
364. As a result of the Search Function Policy, prior to April 2007, if an agent wished to see EA listings he or she needed either to select the “all listings” or the “EA listings” button. Similarly, if an agent did not wish to see ERTS listings, he or she needed to de-select the “ERTS listings” button. (Kage, Tr. 963, 1042).
365. In addition, an agent can search for all properties by the MLS number. (D. Moody, Tr.523).
366. A user could permanently turn off or change the search default so that EA listings were always included in the output by saving changes to their settings. (Kage, Tr. 1048-49; CX 36 (Kage, IHT at 92-93)).

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367. To override the search default to run a search that includes all listings is very simple. (G. Moody, Tr. 878; Kage, Tr. 1048-49; RX 159). It does not require extra onerous steps to search all listings. (CX 415 (Novak Dep. at 45-46)). Instead, it requires one additional click of the mouse to see all listings. (Kage, Tr. 1039).
368. Agents with Exclusive Agency listings acknowledged they did not require any special training to learn how to override the search default. (D. Moody, Tr. 551; CX 526 (Groggins, Dep. at 43)).
369. A practical requirement of the job of a real estate agent is to be able to use a computer and log onto and use the MLS. (Sweeney, Tr. 1336-37; Murray, Tr. 264).
370. On April 27, 2007, Realcomp changed its Rules to repeal the Search Function Policy. (CX 626; Kage, Tr. 1045-47).
371. On April 27, 2007, the Realcomp Board of Governors passed the following motion:

A MOTION was made, SECONDED, and CARRIED to adopt Ms. Kage's recommendation to remove the "Listing Type" defaults that are currently on the search screen of RealcompOnline® and separate "Listing Type" from "Service Levels" making these mandatory fields that must be answered when users perform searches for properties and load listings. Additionally, a feature group for "Services Offered" will be added to all listings.

(CX 626-003).

**c. The Minimum Services Requirement**

372. In 2004, the Realcomp Policy manual was amended to include the following language:

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“The Listing Type field must be properly indicated to show the amount of contracted services that are to be provided as part of the listing agreement. The Listing Type must indicate if the listing is an Exclusive Right to Sell/Full Service, MLS Entry Only, Limited Service or Exclusive Agency contract . . .”

(CX 8-007).

373. Realcomp required its members to check a box disclosing the listing type for every listing entered into the Realcomp MLS. (CX 36 (Kage, IHT at 44-45)). A listing would not be accepted into the Realcomp MLS unless a listing type box was checked. (CX 36 (Kage, IHT at 45)).
374. Prior to April 27, 2007, under Realcomp’s rules, brokers listing properties were required to provide full service brokerage services if they wanted their listing to be considered an Exclusive Right to Sell listing. (CX 10-005; CX 29; CX 35 (Kage, Dep. at 52); *see also* F. 66).
375. On April 27, 2007, the Realcomp Board of Governors voted to eliminate its minimum services definition so that ERTS listings were no longer required to meet Realcomp’s full services definition. (CX 626-003). *See also* Joint Stipulation Regarding Respondent’s Search Function Policy, July 30, 2007 (Realcomp no longer requires that exclusive right to sell listings be full service listings).
376. Prior to April 27, 2007, under Realcomp’s rules, brokers listing properties under Exclusive Right to Sell listings were required to provide full service brokerage services. Further, if a home seller performed any duties that fell under the full service umbrella, the listing would be designated as limited service. (CX 18-003; Kage, Tr. 965-69; CX 100-005; CX 29; CX 35 (Kage, Dep. at 52)).

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377. Prior to April 2007, Realcomp defined the IDX Database in its Rules and Regulations to confirm that all listings other than full service Exclusive Right to Sell listings were excluded. (CX 4-021; CX 36 (Kage, IHT at 107-08 (The IDX rules were adopted separately from the rest of the Realcomp rules, so Realcomp had to make clear that they only included Exclusive Right to Sell listings.))).
378. Under the Realcomp MLS Rules and Regulations, only full service Exclusive Right to Sell listings were included in the IDX feeds to broker member websites prior to April 2007. (CX 36 (Kage, IHT at 52); CX 100-025).
379. Therefore, prior to April 2007, if a listing was not considered “full service,” it was not included in the feed to Realtor.com, MoveInMichigan.com, IDX websites, and not included in the Realcomp MLS search default. (Kage, Tr. 967-68).

**2. Enforcement of the Policies**

380. Realcomp actively enforces the Website Policy and Realcomp members have been fined if they try to submit an Exclusive Agency listing as an Exclusive Right to Sell listing. (CX 36 (Kage, IHT at 58-60, 117-18); CX 22-CX 25).
381. An associate broker for Coldwell Banker in Michigan filed a complaint with Realcomp regarding three listings by Greater Michigan Realty, an unbundled service provider in Michigan who offers both flat fee service and full service at a substantial discount. (CX 22-001; CX 36 (Kage, IHT at 169-71). The broker argued in her letter that all of the listings of Greater Michigan Realty should be “dropped from Realtor.com” because she assumed the listings were limited service. (CX 22-001).
382. In response to this complaint, Realcomp changed the listing type from Exclusive Right to Sell/Full Service

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to Limited Service, causing the listings to be removed from MoveInMichigan.com, Realcomp IDX websites, and Realtor.com. (CX 22-007).

383. Greater Michigan Realty was targeted with numerous complaints because some of its listings were on www.fsbo.com, had a FSBO sign in front of the property, and listed the home seller as the contact reference. (G. Moody, Tr. 841-42; RX 25-004; CX 24-001-002; CX 22-001; CX 23).
384. Realcomp threatened to impose a \$21,000 fine on Greater Michigan Realty (\$1000 fine per listing, with 21 listings at issue) because some home sellers who had entered into Exclusive Right to Sell/Full Service listing agreements with the company, had also taken steps themselves to try to find a buyer. (D. Moody, Tr. 504-07; CX 24-002). Such activity may have included displaying a “for sale by owner” yard sign on the property or advertising the home on a website that featured “for sale by owner” properties. (D. Moody, Tr. 504-07; CX 24-002).
385. Realcomp told another member: “Please be aware Realcomp has received notice that the above referenced listing may have an incorrectly identified Listing Type because it [sic] the seller is the contact and is making arrangements for showings and was submitted as an ERTS/FS Listing Type. This listing has been updated to reflect a Listing Type of Exclusive Agency and a fine has been assessed.” (CX 25-002; CX 36 (Kage, IHT at 58-59)).
386. Realcomp also told its members that the listing agent/office had to be the “exclusive provider” of each required service mandated by Realcomp’s rules in order to be considered a full service listing. (CX 25-003). For example, because in some listings Denise Moody’s listing contract said “we are responsible (with you) for . . .” this did not constitute the listing agent providing that service, and it must be considered limited service. (CX 22-007).



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387. There is no way for a Realcomp member to get their EA listings onto MoveInMichigan.com or ClickOnDetroit.com. (Kage, Tr. 989).

**3. Adoption of the Website Policy and Formulation of the Search Function Policy**

388. The Realcomp Board Minutes accurately describe the actions that the Realcomp Board of Governors took at each of their meetings. (Kage, Tr. 958-60).

389. The Realcomp Board minutes stated that on June 22, 2001, the Realcomp Board of Governors passed several motions regarding Exclusive Agency listings, Limited Service listings, and MLS Only listings, including adopting the Website Policy:

A MOTION was made, SECONDED, and CARRIED to approve the recommendation from the MLS/User Committee to add three new feature options under “Compensation Arrangements” for all property types. These options are:

Exclusive Agency Listing  
Limited Service Listing  
MLS Entry Only Listing.

It was further agreed that listings falling within these categories, will not be included in the data that is sent to the real estate Internet advertisers.

(CX 2-003; CX 36 (Kage, IHT at 125-28); Kage, Tr. 959).

390. At the June 2001 Board of Governors meeting, Realcomp decided to research options to limit the exposure of Exclusive Agency, Limited Service and MLS Entry Only listings in the Realcomp MLS. (CX 2-003; CX 36 (Kage, IHT at 129-30)).

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391. On September 28, 2001, after a discussion with legal counsel regarding Limited Service and MLS Entry Only listings, Realcomp adopted another motion regarding the listing information that would be included on the real estate websites:

A MOTION was made, SECONDED and CARRIED to exclude MLS only and limited service listings from all data extracts to the Internet real estate Web sites publishing Realcomp data.

(CX 3-002).

392. At the same Board meeting in September 2001, the idea of the Search Function Policy was again discussed. (CX 3-002). At this meeting, the Realcomp Board of Governors passed a motion “to establish separate search requirements on Realcomp*Online* in order to include MLS only and/or limited service listings in a basic search.” (CX 3-002).
393. In order to implement the Website Policy, Realcomp had to change its extract program (the MLS program that determined what data was included) to only pull listings that were marked Exclusive Right to Sell listings. (CX 36 (Kage, IHT at 57-58)).
394. After the data extract was changed, Realcomp amended its MLS Rules and Regulations in two separate sections stating that these listings were going to be excluded from the real estate websites and also be excluded from the Realcomp IDX member websites: Exclusive Agency, Limited Service and MLS Entry Only listings will not be distributed to any real estate Internet advertising sites. (CX 4-012; *see also* CX 5-007).
395. Realcomp’s decision to exclude Exclusive Agency, Limited Service, and MLS Entry Only listings was deliberate. (CX 36 (Kage, IHT at 53)).

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**4. Consideration of Excluding EA Listings From the Realcomp MLS**

396. In August 2002, the Realcomp Board of Governors reviewed a request to disallow Exclusive Agency, Limited Service, and MLS Entry Only listings as part of the MLS database. (CX 10-003; CX 36 (Kage, IHT at 142-43)).
397. During the August 2002 Board of Governors meeting, the Board discussed the current method of “flagging these listings in Realcomp and the fine for failure to comply.” (CX 10-003).
398. During the August 2002 meeting, the Board discussed NAR’s requirement to include Exclusive Agency, Limited Service and MLS Entry Only listings into the MLS. (CX 10-002-003).
399. NAR’s MLS Antitrust Compliance Policy bars MLSs from “prohibit[ing] or discourag[ing] participants from taking exclusive agency listings.” (CX 381-019, 023 (“Multiple listing services shall not establish or maintain any rule or policy prohibiting inclusion of Exclusive Agency listings that would be otherwise acceptable for inclusion in the compilation of current listing information.”); *see also* CX 382 (advising MLSs that NAR “requires” MLSs to include Exclusive Right to Sell and Exclusive Agency listings on the MLS)).
400. Realcomp at all times pertinent to this matter has permitted agents to enter Exclusive Agency, Limited Service, and MLS Entry Only listings in the Realcomp MLS. (JX 1-07-08).

**5. Consideration of a Policy to Require Listing Type**

401. On September 27, 2002, the Board revisited the issue of labeling Exclusive Agency, Limited Service, and MLS Entry Only listings in the Realcomp MLS. (CX 11-003; CX 36 (Kage, IHT at 144-46, 149)).

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402. In September 2002, the Board approved the following motion from the MLS/User Committee Meeting, increasing the fines for failing to indicate the proper listing type for Exclusive Agency, Limited Service and MLS Entry Only listings:

To recommend that the Board of Governors approve the addition of a mandatory field to the profile form for all property types that would indicate the type of listing being entered (exclusive right to sell, exclusive agency, MLS entry only or limited service). The first offense for failure to indicate the type of listing would be a fine of \$250, 2<sup>nd</sup> offense \$1000, 3<sup>rd</sup> offense \$2500, 4<sup>th</sup> offense would result in possible 45 day suspension from service for the entire office and 5<sup>th</sup> offense would be dismissal from Realcomp.

(CX 11-003; CX 36 (Kage, IHT at 144); Kage, Tr. 959-61).

403. Realcomp has fined its members for not checking the right listing type box, such as checking Exclusive Right to Sell when the Exclusive Agency box should be checked. (CX 36 (Kage, IHT at 59-60)).
404. In 2003, Realcomp's Policy Handbook stated 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).
405. In July 2003, Realcomp added language to its Rules and Regulations to give the Realcomp CEO the ability to change the listing type of a Realcomp listing if it was incorrectly labeled. (CX 4-015 ("Listing will be updated with the proper flag and removed from any public sites.")).

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**6. Adoption of the Search Function Policy**

406. In August 2003, Karen Kage informed the Realcomp Board of Governors that MiRealSource was no longer accepting Limited Service listings, including Exclusive Agency listings. (CX 9-003; Kage, Tr. 962; CX 36 (Kage, IHT at 146-47, 152,154)).
407. After the discussion of MiRealSource no longer accepting Limited Service listings, the Realcomp Board discussed the priority of defaulting all searches in the Realcomp MLS to Exclusive Right to Sell listings. (CX 9-003; Kage, Tr. 962-63).
408. After this discussion, the Board voted to expedite the enhancement of defaulting all searches to include only Exclusive Right to Sell listings and that the other listing types, including Exclusive Agency, Limited Service, and MLS Entry Only listings be shown only by specific request. (CX 9-003; Kage, Tr. 963).
409. The MLS search screen had to be changed to include the various listing types as an option, and then set up to automatically select the Exclusive Right to Sell or unknown listings as the default. (CX 36 (Kage, IHT at 90)).
410. The Search Function Policy was implemented in November or December of 2003. (Kage, Tr. 963).
411. Prior to the adoption of the Search Function Policy, the MLS search automatically defaulted to all available listing types, including Exclusive Agency, Limited Service, and MLS Entry Only listings. (CX 36 (Kage, IHT at 74); JX 1-07).
412. In November 2003, Realcomp officially notified its membership of the Search Function Policy through its Real Solutions Newsletter. (CX 14-002). In its Newsletter, Realcomp noted the change and laid out the additional steps that would be necessary to search for Exclusive Agency listings, Limited Services

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listings and/or MLS Entry Only listings. (CX 14-002; *see also* (CX 36 (Kage, IHT at 160))).

413. The Realcomp Policy Handbook describes how to submit and how to make changes to a listing. (CX 36 (Kage, IHT at 109). The Realcomp Policy Handbook does not contain any reference to the Search Function Policy. (CX 36 (Kage, IHT at 110-11); CX 100; CX 90).
414. The Realcomp Online Basics Training Workbook does not contain a written explanation on the steps the Realcomp members need to take in order to see all available listing types. (CX 35 (Kage, Dep. at 131-33); CX 249). The Realcomp Online Basics Training Workbook does, however, explain how to see all property types, such as Residential and Condos. (CX 35 (Kage, Dep. at 131-33); CX 249).

**7. Positions by Legal Counsel and NAR on Accepting Listings into the MLS**

415. In April 2004, Karen Kage told Realcomp members that one of the reasons that Realcomp allows Exclusive Agency listings into its MLS is that NAR “requires MLSs to accept all listing types.” (CX 29; Kage, Tr. 970-71; CX 36 (Kage, IHT at 138-39)).
416. Kage told Realcomp members that the second reason why Realcomp accepts Exclusive Agency listings, Limited Service listings and MLS Entry Only listings is because Realcomp has been advised from more than one legal counsel to accept and include these listings. (CX 29; Kage, Tr. 971; CX 36 (Kage, IHT at 139-40)).
417. In July 2004, Karen Kage told Realcomp members that she spoke with several MLSs across the country to determine if any of them had adopted rules that would prohibit listings that are not Full Service/Exclusive Right to Sell from being in their database. (CX 28-001). Karen Kage learned that none of the MLSs had adopted such a rule. (CX 28-001).

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**8. Position by NAR on MLS Feeds to Public Websites**

418. In November 2006, NAR amended its IDX rules to require MLSs to “include all current listings” in their IDX feeds. (CX 400-002). NAR’s rule amendment eliminated the ability of NAR member MLSs to exclude Exclusive Agency listings from their IDX feeds. (CX 400-002; CX 393-003-005, 009; CX 414 (Niersbach, Dep. at 95-96)).
419. In November 2006, NAR also amended its IDX rules to allow individual brokers to independently choose which IDX listings will be displayed on their firm’s websites based on objective criteria, such as geography, list price, and type of listing. (CX 401-003 (amendments reflected in Rule 18.2.4); CX 414 (Niersbach, Dep. at 102, 118-20)).
420. The November 2006 IDX rule amendments are mandatory. (CX 400-002 (MLSs “must” include all current listings on their IDX feeds); CX 401-003 (designating rule change as “M,” or Mandatory)).
421. Mandatory rules must be followed in order to remain a member of NAR and to be covered by NAR’s errors and omissions insurance policy. (CX 414 (Niersbach, Dep. at 36-37); Kage, Tr. 1005-06).
422. Karen Kage is aware that in November 2006, NAR adopted a new IDX rule and that the new NAR IDX rule is contained in the NAR Handbook on Multiple Listing Policy for 2007. (CX 401; Kage, Tr. 996).
423. On April 27, 2007, the Realcomp Board of Governors voted against adopting the new NAR IDX policy. (CX 626-003; Kage, Tr. 998-99).
424. The Realcomp Board of Governors, through Karen Kage, tried, unsuccessfully, to get NAR to postpone its rule change requiring NAR affiliated MLSs to include all listing types on Realtor.com, IDX websites and any other websites to which the MLS sends listing

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information. (CX 233-CX 235; CX 35 (Kage, Dep. at 86-100, 102-05, 107)).

425. Karen Kage, on behalf of Realcomp, argued to NAR that without the Website Policy, the MLS would become a public utility and urged NAR to postpone the rule change since it could affect the operation of MLSs all over the country. (CX 234-003-004).
426. NAR rejected Realcomp's request and responded that EA listings on these feeds would not detract from the purposes of the MLS. (CX 234-003).
427. NAR's Vice President of Board Policy and Programs, Clifford Niersbach, testified that the reason NAR changed its IDX Policy was that "it wasn't worth fighting about" in light of the Federal Trade Commission's enforcement actions initiated against various MLSs around the country. (CX 414 (Niersbach, Dep. at 96-97). *See also* CX 234-004 ("Since NAR's existing policy is deemed to produce anticompetitive effects by the [Department of Justice] and the FTC, it would have been irresponsible for NAR to do nothing.")).

### **G. Exclusive Agency Brokers Not Excluded from Competition**

#### **1. Discount Brokers are Able to List Their Properties on Realcomp's MLS**

428. The MLS is the most significant thing that has happened in the real estate industry to promote competition. (Murray, Tr. 257).
429. The MLS levels the playing field between large and small brokers as, without the MLS, large real estate agencies would attract more consumers since they have larger marketing budgets. (Murray, Tr. 257).
430. The MLS is the most effective tool and substantially more important than any other tool for the sale of



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residential real estate in Southeastern Michigan. (Hepp, Tr. 706-08; CX 422 (Aronson, Dep. at 21-23)).

431. Eighty percent of all home buyers are reached by the MLS. (Mincy, Tr. 449-50; RX 109; *see also* Kermath, Tr. 795; RX 4; RX 5).
432. The EA agents themselves agree that while exposure is important, the MLS is by far the most important source of Internet exposure. (Hepp, Tr. 706 (The MLS is substantially more important than any other tool for the sale of residential real estate in Southeastern Michigan and finds a buyer three times more often than other home selling tools)); CX 422 (Aronson, Dep. at 21-23 (The MLS is, by a considerable extent, the most effective means of promoting residential real estate in Michigan.)).
433. At no time has Realcomp restricted EA brokers from being listed on its MLS. (JX 1- 0708).

**2. Discount Brokers are Able to List Their Properties on Realtor.com**

434. EA agents ranked Realtor.com as being the second most important tool for residential real estate sales in Southeastern Michigan, after the MLS itself. (Hepp, Tr. 709; G. Moody, Tr. 870-71, 886-89; CX 422 (Aronson, Dep. at 22)).
435. While eighty percent of home buyers are reached by the MLS, in combination with Realtor.com, ninety percent of all home buyers are reached. (Mincy, Tr. 449-50; RX 109; Kermath, Tr. 795; RX 4; RX 5).
436. Exclusive Agency listings can be listed on Realtor.com by dual-listing; that is, listing the property on another MLS, with which Realcomp has a data-sharing agreement and which downloads Exclusive Agency listings to Realtor.com. (Kage, Tr. 991-92; JX 1-07; Mincy, Tr. 438, 442; D. Moody, Tr. 552-53; Kermath, Tr. 789). Dual-listing is a common, if not prevalent,

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practice among discount broker firms. (CX 133-014-015).

437. However, 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 harder for a cooperating broker to match an Exclusive Agency listing in Realtor.com with the corresponding listing in Realcomp. (Mincy, Tr. 412-15).
438. Realcomp has data-sharing arrangements with seven MLSs in Southeastern Michigan. (Kage, Tr. 916).
439. 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. 1059-60). 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).
440. EA 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).
441. EA 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 13-14, 22)).
442. The costs associated with joining a bypass MLS are nominal and are comparable to those charged by Realcomp. (Sweeney, Tr. 1312). In addition to the annual membership fees, the Ann Arbor MLS charges \$55 a month to be a member. (Kermath, Tr. 789). The Flint MLS charges \$99 a quarter to be a member in addition to the annual dues. (D. Moody, Tr. 554). MiRealSource charges \$29 per licensee and broker and

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\$24 per office after the initiation fee is paid. (CX 407 (Bratt, Dep. at 19-20)).

443. The time costs associated with listing Exclusive Agency listings on more than one MLS to bypass Realcomp are nominal. It takes between forty minutes to two hours to update a listing over its life. (Hepp, Tr. 693; Mincy, Tr. 415-17; D. Moody, Tr. 561). EA agents pay anywhere from \$7.00 to \$20.00 per hour for data entry. (Hepp, Tr. 693; Mincy, Tr.436-37). 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).
444. Some EA agents charge customers additional fees to cover the dual-listing cost. (Hepp, Tr. 701-02). MichiganListing.com charges an additional \$100. (Mincy, Tr. 430-31); Greater Michigan Realty charges an additional \$50. (D. Moody, Tr. 553).

### **3. Discount Brokers are Able to Compete on the Internet**

445. The Internet is a dynamic process. (G. Moody, Tr. 890). The Internet sites that have the greatest value to the market are “a moving target.” (Sweeney, Tr. 1315-16).
446. Realtor.com and the other Approved Websites are among numerous Internet sources from which the general public can, and does, obtain information about real estate listings. (CX 133-016-017).
447. In its 2006 Profile of Home Buyers and Sellers, NAR found that home buyers visited four categories of websites in their home search much more than any others: MLS websites; Realtor.com; and the websites of real estate companies and real estate agents, also referred to as “IDX websites.” (CX 373-046 (40-50% of home buyers reported visiting these four categories of websites); CX 406 (Bishop, Dep. at 90-91)). NAR reached these same findings in its 2004 and 2005

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Profile of Home Buyers and Sellers. (CX 372-039 (most visited websites by home buyers in 2005 were Realtor.com, MLS websites, and IDX websites); CX 371-038 (most visited websites reported by home buyers in 2004 were Realtor.com, MLS websites, and the IDX websites)).

448. Public websites other than Realtor.com and the other Approved Websites are numerous, and listings reach those websites regardless of Realcomp's Policies. (CX 133-015-024).
449. Other publicly-available websites for EA agents, such as Google and Trulia, are growing in usage, although they do not reach nearly as many home buyers as the Approved Websites. (G. Moody, Tr. 888-89; Murray, Tr. 258-60). MLS systems across Michigan are beginning to put their data onto Google Base and Trulia. (G. Moody, Tr. 888).
450. Google presently has a site which is open to everyone and which takes Exclusive Agency listings without a charge for putting a listing into Google. (Murray, Tr. 259-60). Google has publicly announced that it intends to build as large and robust a real estate site as possible. (Murray, Tr. 259).
451. Mr. Moody testified in his deposition regarding the popularity of different real estate websites. Specifically, he ranked Google Base number four in popularity, behind MoveInMichigan.com, Realtor.com, and the IDX. (G. Moody, Tr. 887). He further stated that "in the near future, Google Base will be more important than IDX." (G. Moody, Tr. 887-88).
452. Trulia, a growing public website which also does not charge for listings, has grown substantially in the last several months. (Murray, Tr. 258). It is a recently launched site with real estate listings based on its relationships with brokers including Realogy, which gives it access to listings by Coldwell Banker, Century

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21, ERA and Sotheby's. (CX 417 (Simos, Dep. at 34). Trulia allows brokers and others to post listings for free on their website, but it is a relatively new website with problems with capital funding. (RX 154-A- 070; Murray, Tr. 242).

453. In light of their growing popularity, public websites besides the Approved Websites are an economically viable and effective channel for reaching prospective buyers. (CX 133-015-024).
454. Home 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 133-007-008).

**4. Discount Brokers are not Excluded by the Search Function Policy**

455. 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 function necessarily must be able to use a computer to at least some extent. (Murray, Tr. 264).
456. Under Realcomp's Search Function Policy, prior to April 2007, Exclusive Right to Sell listings are the default, and Exclusive Agency listings must be independently selected. (Kage, Tr. 906-07).
457. Under Realcomp's old search screen, if someone wanted to see all the listings from the Quick Search screen, he or she just had to click with the mouse one additional button for type of listings. (Kage, Tr. 1039; G. Moody, Tr. 864-65).
458. A user could also permanently change the search default or turn off the default search settings permanently, so that Exclusive Agency listings were always included in the output, by saving the changes to

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their settings. (CX 36 (Kage, IHT at 92-93); Kage, Tr.1048-49).

459. 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).
460. Likewise, users could also utilize the qualifier on the right side of the screen that says “match any” or “exclude.” (Kage, Tr. 1042).
461. 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 45-46)).
462. 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)).

##### **5. Discount Brokers are Thriving in Southeastern Michigan Despite the Realcomp Policies**

463. In a declining or distressed market, where both the value of a home and the seller’s equity is constantly declining, home sellers are choosing full service ERTS listings over EA listings because they want and need the professional marketing services of a full service broker. (Sweeney, Tr. 1326-27).
464. Despite Michigan’s economic downturn, agents offering Exclusive Agency listings are thriving in Southeastern Michigan. F. 465-68.
465. AmeriSell has grown substantially since 2003-2004, with over \$46 million in listings and more listings statewide than any other company. (Kermath, Tr. 788, 793-94; RX 5; RX 6).

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466. 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. 428-30).
467. Greater Michigan Realty has done very well, and is growing. (G. Moody; Tr. 881-84; RX 25-003). Denise Moody, of Greater Michigan Realty, had approximately 500 listings last year, when the industry average was 25. (G. Moody, Tr. 881-82; RX 29). Greater Michigan Realty generated \$23,275,000 in home sales in its first year of operation. (D. Moody, Tr. 567; RX 25-003).
468. Although it is not in the direct listing business in Southeastern Michigan, BuySelf is engaged in the referral business. BuySelf's business has grown 10% to 35% since 2004 in Southeastern Michigan. (Hepp, Tr. 604, 699).
469. Dr. Williams testified 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. (Williams, Tr. 1096 (noting that limited service brokers represent "a relatively new business model" and that model's "growth has been facilitated by the Internet").
470. Respondent's expert, Dr. David 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).
471. Complaint Counsel's industry expert, Mr. Steve Murray, enunciated numerous reasons why he expects to see continued growth in the limited service brokerage model. (Murray, Tr. 167-71).
472. No agents offering Exclusive Agency listings suggested that they left Michigan because of

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Realcomp's Policies, except YourIgloo.com, whose Vice President testified that its decision to leave was "one-hundred percent" attributable to Realcomp's Policies. (CX 422 (Aronson, Dep. at 111, 118)).

473. YourIgloo is a discount real estate company, headquartered in Florida. (CX 422 (Aronson, Dep. at 4)).
474. YourIgloo used one broker in Michigan, Anita Groggins, to operate its business in Michigan from 2001 to 2004. (CX 422 (Aronson, Dep. at 9)).
475. YourIgloo withdrew from Michigan for numerous reasons, besides the Realcomp Policies, including: additional competition in 2004 which it did not face when it first started in Michigan in 2001; (CX 422 (Aronson, Dep. at 9-10 ("the industry became very competitive and very crowded"))); a conflict between the owners of YourIgloo and the associate broker in Michigan for YourIgloo who was let go, in part, because she would not come into the office during hours she was expected to be available; CX 526 (Groggins. Dep, at 8, 36-37)).
476. 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)).
477. Yourigloo encountered problems in other states, and withdrew from two of the nine states in which it is licensed, Pennsylvania and New Jersey. (CX 422 (Aronson, Dep. at 31-32)).

**6. Consumers Have a Choice of Products**

478. Consumers can avoid the effects of Realcomp's Policies on the exposure of their listing by paying



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slightly more to the agents offering Exclusive Agency listings to have their listing sent to Realtor.com or to the agents offering flat fee Exclusive Right to Sell listings. F. 479-81.

479. 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).
480. MichiganListing.com charges a flat fee of \$495 for an EZ-listing, plus an extra \$100 to be listed in Realtor.com for \$595. (Mincy, Tr. 411; CX 439; CX 109).
481. Greater Michigan Realty offers a bronze package for \$299, which includes a Limited Service, MLS Entry Only listing. For an extra \$50, 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 435-001).

## **H. Effect on Competition**

### **1. Effect on Non-ERTS Share Not Significant**

482. Realcomp's antitrust economic expert, Dr. Eisenstadt testified 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; F. 484-503).
483. Dr. Eisenstadt based this finding of an at most 1% decrease in the non-ERTS share in the Realcomp Service Area on: (a) a time series analysis; (b) a comparison to Dayton; (c) a comparison to Boulder; (d) a comparison to Washtenaw County of the Ann Arbor MLS; and (e) his probit regression analysis. (Eisenstadt, Tr. 1407-42; F. 484-503.).

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**a. Time Series Analysis**

484. The time series analysis, or before-and-after analysis, utilized by Complaint Counsel's expert, Dr. Williams in his April 3, 2007 Report, measures the share of non-ERTS new listings in the Realcomp MLS for the period of January 2002 through October 2006. (CX 498-A-096-098; CX 521; Eisenstadt, Tr. 1409).
485. Dr. Williams observed that average monthly share of new non-ERTS listings on the Realcomp MLS declined after the Realcomp Policies were implemented. (Williams, Tr.1150-60; CX 523).
486. Realcomp made the listing type field a mandatory field in late 2003 and by the middle of 2004, virtually all the listings contained the listing type. (Kage, Tr. 973-74; Williams, Tr.1152-53).
487. According to Dr. Williams' data, the percent of non-ERTS new listings in the Realcomp MLS was about 1.5% in May 2004 and about 0.75% in October 2006. (CX 498-A- 096-098, CX 521; Eisenstadt, Tr. 1409).
488. Thus, using Dr. Williams' data, Dr. Eisenstadt found the percentage decrease of non-ERTS new listings in the Realcomp MLS from the time at which the policies were in effect to the most recent time for which data was available, is approximately 0.75 percentage points. (Eisenstadt, Tr. 1409).
489. Dr. Williams also indicated 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).

**b. Dayton MLS**

490. Dr. Williams also performed a benchmark comparison (F. 512-14) or cross-sectional comparison through

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which he compared data from the Realcomp MLS to nine other Metropolitan Statistical Areas (“MSAs”) for the period 2002 to 2006. (Williams, Tr.1157-58, 1243).

491. He selected a group of six MSAs where the MLSs were without restrictions similar to those of Realcomp and a group of four MSAs (including the Realcomp Service Area) where the MLSs were with restrictions similar to those of Realcomp. (Williams, Tr.1158-59).
492. The MSAs were ranked according to their similarity to Detroit in terms of certain economic and demographic characteristics of the area. (CX 498-A-070). The difference between Detroit and each MSA was estimated for certain variables, measured in standard deviations. (CX 498-A-070).
493. The MSA which had the smallest standard deviation and thus was closest in similarity to Detroit was Dayton, Ohio. (Williams, Tr. 1257).
494. Dayton had a non-ERTS share of 1.24% as contrasted with Realcomp’s non-ERTS share of 1.01% for the period 2002 to 2006. (Eisenstadt, Tr. 1422-25; CX 458).

**c. Boulder MLS**

495. In Dr. Williams’ benchmark comparison study, Boulder, Colorado was the only MLS that had a period of time without restrictions and a period of time with restrictions. (Williams, Tr. 1174; Eisenstadt, Tr. 1412).
496. In April 2003, the Boulder MLS imposed a restriction similar to the Website Policy challenged in this case. (Williams, Tr. 1174-75).
497. In the Boulder MLS, the average share of non-ERTS listings was 2.03% in the pre-restriction period and was 0.98% in the post-restriction period. (Eisenstadt,

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Tr. 1413). The difference is about one percentage point. (Eisenstadt, Tr. 1413).

498. Dr. Eisenstadt 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. 1412-14). 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. 1413-14).

**d. Washtenaw County**

499. Discount brokers operating in Realcomp's Service Area, use the Ann Arbor MLS to list non-ERTS properties located in Livingston, Macomb, Oakland and Wayne counties, because the Ann Arbor MLS forwards those listings to certain websites, such as Realtor.com. (Eisenstadt, Tr. 1417; *see also* F. 439-40).
500. Because the Ann Arbor MLS is used as a bypass for non-ERTS listings in the Realcomp Service Area, an appropriate comparison between the Ann Arbor MLS and Realcomp is to look at non-ERTS listings in Washtenaw County on the Ann Arbor MLS. (Eisenstadt, Tr. 1417-18).
501. Washtenaw County is the principal county served by the Ann Arbor MLS; close to 80% of the listings on the Ann Arbor MLS are located in Washtenaw County. (Eisenstadt, Tr.1418).
502. The percentage of non-ERTS listings in Washtenaw County on the Ann Arbor MLS is 1.6%. (Eisenstadt, Tr. 1418). The percentage of non-ERTS listings on the Realcomp MLS is 0.74%. (Eisenstadt, Tr. 1419). The difference between the two is 0.86%. (Eisenstadt, Tr. 1419).

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**e. Probit Regression Analyses**

503. Under his probit regression analyses, Dr. Eisenstadt found that the decline in Realcomp's non-ERTS shares, as a consequence of the restrictions, was not statistically significant. (Eisenstadt, Tr. 1430). Dr. Eisenstadt's regression analyses are set forth at F. 557-67.

**2. Dr. Williams' Opinion did not Determine the Effect on Competition of the Access Restrictions Separately**

504. Dr. Williams' opinions are based on the combined effect of what he called "access restrictions" which are the Search Function Policy, Website Policy and Minimum Services Requirement. (Williams, Tr. 1236-37).

505. Dr. Williams cannot disentangle the effects of the Search Function Policy, Website Policy and Minimum Services Requirement. (Williams, Tr. 1236-38).

506. Dr. Williams did not have data available to analyze the impact of Realcomp's Search Function Policy, separate from the Website Policy and Minimum Services Requirement. (Williams, Tr. 1237-38).

507. Dr. Williams did not determine what the effect would be on competition if Realcomp eliminated the Search Function Policy or the Minimum Services Requirement. (Williams, Tr. 1237-39).

**3. Complaint Counsel's Expert's Testimony on Non-ERTS Share is Flawed**

508. Dr. Williams opined that the Realcomp Policies affect "every channel through which a potential home buyer could see" EA listings. (Williams, Tr. 1131).

509. Dr. Williams opined that the Realcomp MLS has a significantly smaller share of non-ERTS listings than

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MLSs without restrictions and supported this opinion by his benchmark analysis. (Williams, Tr. 1157-66; CX 524).

510. Dr. Williams opined that Realcomp's Policies effected a 5.5% decrease in non-ERTS listings in the Realcomp MLS which he found to be statistically significant and supported this opinion by his probit analysis. (Williams, Tr. 1166-84, 1678-79; CX 498-A-041-042,071; CX 560-011-014, 019-020).
511. Dr. Williams' opinion on the effect of Realcomp's Policies on non-ERTS shares is given little weight because: (a) his selection of comparative MSAs is flawed (F. 512-34); (b) his weighting of average EA percentage shares is flawed (F. 535-43); and (c) his probit analysis did not control for relevant factors. (F. 544-56).

**a. Dr. Williams' Selection of Comparative MSAs is Flawed**

512. In both his benchmark analysis and his probit analysis, Dr. Williams used data from 2002 to 2006 from the MSAs containing MLSs without restrictions in the following six geographic areas: Charlotte, NC; Dayton, OH; Denver, CO; Memphis, TN; Toledo, OH; and Wichita, KS (the "Control MSAs"). (CX 498-A-041, 073; RX 162).
513. In both his benchmark analysis and his probit analysis, Dr. Williams used data from 2002 to 2006 from Realcomp and three other MLSs that had and enforced restrictive policies that prevented Exclusive Agency listings from being included in the MLS feed of listings to public websites and the MLS's IDX. (CX 498-A-041, 073; Williams, Tr. 1283-87). The MSAs with MLSs with restrictions were located in: Williamsburg, VA; Green Bay/Appleton, WI; and Boulder, CO ("Restriction MSAs"). (CX 498-A-041-042, 073; Williams, Tr. 1283-87). The Boulder MLS changed its policy near the middle of the time period

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for which data was collected. (CX 498-A-041-042, 073).

514. In his benchmark analysis, Dr. Williams compared the prevalence of EA listings in MSAs without restrictions to that in MSAs with restrictions. This comparison was based on the overall average percentage of EA listings in each of the two groups and weighting the average according to the number of listings in each MSA. He observed that the weighted average percentage of EA listings is higher in MSAs without restrictions than the MSAs with restrictions. (Williams, Tr. 1161-84; CX 524).

**(i) Methodology for Selecting the Control MSAs**

515. Dr. Williams selected six MSAs without restrictions based on seven economic and demographic characteristics that he believes are “likely to affect the level of non-ERTS listings.” (Williams, Tr. 1247-50). Dr. Williams believed that each of the seven factors “theoretically may be related to the use” of EA listings, and therefore are “economically plausible criteria” affecting home sellers’ choice of listing contract type (*i.e.*, non-ERTS or ERTS). (Williams, Tr. 1158-60).
516. The values of the seven variables used as sample selection criteria vary across MSAs in the control sample. (CX 560-005 n.6).
517. Dr. Williams’ explanation of why he would expect any of his criteria (*i.e.*, the economic and demographic characteristics) to affect the choice of an EA contract and of why he gave all of the factors equal weight (*see* CX 560-005; Williams, Tr. 1291-92) is not convincing. Weighting each factor the same would make sense only if each factor had the same effect on the share of EA listings, a condition which is both implausible and counter to the facts. (CX 458-006).

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518. The list of potential choices from which Dr. Williams selected his Control MSAs omitted cities (*e.g.*, Pittsburgh, Cleveland, Milwaukee) (Williams, Tr. 1265) that intuitively might be thought more similar to Detroit in terms of being Midwestern industrial “rust belt” areas than, for example Charlotte or Memphis.
519. Dr. Williams did not seek to show why these cities were less similar than Detroit than those in his Control MSAs and testified that he did not even have data for the cities in question. (Williams, Tr. 1265).
520. Dr. Williams ranked his possible choices according to their respective closeness to Detroit across the economic and demographic characteristics. (RX 162; Williams, Tr.1250).
521. 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).
522. The percentage of EA listings in the Control MSAs ranges from a low of approximately 1% in Dayton to a high of almost 14% in Denver. (Eisenstadt, Tr. 1425).
523. Dayton, the MSA closest to Detroit under Dr. Williams’ methodology, had an EA share (1.24%) only slightly above Realcomp’s (1.01%). (Eisenstadt, Tr. 1423-25; Williams, Tr.1255).
524. The next lowest MSA, Toledo, had an EA share (3.4%) nearly three times that of Dayton. (RX 161-008; Williams, Tr. 1254-58).
525. The MSA with the highest EA share, Denver, which was 5th (out of 6) in closeness to Detroit, had a share of 14%, more than 10 times that of Dayton. (RX 161-008; Williams, Tr. 1254-58).



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526. 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 458-007-008). Instead, the wide variation demonstrates that Dr. Williams did not account for the factors that are actual determinants of the EA shares in the Control MSAs. (CX 458-007-008).
527. 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 Dr. Eisenstadt's 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. Differences in the levels of these variables may explain the substantial variation in the non-ERTS shares among the six Control MSAs. (RX 161-029; CX 458-008).
528. The Control 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. (RX 161-036; Eisenstadt, Tr. 1425-26).

**(ii) Selection of the Restriction MSAs**

529. In addition to Realcomp, Dr. Williams' group of Restriction MSAs includes Green Bay, Williamsburg, and Boulder, all of which are much smaller urban areas than Detroit. (Williams, Tr. 1161-63; CX 458-009).

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530. The selection of this grouping was made not by Dr. Williams, but by FTC staff. (Williams, Tr. 1263-64 (“I didn’t pick anything”).
531. The FTC provided Dr. Williams with data from three MLSs that had website policies similar to Realcomp’s, that enforced those policies, and that had entered into consent decrees with the Commission. (CX 498-A-041-042 n.103; Williams, Tr. 1263-64).
532. Dr. Williams did not use the same selection criteria for choosing the MSAs with restrictions as he did for the control group and testified that there were very few MLSs with restrictions from which a selection could be made. (CX 458-006-008; Williams, Tr.1263).
533. 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 of less than 500,000, and for that reason alone would have been excluded from Dr. Williams’ sample of Control MSAs. (CX 458-009).
534. 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 458-007-009).

**b. Dr. Williams’ Comparison of Average EA Shares for the Control MSAs and Restriction MSAs is not Probative**

535. Dr. Williams tracked and compared the EA shares of MSAs with restrictions to MSAs without restrictions over time. Dr. Williams found the difference in EA shares between the two types of MLSs to be between 5 and 6 percentage points. (Williams, Tr. 1169-85; CX 524).

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536. 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 5.6%. (Williams, Tr. 1162-63).
537. The data set included over 1.08 million listings for the period 2002 to 200(), with an average of 17,000 new listings per month. (CX 498-A-041; Williams, Tr. 1161-62).
538. Dr. Williams' calculations of the average EA percentage share for the Control MSAs and the Restriction MSAs was weighted based on the number of listings. (Williams, Tr.1261-62).
539. Dr. Williams stated that he used a weighted average because Realcomp is a large MLS and he believed that the bigger MLSs are more comparable to Realcomp. (Williams, Tr.1291-92).
540. As a result of this weighting, 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. 1260-63).
541. Denver, the largest of the Control MSAs, is both (a) the second most dis-similar MSA in the Control MSAs from Detroit; and (b) the MSA with the highest EA share. (Williams, Tr. 1261-63).
542. 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. 1261-63).

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543. Dr. Eisenstadt also performed direct comparisons of the Detroit MSA to Dr. Williams' Control MSAs. 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. 1426-27). As noted, Dayton's percentage of EA listings was 1.24%, as contrasted with Realcomp's percentage of EA listings of 1.01% during the same period. (Eisenstadt, Tr. 1423).

**c. Dr. Williams' Probit Analyses are Instructive, but not Conclusive**

544. Dr. Williams also relied on statistical regression ("probit") analyses in an attempt to predict the effects of the Realcomp Policies. (Williams, Tr. 1168-69).

545. Statistical regression analysis is a tool to measure the effects of different factors, called independent variables, on a particular outcome, called the dependent variable, to isolate the effect of the rule versus the effect of other things. (Williams, Tr. 1169, 1266).

546. In this case, the dependent variable is the type of listing contract a home seller chooses (EA versus ERTS), and the independent variables are factors other than the Realcomp Policies, that might explain the share of non-ERTS listings. (CX 458-14; Williams, Tr.1266).

547. In his probit analysis, Dr. Williams conducted a statistical analysis to control for other factors that might be related to the listing type (EA versus ERTS) to try to isolate the effects of the Realcomp Policies. (Williams, Tr. 1168-69).

548. It is not clear to what extent Dr. Williams actually used the seven economic and demographic factors used in his benchmark analysis (F. 515) as independent variables in his probit analysis. (See CX 498-A-070-071; CX 458-14).

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549. Dr. Williams conducted a total of ten statistical analyses. (CX 498-A-041-042, 071; CX 560-011-014, 019-020). The first three are contained in Dr. Williams' initial report. (CX 498-A-041-042, 071). The remaining seven are contained in Dr. Williams' surrebuttal report. (CX 560-011-014, 019-020).
550. 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; CX 560-011-014, 019-020). In his initial report, Dr. Williams' 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 controlled for twenty-five variables. (CX 560-019-020).
551. The three statistical analyses in Dr. Williams' initial report indicated that Realcomp's Policies are associated with a reduction in the share of EA listings of 5.51, 5.47, and 6.15 percentage points. (CX 498-A-042 n. 104, 071). In his surrebuttal report, Dr. Williams' analyses indicated that Realcomp's Policies are associated with a reduction in the share of EA listings of 5.5528 and 5.774. (CX 560-013-014).
552. From these analyses, Dr. Williams predicted that the percentage of EA listings in Realcomp would be higher, and the use of ERTS listings would be lower, in the absence of the Realcomp Policies. (Williams, Tr. 1165-67).
553. Dr. Eisenstadt challenged the methods used by Dr. Williams for failure to consider the economic and demographic characteristics of each local housing market and the demographic characteristics of home buyers and sellers in each market. (Eisenstadt, Tr.1422-27). Dr. Eisenstadt described how such factors would ordinarily be addressed in economic

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analysis, and the errors introduced into Dr. Williams' probit analyses by his failure to do so. (CX 458-013-015).

554. When 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. 1429-35).
555. Dr. Williams added demographic variables to his probit model and re-estimated the model controlling for additional 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).
556. When Dr. Williams reran his statistical analysis adding economic and demographic variables that Dr. Eisenstadt believed were significant, he did not use all of Dr. Eisenstadt's explanatory variables. (CX 560-013; Eisenstadt, Tr. 1466-67).

**d. No Adverse Effect on EA Shares When Dr. Williams' Methodological Errors are Corrected**

557. Dr. Eisenstadt ran the same basic probit regression model that Dr. Williams used, but added a separate independent variable for the economic and demographic factors that Dr. Williams identified as relevant to the prevalence of EA listings. Dr. Eisenstadt excluded the variables of population and population density and added several other economic and demographic factors which he identified as likely to affect contract choice both across and within the MSAs. (Eisenstadt, Tr. 1428-29, 1569-70; CX 458-014-015).
558. Dr. Eisenstadt took into account the following variables which were only partially considered by Dr. Williams: the MSA-wide one-year change, by quarter, in the median housing price index; the MSA-wide

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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 days on market over the prior year at the MSA and county level. (Eisenstadt, Tr. 1435-45; CX 458-014-015).

559. Dr. Williams measured certain factors at the MSA level but did not control for certain variables at the local level, opining that to do so would duplicate measures of the same variables. (Eisenstadt, Tr. 1469; CX 560-008).
560. Certain variables should be measured at both the county or zip code level, as appropriate, as well as at the MSA level, in order to measure local neighborhood effects which might impact a home seller's decision as to what type of contract to enter into. (Eisenstadt Tr.1471-72).
561. Controlling for the same factor at both the MSA and zip code level is not measuring the same variable twice (or duplicative as Dr. Williams opined) because there are both neighborhood and metropolitan-wide characteristics of home buyers and sellers that you want to control for in the analysis. (Eisenstadt Tr. 1471-72 ("It's not completely duplicative.")).
562. Dr. Eisenstadt's re-estimation of Dr. Williams' work suggests that additional economic and demographic characteristics should have been considered as independent variables by Dr. Williams because a high number of them (thirteen) proved to be statistically significant at the generally-accepted level of

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- confidence. (Eisenstadt, Tr. 1435-42; CX 458-015-016).
563. From Dr. Eisenstadt's perspective, it is the characteristics of the home buyers the home seller is interested in attracting that would affect the seller's decision as to what kind of contract to use. (Eisenstadt, Tr. 1605-08 (It is "economically plausible" and "perfectly reasonable" for home sellers to take into account the expected characteristics of the buyers that they seek to attract)).
564. 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 0.24 percent, and that this effect was not statistically different from zero. (CX 458-015-016, 031; Eisenstadt, Tr. 1429-31).
565. Dr. Eisenstadt then estimated the same basic regression equation with the inclusion of a separate "RULE" variable for each of the Restriction MSAs. (Eisenstadt, Tr. 1431-32). 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. 1431-32).
566. 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 different from zero. (Eisenstadt, Tr. 1430-32; CX 458-015-016 n.21).
567. 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. 1434-35; CX 458-015-016).



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**e. Detroit MSA has More EA Listings Than Would be Expected**

568. Dr. Eisenstadt also estimated a regression using only the data from the six Control MSAs selected by Dr. Williams. 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. (Eisenstadt, Tr. 1429-30).
569. Considering the economic and demographic characteristics of the Realcomp Service Area, Dr. Eisenstadt predicted the share of non-ERTS listings in the absence of any restrictions to be about 0.3 percent, less than about one-third of Realcomp's actual non-ERTS share (1.01%). (CX 458-017; Eisenstadt, Tr. 1434).
570. Dr. Eisenstadt testified that this result indicates that there is no evidence that Realcomp's access restrictions have had a lowering effect on the level of non-ERTS share in the Realcomp MLS. Instead, it is the demographic characteristics of the Detroit MSA, which are being controlled for in the regression, that are largely responsible for the low non-ERTS share of listings in the Realcomp MLS. (Eisenstadt, Tr. 1434-35).

**4. Dr. Williams' Analysis Does Not Directly Estimate Harm to Consumers**

571. Dr. Williams attempted to measure only the effect of the Realcomp Policies (plus the Minimum Services Requirement) on the prevalence of EA listings. (Williams, Tr. 1235-36).
572. As Dr. Eisenstadt explained, Dr. Williams' analysis 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. 1228-30), but Dr. Williams did not quantify any higher

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brokerage costs incurred by consumers who, as a consequence of Realcomp's Policies, substitute ERTS contracts for EA contracts. (*See* CX 458-018-019).

573. Dr. Williams also did not investigate whether home sellers of residential properties who used EA listings on the Realcomp MLS received higher or lower sales prices for their properties. (CX 458-018-019).
574. Dr. Williams 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).
575. 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 458-018-019).

**5. Analysis of Days on Market and Sales Prices**

576. The concern of antitrust economics is the effect of challenged conduct on consumers. (Williams, Tr. 1692). Selling the home in a timely fashion and the sale price of the house are relevant to a home seller who contracts for brokerage services. (Williams, Tr. 1694).

**a. Days on Market**

577. Days on market is how long it takes for a listing, once it is on an MLS, to be sold. (Murray, Tr. 264-65).
578. 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).

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579. Murray testified that it is generally expected that more exposure increases the chances that a broker is going to get their home sold faster and at a better price than otherwise. (Murray, Tr. 183). However, any conclusion that Realcomp's Website Policy caused home sellers with EA listings to have their homes spend longer times on the market due to lower exposure to potential buyers is 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. 264-65).
580. Dr. Williams did not do an analysis of days on market. (Williams, Tr. 1271-72).
581. The only expert who analyzed days on market was Dr. Eisenstadt. Dr. Eisenstadt found that, in the Realcomp MLS, non-ERTS homes had 17% fewer days on market than comparable ERTS homes. (Eisenstadt, Tr. 1391-92).
582. The average number of days on market on the Realcomp MLS for non-ERTS properties is 118, compared to approximately 142 average days on market for ERTS properties, based upon data analyzed from January 2005 through October 2006. (Eisenstadt, Tr.1387-88).
583. However, Dr. Eisenstadt admitted that he did not control for certain factors that can affect how quickly a home sells. For instance, he did not control for whether the home has a remodeled kitchen, a remodeled bathroom, or was recently painted. (Eisenstadt, Tr.1558-59).
584. Mr. Mincy, an EA agent called by Complaint Counsel, has done no comparison but has not noticed a difference in the days on market between Exclusive Agency listings and Exclusive Right to Sell listings. (Mincy, Tr. 450).

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**b. Sales Price**

585. The only expert to analyze what, if any, effect there was on the sales price of Exclusive Agency listings in Realcomp was Dr. Eisenstadt who performed a sales price regression to compare sales prices of EA listings in the Realcomp Service Area with those in the Ann Arbor MLS and with the Control MSAs. (Eisenstadt, Tr. 1449-60; CX 133-044-046; CX 458-020-023).

**(i) Comparison to Ann Arbor**

586. Dr. Eisenstadt postulated that if Realcomp's Policies harmed consumers, home sellers of non-ERTS properties would realize lower selling prices than they would earn "but for" the Realcomp Policies. (CX 133-044).

587. To test that theory, in his April 17, 2007 Report, Dr. Eisenstadt compared the home sales prices for EA listed residential properties in the Realcomp MLS against those in the Ann Arbor MLS for the years 2005 and 2006 and concluded that home sellers of EA properties located in Realcomp's MLS appear to do about 14% better than home sellers of non-ERTS comparably sold properties in Ann Arbor. (Eisenstadt, Tr. 1545-47; CX 133-044-047).

588. However, Dr. Eisenstadt removed all of the Detroit listings from the data for the Realcomp MLS and removed all listings for properties outside of Washtenaw county from the data for the Ann Arbor MLS. (Eisenstadt, Tr. 1543-44; *see* F. 499-501 for discussion of the use of the Ann Arbor MLS as a bypass). Thus, Dr. Eisenstadt compared only part of the Realcomp MLS to only part of the Ann Arbor MLS. (Williams, Tr. 1657).

589. In removing the Detroit listings, Dr. Eisenstadt removed approximately 25,000 to 27,000 listings from the Realcomp Service Area and was left with only 100 or so properties that sold under Exclusive Agency

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listings in the remaining Realcomp MLS data. (Eisenstadt, Tr. 1544-47).

590. In comparing only Washtenaw county listings, Dr. Eisenstadt was left with only 24 or 25 properties that sold under EA listings in the Ann Arbor MLS data. (Eisenstadt, Tr. 1546-47).
591. Dr. Eisenstadt compared these data sets in order to compare suburban areas with suburban areas and because he thought that home sellers who live in very densely populated areas such as Detroit might place a different value on certain home characteristics when they are buying a home than home sellers who live in more suburban environments. (Eisenstadt, Tr. 1549-50).
592. Dr. Eisenstadt sought to account 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 try 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 sales prices of ERTS-listed properties in the two areas. (CX 133-044-045).
593. However, as with his days on market analysis, Dr. Eisenstadt did not control for certain factors that can affect the sales price of a home. 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. 1558-59).
594. 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. 1557-58). He also admitted that there are unobservable characteristics that could make it more likely that a home seller use an Exclusive Agency

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listing. (Eisenstadt, Tr. 1557). For instance, a home seller whose home has greater “curb appeal” may be more likely to use an Exclusive Agency listing. (Eisenstadt, Tr. 1557-58). He did not control for such factors. (CX 557-A-040).

595. Although 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 133-045-046; Eisenstadt, Tr. 1560-61), at trial, Dr. Eisenstadt admitted that he could not give an interpretation of that regression coefficient. (Eisenstadt, Tr. 1562-63; CX 460-002-003).
596. Dr. Eisenstadt’s sales price regression shows only a correlation between sales price and the presence of Realcomp’s Policies; but does not establish a causal connection. (Eisenstadt, Tr. 1551-52 (“I believe there is a theory that [would] expect it to be a causal relationship”).

**(ii) Comparison to Control MSAs**

597. In his May 31, 2007 Supplemental Expert Report, Dr. Eisenstadt compared the home sales prices of EA properties listed and sold in Realcomp to those listed and sold in five of the Control MSAs used by Dr. Williams. One of Dr. Williams’ Control MSAs was not used in this analysis because it did not provide sales price data. (CX 458-021-022).
598. Dr. Eisenstadt concluded 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, Dr. Eisenstadt found, on average residential sellers in the Realcomp Service Area realized approximately 6% higher sales



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605. In 2006, Realcomp paid {■■■■■■■■■■} for radio ads to promote MoveInMichigan.com and its realtor members. (Kage, Tr. 941-43, *in camera*).
606. A home seller who is not a Realcomp member does not pay membership dues to Realcomp. (Eisenstadt, Tr. 1401).
607. To the extent non-ERTS listings are available on public websites, home sellers may be better able to sell directly to buyers without using any broker. (Sweeney, Tr. 1333-34).
608. When home sellers use a non-ERTS listing and find their own buyer directly, the home sellers capture for themselves the commission that they would otherwise pay at settlement. (Eisenstadt, Tr. 1401). In this sense, home sellers using non-ERTS contracts are in competition with cooperating brokers for buyers. (CX 133-032).
609. The Website Policy limits the free distribution of information to buyers who do not intend to use the services of cooperating brokers. (Sweeney, Tr. 1333-34; CX 133-034).
610. The Website Policy protects Realcomp cooperating brokers from having to subsidize the cost that EA home sellers would otherwise have to incur to compete for buyers who do not use cooperating brokers. (CX 133-034; Eisenstadt, Tr. 1401-02).
611. Realcomp members should not have to subsidize or otherwise facilitate transactions that directly conflict with Realcomp members' business purpose. (*See* Sweeney, Tr. 1333-34).
612. Dr. Williams claimed that there is no free riding problem that justifies the Realcomp Policies. (Williams, Tr. 1639-56; F. 613-15).



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613. Dr. Williams testified that home sellers using EA listings do not free ride on listing agents because the listing agent participates in the transaction and is paid. (Williams, Tr.1641 -43).
614. Dr. Williams testified that home sellers using EA listings do not free ride on cooperating agents 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% of the time a cooperating broker participates in a non-ERTS transaction. (Williams, Tr. 1643-51).
615. Dr. Williams testified that home sellers using EA listings do not free ride on the MLS itself as a platform because it is being compensated by membership fees, including fees paid by discount brokers; whether the brokers participate in transactions doesn't affect the amount of fees that the MLS is receiving. (Williams, Tr. 1652-54).
616. However, Dr. Williams failed to address the free riding by EA home sellers seeking IDX benefits to compete with Realcomp brokers for buyers, which by Dr. Williams' own estimate, occurs 20% of the time in non-ERTS transactions. (Eisenstadt, Tr. 1401, Williams, Tr. 1639-56).
617. Dr. Williams further opined 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 cannot assure that a Realcomp cooperating broker will participate in a given transaction. (Williams, Tr. 1224-27, 1645-47). However, Dr. Williams failed 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. 914-15).
618. The "Realcomp Call to Action," created after the FTC filed its Complaint against Realcomp, is the only

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document that the Board of Governors has approved stating the justifications for the Website Policy. (CX 38 (Gleason, Dep. at 115-16); CX 89; Kage, Tr. 994).

619. In the “Call to Action,” Realcomp describes its services as in high demand by consumers, argues that changing the Website Policy compromises the purpose of the cooperative, and urges that the use of the Realtors® website be reserved specifically for the purpose of marketing properties represented by Realtors®. (CX 89).

**2. Increasing Efficiencies****a. Increasing Participation**

620. 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). (CX 133-036; Eisenstadt, Tr. 1405-06).
621. 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. (CX 133-036; Eisenstadt, Tr. 1404-07).
622. 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. 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. (CX 133-037; Eisenstadt, Tr. 1404-07).

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623. Dr. Eisenstadt opined, 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. 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. (CX 133-037-038; Eisenstadt, Tr. 1404-07).
624. Dr. Eisenstadt believed that these factors support the conclusion that cooperating agents would prefer a platform that favored ERTS listing contracts than one that had only limited service contracts of equivalent number on the other side. On this basis, he opined that the Realcomp Policies promote this result and thereby the efficiency of the cooperative MLS platform. (CX 133-037-038; Eisenstadt, Tr. 1404-07).
625. According to Dr. Eisenstadt, Realcomp is treating listing agents who use ERTS listings more favorably than listing agents who use non-ERTS listings on the basis that the ERTS listings are more effective in attracting cooperating agents to the other side of the platform to the MLS. (Eisenstadt, Tr. 1407).
626. However, most brokers compete as both listing and cooperative brokers, which would indicate that a member of an MLS will typically be on both sides of the platform. (Eisenstadt, Tr. 1582-83; Mincy, Tr. 361-63 (although brokers compete with one another to secure new listings, once a broker secures that listing, he or she may then potentially be in a cooperative relationship with those same or other brokers who are representing buyers.)).
627. Moreover, Dr. Eisenstadt's theory that limited service brokers contribute only "an equivalent number" of Exclusive Agency listings to the platform is incorrect.

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In his own report, Dr. Eisenstadt claimed to show that EA brokers bring more listings than full service brokers. (CX 133-067).

628. Further, Dr. Eisenstadt admitted that more listings attract more cooperating brokers. (Eisenstadt, Tr. 1530).

**b. Reducing Bidding Disadvantage**

629. Buyers who use cooperating brokers are at a bidding disadvantage relative to buyers who do not use a cooperating broker when both bid for properties listed under EA contracts. Because the home seller must pay a commission when a buyer uses a cooperating broker, the rational home 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. (CX 133-032-033; Eisenstadt, Tr. 1402-03).
630. Buyers have more incentive to use the services of selling agents when they acquire ERTS properties than when they acquire EA properties, because they are economically disadvantaged as bidders in the latter case. (CX 133-032-034).
631. The Realcomp Website Policy, by not promoting EA properties to the same extent as ERTS properties, increases the probability that the client of a Realcomp member who is acting as a cooperating broker will make a successful offer for that property. (Eisenstadt, Tr. 1402; CX 133-032-033).
632. In addition, 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. (CX 133-037-038).

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**III. ANALYSIS AND CONCLUSIONS OF LAW****A. Burden of Proof**

Under Commission Rule of Practice 3.5 I (c)(l), “[a]n initial decision shall be based on a consideration of the whole record relevant to the issues decided, and shall be supported by reliable and probative evidence.” 16 C.F.R. § 3.51(c)(1). The parties’ burdens of proof are governed by Commission Rule 3.43(a), Section 556(d) of the Administrative Procedure Act (“APA”), and case law. FTC Rules of Practice, Interim rules with request for comments, 66 Fed. Reg. 17,622, 17,626 (April 3, 2001). Pursuant to Commission Rule 3.43(a), “[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.” 16 C.F.R. § 3.43(a). Under the APA, “[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. § 556(d). *See also Steadman v. SEC*, 450 U.S. 91, 102 (1981) (APA establishes preponderance of the evidence standard of proof for formal administrative adjudicatory proceedings).

The government bears the burden of establishing a violation of antitrust law. *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 334 (1961). “[T]he antitrust plaintiff must present evidence sufficient to carry its burden of proving that there was [an anticompetitive] agreement.” *Monsanto Co. v. Spray-Rite Servo Corp.*, 465 U.S. 752, 763 (1984). Accordingly, Complaint Counsel bears the burden of demonstrating that Respondent’s actions in this case are anticompetitive. “[O]nce the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.” *E. I. du Pont*, 366 U.S. at 334.

**B. Jurisdiction and Interstate Commerce**

The Complaint charges Respondent with violating Section 5 of the Federal Trade Commission Act, as amended (“FTC Act”). 15 U.S.C. § 45. Section 5(a)(2) of the FTC Act gives the Commission jurisdiction “to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce . . .” 15 U.S.C. § 45(a)(2); *Atlantic Ref Co.*, v.

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*FTC*, 381 U.S. 357, 363 (1965). The FTC Act defines “corporation” to include “any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members . . .” 15 U.S.C. § 44. *See also Community Blood Bank v. FTC*, 405 F.2d 1011, 1015-16 (8th Cir. 1969). The FTC Act definition of commerce includes “commerce among the several States.” 15 U.S.C. § 44.

In this case, the parties have stipulated that Respondent is subject to the jurisdiction of the Federal Trade Commission. Joint Stipulations of Law and Fact, June 14, 2007 at 9. The parties have also stipulated that Realcomp is a corporation, as “corporation” is defined by Section 4 of the FTC Act, 15 U.S.C. § 44; that Realcomp is engaged in commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44; and that Realcomp’s acts and practices have been or are in or affecting commerce, as “commerce” is defined in the FTC Act. Joint Stipulations of Law and Fact, at 9. *See also Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133, 1144 (9th Cir. 2003) (holding the MLS has a substantial effect on interstate commerce).

**C. Relevant Market**

Antitrust law is concerned with abuses of power by private actors in the marketplace. Therefore, before reaching the question of whether Respondent violated Section 5 of the FTC Act, it is necessary to confront the threshold issue of defining the relevant market. The relevant market has two components, a product market and a geographic market. *H.J., Inc. v. Int’l Tel. & Tel. Corp.*, 867 F.2d 1531, 1537 (8th Cir. 1989). “The burden is on the antitrust plaintiff to define the relevant market within which the alleged anticompetitive effects of the defendant’s actions occur.” *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004).

Complaint Counsel asserts that there are two, related relevant product markets in this case. CCB at 56. The first alleged relevant product market is the market for residential real estate brokerage services. CCB at 56. The second asserted relevant product market is the market for the supply of multiple listing services to real estate brokers. CCB at 56. Complaint Counsel

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argues that the relevant geographic market is comprised of four counties in Southeastern Michigan: Wayne, Oakland, Livingston, and Macomb. CCB at 56. In support of its proposed market definition, Complaint Counsel relies on the report of its economic expert, Dr. Darrell Williams.

Respondent contends that Complaint Counsel has failed to prove a legally sufficient relevant market. RRB at 28-33. It argues that, in assessing relevant markets, courts have emphasized two factors in particular: first, the extent to which defendant's product is reasonably interchangeable in use with alternative products; and second, the degree of cross-elasticity of demand between the defendant's product and the potential substitutes for it. RRB at 29.

Respondent criticizes Complaint Counsel's expert, Dr. Williams, for having failed to engage in a sufficiently rigorous economic examination of the interchangeability of products or suppliers, cross-elasticities of demand or supply, or the practicability of alternatives, particularly as they relate to the proposed geographic market. RRB at 31. Respondent further attacks Dr. Williams' failure to present any form of systematic examination of the evidence as articulated by the *Horizontal Merger Guidelines*. RRB at 30-31 (citing Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (1992, amended Apr. 1997)). Respondent thus argues that, in lieu of presenting sufficient, viable economic support for its geographic market definition as the law requires, Complaint Counsel has merely offered a definition that comports to its "intuitive" wishes as to what it believes the geographic market should be. RRB at 31. In other words, Respondent asserts that by simply presenting evidence that Respondent provides most of its MLS services to brokers in four counties, Complaint Counsel seeks to show that the geographic market can be summarily defined as MLS services in those four counties. This, of course, is not the analysis that the law requires. See *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8th Cir. 1999); *FTC v. Freeman Hosp.*, 69 F.3d 260, 268 (8th Cir. 1995).

Complaint Counsel advances no direct argument in its briefs to rebut Respondent's assertions as to the sufficiency of its geographic market definition analysis, but rather relies on

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evidence establishing that Respondent has market power within the area of Southeastern Michigan where it competes. CCB at 56. However, as noted by the Fifth Circuit in *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980):

Courts in rule of reason cases seldom proceed to engage in the meticulous analysis of power that is associated with monopolization cases. The issue is not whether defendants possess monopoly power, but whether they possess a substantial degree of market power. On this issue, a truncated or threshold analysis will suffice. For example, if defendants possess substantial shares of the market for a well differentiated product such as cellophane, we would assume significant power without scrupulous inquiry into cross-elasticity of substitute products. Courts are understandably loath to move into the intricacies and imponderables of thorough-going analysis of power and tend to avoid doing so where the need is not insistent.

*Id.* at 1372 (quoting L. Sullivan, *Antitrust* 192 (1977)). As set forth below, and based upon the established legal standards herein discussed, the Court determines that the analysis provided by Dr. Williams is sufficient to meet Complaint Counsel's burden of defining the relevant market in this case.

### **1. Product Market**

The relevant product or service market is "composed of products that have reasonable interchangeability for the purposes for which they are produced - price, use and qualities considered." *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956). This "cross-elasticity of demand" represents product substitutability and the customer's ability to choose among competing products. *Id.* at 380, 394; *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 718 (D.C. Cir. 2001). The courts rely on various factors to determine how closely the products at issue compete. *E.g.*, *H.J. Heinz*, 246 F.3d at 718-19; *FTC v. Swedish Match*, 131 F. Supp. 2d 151, 158-59 (D.D.C. 2000). "An element for consideration as to cross-elasticity of demand between products is the responsiveness of the sales of one product to price changes of the other." *E. I. du Pont*, 351 U.S. at 400.



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The *Merger Guidelines* delineate a product market by asking whether a hypothetical monopolist of the proposed product market could impose a “small but significant and nontransitory increase in price” (“SSNIP”) and not lose so much of its sales to alternative products that the price increase would be unprofitable. *Merger Guidelines* § 1.11; *Swedish Match*, 131 F. Supp. 2d at 160 (relevant question is whether the increase in the price of product B will induce substitution to product A to render product B’s “price increase unprofitable”). The assessment of whether a hypothetical monopolist would be able to profitably increase its prices above competitive levels involves an examination of the extent to which consumers could substitute to other products or services in response to such a price increase. *Merger Guidelines* § 1.11. Although the *Merger Guidelines* are not binding, courts have often adopted the standards set forth in the *Merger Guidelines* in analyzing antitrust issues and have looked to them in defining markets in Section 1 cases. *FTC v. PPG Indus. Inc.*, 798 F.2d 1500, 1503 n.4 (D.C. Cir. 1986); *Ball Mem. Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1336 (7th Cir. 1986); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322,339 (S.D.N.Y. 2001).

The evidence in this case supports the two, related relevant product markets proffered by Dr. Williams. F. 285. The first established relevant product market is the market for residential real estate brokerage services; this is the market in which Realcomp’s members compete. F. 285-86. For the majority of home sellers, selling For Sale By Owner (“FSBO”) is not a reasonable substitute for using a real estate broker because of the significant advantages to using a real estate broker in selling a home. F. 288-92. The primary benefit of using a real estate broker is the ability to list a home in an MLS. F. 289. Because FSBO sellers cannot list on the MLS, most home sellers will not perceive FSBO as a viable substitute for brokerage services. F. 294. Thus, a hypothetical monopolist of real estate brokerage services would be able to profitably increase commissions significantly above competitive levels without risking sellers of homes switching to FSBO. F. 295. Because there is no other service that is reasonably interchangeable for consumers seeking to sell a home, residential real estate brokerage services constitute a relevant product market.

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The second relevant product market is found to be the market for the supply of multiple listing services to real estate brokers, which is the market in which Realcomp competes. F. 286, 298. Although there are various outlets through which a real estate broker can list a property for sale (*e.g.*, print classified ads), the MLS is an important input for cooperating brokers searching on behalf of home buyers and thus an attractive venue for listing brokers to advertise houses being sold. F. 299-300. Listing brokers that do not have access to the MLS, and thus are required to advertise their listings by means other than an MLS, can expect that fewer cooperating brokers will see the property. F. 311. Thus, at a given asking price, the likelihood of a sale will be lower and, if a sale occurs, the expected time to sell will be longer, all else equal. F. 311., Cooperating brokers who do not have access to the MLS would need to contact listing brokers or home sellers directly to learn the compensation offer and at the same time would need to search over multiple sources in order to identify the same number and type of houses being offered for sale that are available on the MLS. F. 312. As a result, search costs, including time costs, would increase significantly compared to the search costs of using the MLS. F. 312. Brokers without full access to the MLS would be at a significant competitive disadvantage. F. 313. Further, applying the standard economic framework for defining relevant markets, the net result is that a hypothetical monopolist of MLS listing services would be able to implement a “small but significant and non-transitory increase in price” for access to the MLS because few brokers could withdraw from participating in an MLS even if the fees or other costs associated with participation substantially increased. F. 315. As there is no other service that is reasonably interchangeable, the supply for multiple listing services to real estate brokers constitutes a relevant product market.

## 2. Geographic Market

The Supreme Court has defined the relevant geographic market as “the ‘area of effective competition . . . in which the seller operates, and to which the purchaser can practicably turn for supplies.’” *United States v. Philadelphia Nat ‘I Bank*, 374 U.S. 321, 359 (1963) (quoting *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961)). A geographic market has also been

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described as the area “in which the antitrust defendants face competition.” *Freeman Hosp.*, 69 F.3d at 268.

Respondent states that an assessment of the relevant geographic market requires an inquiry into the geographic area within which defendant’s customers can practicably turn to other sellers in the event of an attempted exercise of market power by the defendant. RRB at 30. As noted, Respondent asserts, simply because Realcomp provides most of its MLS services to brokers in four counties does not compel Complaint Counsel’s conclusion that the market can be summarily defined as MLS services in those four counties. RRB at 31.

As with the relevant product market, in defining the relevant geographic market, the objective is to identify the smallest geographic area in which a “hypothetical monopolist” could profitably impose a SSNIP above competitive levels. *Merger Guidelines* § 1.21. This assessment involves an examination of whether consumers could substitute to suppliers in other geographic areas in response to such a price increase. *Merger Guidelines* § 1.11.

Applying the hypothetical monopolist framework generally to various subsets of an MLS service area, starting with any local geographic area (*e.g.*, neighborhoods or groups of neighborhoods), the relevant geographic market will be determined by the degree of substitutability between neighborhoods for home buyers. F. 318. *See also Bathke v. Casey’s Gen. Stores, Inc.*, 64 F.3d 340, 346 (8th Cir. 1995) (considering the distance “customers will travel in order to avoid doing business at [the entity that has raised prices].” In the case of MLSs, the scope of the geographic market will largely be determined by degree of substitutability between neighborhoods for home buyers. F. 318

The evidence in this case demonstrates that, from a buyer’s perspective, MLSs prevalent in adjoining geographic areas are not effective substitutes to the MLSs operating in the counties in which a buyer is searching for a home because a listing in an adjacent MLS will not be seen by the majority of cooperating brokers and home buyers searching for a home in the particular area. F. 318. Thus, home buyers can defeat an increase in the

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price of brokerage services in the relevant area only by buying a house in a neighborhood other than that particular area where the supracompetitive listing fees apply. F. 324. But, from the home buyer's perspective, location is the guiding principle in real estate, F. 321, thus home buyers would not consider other locations to be adequate substitutes.

The evidence also demonstrates that, from a home seller's perspective, listing brokers representing the sellers of homes located in the relevant geographic area cannot substitute away from MLS listing services in that area because a listing in an adjacent MLS will not be seen by the majority of cooperating brokers and home buyers searching for a home in the particular area. F. 318. Because of the lack of substitutes, any broker representing the seller of a home located in that particular area would face the supracompetitive price for MLS listing services for houses located in that area. F. 318. Home sellers, obviously, cannot change the location of the house they are selling, thus cannot substitute away to another location.

In addition to evaluating the practicability of other locations or MLSs located in other locations as adequate substitutes, a proper line of inquiry is to determine, over what geographical region could a hypothetical monopolist impose a SSNIP. "The touchstone of market definition is whether a hypothetical monopolist could raise prices." *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 198 (1st Cir. 1996). The evidence in this case, as discussed below, establishes that Respondent has market power, and thus could raise prices, throughout the four Michigan counties of Wayne, Oakland, Livingston, and Macomb. F. 317-28.

Realcomp's market shares in terms of new listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 to 2006 was{■■■■}. F. 340. By county, Realcomp's market share in terms of new listings in Wayne county is{■■■■■}; in Oakland county it is{■■■■■}; in Livingston county it is {■■■■■}; and in Macomb county it is{■■■}. F. 341. Market shares based on new listings, however, may understate the extent to which the Realcomp MLS is important to brokers. F. 343. Particularly in areas in which two MLSs overlap, brokers may list on both MLSs. F. 343. Thus, an MLS's share of "unique" listings - the share of

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all listed homes that are listed on Realcomp (whether or not listed on another MLS) - is also an important indicator of market power. F. 345. Realcomp's market share in terms of unique listings for Wayne, Oakland, Livingston, and Macomb counties for 2002 to 2006 was {■■■■}. F. 346. Realcomp's market share in terms of unique listings in Wayne county is{■■■■■}; in Oakland county it is{■■■■■■}; in Livingston county it is{■■■■■■}; and in Macomb county it is {■■■■■■}. F. 347. A firm's high market share in the relevant market, plus the presence of barriers to entry, will support a finding of market power. *See, e.g., United States v. Microsoft Corp.*, 253 F.3d 34, 51-56 (D.C. Cir. 2001); *Rebel Oil Co. v. Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995). These market shares are sufficiently high to indicate market power. *Cf United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (87% is predominant); *E. I. du Pont*, 351 U.S. at 379,391 (75%).

While MiRealSource also operates as an MLS in these four counties, it is not an effective substitute for Realcomp. From 2002 to 2006, MiRealSource had {■■■■■■■■} listings in each area of Livingston county, most of Wayne county, and the majority of Oakland county. F. 337. In contrast, Realcomp had {■■■■■■} listings in almost all of Wayne, Oakland, and Livingston counties and in a majority of Macomb county. F. 337. Realcomp had {■■■■■■} listings in substantial portions of each of these counties. F. 337. {■■■■■■■■■■■■■■■■} of MiRealSource members are also members of Realcomp. F. 338. This suggests that for these brokers that are dual members, MiRealSource is not an effective substitute to Realcomp in certain geographic areas. F. 338. If MiRealSource and Realcomp were effective substitutes in all areas where these brokers operate, then such dual membership would not be necessary. F. 338.

Respondent's market power is further enhanced by "network effects." Network effects are a type of demand-side economies of scale that occur when the value of a product or service to a customer depends on the number of other customers who also use the product or service. F. 304. Network effects exist where the value or quality of a service to one user increases as the number of other users of the same service increases. F. 305. The classic example of network effects is a telephone network - the value of

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the telephone network increases as more users join the network, allowing a user to be able to call more persons. F. 305.

Because of network effects, an individual listing broker has little or no unilateral incentive to switch to an alternative MLS in response to, *e.g.*, an increase in listing fees by the MLS, because there would be few, if any, cooperating brokers working with home buyers using the alternative MLS. F. 334. Because of network effects, an individual cooperating broker has little or no incentive to switch in response to an increase in the price of MLS listing services because there would be few, if any, listings to search. F. 335. Consequently, brokers on both the selling and buying sides will not perceive an alternative MLS as an economically viable substitute to the hypothetical MLS monopoly. F. 336. These network effects thus create barriers to entry, further enhancing Respondent's market power. F. 330-35.

Because Complaint Counsel has demonstrated the lack of reasonable substitutes and that Respondent has sufficient market power to raise prices in the counties of Wayne, Oakland, Livingston, and Macomb, it is established that these four Southeastern Michigan counties constitute the relevant geographic market.

#### **D. Analytical Framework**

The FTC Act's prohibition of unfair methods of competition encompasses violations of Section 1 of the Sherman Act, which prohibits agreements in restraint of trade. *California Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999). The Commission relies on Sherman Act law in adjudicating cases alleging unfair competition. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 451-52 (1986); *In re California Dental Ass'n*, 121 F.T.C. 190, 292 n.5 (1996); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 463-64 (1941). *See also Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 32 (D.C. Cir. 2005) ("analysis under § 5 of the FTC Act is the same in this case as it would be under § 1 of the Sherman Act."). Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . ." 15 U.S.C. § 1. The ban on contracts in restraint of trade extends only to unreasonable restraints of trade, *i.e.*,

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restraints that impair competition. *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

For alleged restraints of trade falling within Section 1 of the Sherman Act, “the Supreme Court has authorized three methods of analysis: (1) *per se* analysis, for obviously anticompetitive restraints, (2) quick-look analysis, for those [restraints] with some procompetitive justification, and (3) the full ‘rule of reason’ [analysis], for restraints whose net impact on competition is particularly difficult to determine.” *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 508-09 (4th Cir. 2002). The abbreviated rule of reason analysis, an intermediate standard, applies “in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitive character” of an alleged restraint. *Gordon v. Lewiston Hosp.*, 423 F.3d 184, 209-10 (3d Cir. 2005). For instance, the Commission condemned under an abbreviated rule of reason analysis a joint venture’s moratorium on discounting and advertising for products outside of the venture, *In re Polygram Holding, Inc.*, 2003 FTC LEXIS 120 (Jul. 24, 2003), *aff’d*, 416 F.3d 29 (D.C. Cir. 2005), and a licensing board’s ban on advertising discounts by optometrists, *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549,607 (1988).

The dispute between the parties here concerns which rule of reason standard is most appropriate for the Court’s analysis. Complaint Counsel asserts that this matter should be adjudicated pursuant to the abbreviated “quick look” rule applied in *Polygram*, while Respondent argues that a full rule of reason examination, complete with proof of actual anticompetitive effects is required under the traditional theory. CCB at 45; RB at 8, 14. An examination of the parties’ arguments against established case precedent follows.

Complaint Counsel has never contended that the policies, acts, or practices in this case constitute *per se* illegal actions, as only conduct that is “manifestly anticompetitive” is appropriate for *per se* condemnation under the antitrust laws. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988); *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 289-90 (1985) (“The decision to apply the *per se*

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rule turns on “whether the practice facially appears to be one that would always or almost always would tend to restrict competition and decrease output.”). As such, the Court need not address Respondent’s arguments on the express inapplicability of *per se* analysis to the issues raised in this case.

“[M]ost antitrust claims are analyzed under a ‘rule of reason’ . . . “ *Khan*, 522 U.S. at to (citations omitted); *Chicago Bd. of Trade*, 246 U.S. at 238-39. Under this theory, the plaintiff bears the initial burden of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant market. *Tunis Bros. Co. v. Ford Motor Co.*, 952 F.2d 715, 722 (3d Cir. 1991); *Gordon*, 423 F.3d at 210. As noted by Complaint Counsel, agreements unreasonably restrain trade when they have, or are likely to have, a substantial anticompetitive effect in the relevant market, such as by increasing prices, reducing output, reducing quality, or reducing consumer choice. CCB at 41 (citing *Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931); *Hahn v. Oregon Physicians’ Serv.*, 868 F.2d 1022, 1026 (9th Cir. 1988)).

When proof of actual anticompetitive effects is impossible to make due to the difficulty of isolating or sustaining the market effects of challenged conduct, courts may allow proof of the defendant’s market power instead. *Gordon*, 423 F.3d at 210; *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993). “Market power, the ability to raise prices above those that would otherwise prevail in a competitive market, is essentially a surrogate for detrimental effects.” *Id.* (internal citations omitted). The nature of the restraint and market power, under certain facts, may establish presumed anticompetitive effects, in the absence of proof of actual anticompetitive effects. *See, e.g., Indiana Fed’n of Dentists*, 476 U.S. at 462 (restraint could be condemned “even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence”).

As noted in *California Dental*, the Supreme Court suggested that where the anticompetitive nature of a restraint is less obvious than a *per se* violation, the courts may not need to engage in a complete plenary market examination. 526 U.S. at 779 (the need for “a more extended examination of the possible factual



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underpinnings . . . is not, of course, necessarily to call for the fullest market analysis”). Rather, in examining agreements among competitors, the essential inquiry is “whether or not the challenged restraint enhances competition,” and the court need only conduct a sufficient analysis to arrive at a “confident conclusion about the principal tendency of a restriction.” *Id.* at 780-81.

Nevertheless, the Court also stressed that courts must have a solid theoretical basis for concluding that challenged practices have anticompetitive consequences under a “quick look” abbreviated analysis. *Id.* at 775 n.12 (when the facts and circumstances “are somewhat complex, assumption alone will not do”). As such, a “quick look” rule of reason analysis was deemed inappropriate in *California Dental*, where the challenged restrictions “might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition.” *Id.* at 771. *See also Paladin Assocs. v. Montana Power Co.*, 328 F.3d 1145, 1155 n.8 (9th Cir. 2003) (when a defendant advances plausible arguments that a practice is procompetitive, the rule of reason applies because courts are unable to conclude that the likelihood of anticompetitive effects is clear and the possibility of procompetitive effects is remote). As to plausibility, the issue is not whether the restrictions *were* procompetitive, but whether they *could be*. *California Dental*, 526 U.S. at 778 (“[T]he plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission’s order was treated.”).

“If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective.” *Brown Univ.*, 5 F.3d at 669; *California Dental*, 526 U.S. at 775 n.12. “If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and ‘the court condemns the practice without ado.’” *Brown Univ.*, 5 F.3d at 669 (citations omitted).

“If the defendant offers sound procompetitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.” *Brown Univ.*, 5 F.3d at 669. Courts then evaluate

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whether the challenged conduct is reasonably necessary to achieve the procompetitive objectives identified by a defendant. *NCAA v. Board of Regents of the University Okla.*, 468 U.S. 85, 114-15 (1984); *Hahn*, 868 F.2d at 1026; *Brown Univ.*, 5 F.3d at 678-79; *In re Brunswick Corp.*, 94F.T.C. 1174, 1275 (1979).

Courts have historically applied the abbreviated rule of reason analysis to MLS rules, but only as to certain types of restrictions. In *Realty Multi-List*, the membership criteria of an MLS, which required that members have a “favorable credit report and business reputation” and maintain an office “kept open during customary business hours” was challenged under Section 1. 629 F.2d at 1358. The Fifth Circuit, in evaluating these membership restraints, applied an abbreviated rule of reason analysis that “allows the courts to reach and void on its face any significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination’s legitimate needs.” *Id.* at 1370.

Under such factual analysis, once the antitrust plaintiff can demonstrate market power, the burden of proof is on the MLS to justify the challenged rule. *See Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1581 (11th Cir. 1991). The reasonableness of an association’s rule under such clearly defined circumstances, can then be determined by the court, by gauging on its face, the rule’s justification in terms “of the competitive needs of the association and by examining the rule itself to determine if it is drawn in such a manner as to further that need without unnecessarily trampling competitive opportunities.” *Realty Multi-List*, 629 F.2d at 1372. Under this test, if the rule is not “reasonably necessary” to the “competitive needs of the association” and “narrowly tailored to that end,” the rule “may be condemned on its face, without proof of past effect.” *Id.* at 1375.

The evidence in this case, however, unlike the issues presented in *Realty Multi-List*, establishes that Respondent does not deny membership in its MLS to brokers who use exclusive agency contracts, nor does it preclude brokers from placing such listings on the Realcomp MLS. F. 163-64, 181. Rather, the restraints challenged in the instant proceeding are completely unrelated to any membership criteria or rules considered in the

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previously mentioned cases. As such, Complaint Counsel's reliance on *Realty Multi-List*, et. al, as support for a truncated analysis, is of limited probative value.

Similarly, the Court rejects Respondent's argument that Complaint Counsel needs to demonstrate a "materially adverse effect on competition," pursuant to 15 U.S.C. § 45(n) (Policy Statement on Unfairness (FTC, Dec. 17, 1980)). RB at 14. The Commission's statement at § 45(n) is applicable specifically to consumer protection cases, involving an unfair "act or practice," such as deceptive advertising and should not be read to apply to cases such as here, which involve "unfair methods of competition." See 15 U.S.C. § 45(a)(I).

This conclusion, however, does not persuade the Court that a truncated analysis is appropriate under the circumstances of this case. In the years following the Supreme Court's decision in *California Dental*, several Circuits have specifically considered the applicability of an abbreviated rule of reason analysis. Apart from the D.C. Circuit's holding in *Polygram*, which Complaint Counsel cites in support of a quick look here, other Circuits appear to have tread more cautiously with respect to a less-than-traditional rule of reason analysis.

In *Brookins v. Int'l Motor Contest Ass'n*, 219 F.3d 849, 854 (8th Cir, 2000), the Eighth Circuit held that rules imposed by an auto racing governing body were "not the kind of 'naked restraint' on competition that justify foregoing the market analysis normally required in Section 1 rule-of-reason cases." Similarly, in *Worldwide Basketball*, 388 F.3d at 961, the Sixth Circuit ruled that an "abbreviated or 'quick-look' analysis may only be done where the contours of the market . . . are sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition." Finally, in *Continental Airlines*, 277 F.3d at 512, 517, the Fourth Circuit rejected the quick look approach, finding that the procompetitive justifications offered by the defendant were, in fact, plausible.

It is not necessary for purposes of the Court's determination as to the appropriate review standard, here, to address Respondent's extensive arguments as to whether the *Polygram* decision and its

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“inherently suspect” approach is sanctioned by virtue of the Supreme Court’s holding in *California Dental*, or is legally inconsistent with the various Circuit Court decisions noted above. Nor is it useful to opine on whether the Commission’s construction of the “quick look” resembles an expanded *per se* rule, as Respondent strongly suggests. RRB at 15-16.

Complaint Counsel relies on *Polygram*, despite the fact that the challenged conduct there was an express agreement by the parties to cease price competition outside of the joint venture. Such conduct is clearly inapposite from the policies, acts and practices of Respondent here, which are stipulated by the parties to be *non-price* in nature. Joint Stipulations of Law and Fact at 4-5; F. 189, 196-97, 203. In addition, Complaint Counsel’s reliance on *Realty Multi-List* and *Thompson* is misplaced, as these cases pre-date *California Dental* and involved restrictive membership requirements not present in the instant case. Neither is of marked assistance to the Court as the rules in those cases sought to exclude certain brokers from the market altogether. Thus, Complaint Counsel’s efforts to condemn Respondent’s policies, acts, and practices as “facially” anticompetitive, based on dissimilar factual situations are ill-founded and must fail.

Although the evidence shows that Respondent possesses market power, F. 329-48, the Court must still determine from the empirical and evidentiary record, whether the nature of the challenged restraints encompassed by the Realcomp Policies were likely to result in anticompetitive effects on competition. *See California Dental*, 526 U.S. at 771. As such, Complaint Counsel has not demonstrated upon mere facial analysis, that such policies, acts or practices, together with Respondent’s proffered justifications, were sufficient to allow the Court to arrive at a “confident conclusion about the principal tendency of [the] restriction[s].” *Id.* at 781. Nor is it “immediately obvious” that the alleged restraint of trade likely impairs competition. *Indiana Fed’n of Dentists*, 476 U.S. at 459; *Polygram*, 416 F.3d at 36. Accordingly, for the reasons herein stated, this case can only be properly adjudicated utilizing the traditional rule of reason analysis. Such analysis examines the nature of the restraint, market power, and evidence of actual competitive effects.

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**E. Liability Under Section 5**

To determine whether Complaint Counsel has established that Respondent's actions violate Section 5 of the FTC Act, the critical issues to be determined are: (1) whether there was a contract, combination, or conspiracy; and, if so, (2) whether the contract, combination, or conspiracy unreasonably restrained trade. *Law v. NCAA*, 134 F.3d 1010, 1016 (10th Cir. 1998) (identifying elements of a violation of Section 1 of the Sherman Act). *See also* Joint Stipulations of Law and Fact at 9 (stipulating to these elements of a combination or conspiracy that unreasonably restrains trade).

**1. Whether There Was a Contract, Combination, or Conspiracy**

Respondent has stipulated that it "is a combination of its members with respect to the policies at issue." Joint Stipulations of Law and Fact at 10. This conclusion was inevitable. Realcomp is owned by seven associations of competing real estate brokers. F. 136-38. These associations of competitors appoint the members of Realcomp's Board of Governors. F. 140. The Board, which is comprised of competing real estate brokers, sets Realcomp's rules and policies. F. 142, 146-47. Realcomp's members are also competitors in the market for real estate brokerage services. F. 158.

Moreover, this stipulation is consistent with the holding of *Realty Multi-List*, 629 F.2d at 1361 n.20, where the Fifth Circuit found that members of an MLS engaged in the "concerted action necessary to establish a Section 1 violation" by adopting and applying MLS rules. *Accord San Diego Ass'n of Realtors*, 322 F.3d at 1150 (several real estate associations acting together to form a county-wide MLS were not a single entity and thus not immune from antitrust scrutiny). *See also Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007 (3d Cir. 1994) (holding that association action taken on behalf of its competing members, such as when a board of directors or a committee adopts a rule or policy, is considered to be the concerted action of the competing members); *In re North Texas Specialty Physicians*, Dkt. No. 9312, 2005 FTC LEXIS 173, at \*37 (F.T.C. Nov. 29, 2005) ("The Commission has also held that when an organization is controlled by a group of competitors, the organization is viewed as a

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combination of its members, and their concerted actions will violate the antitrust laws if an unreasonable restraint of trade.”). Thus, it is established for purposes of Section 5, that here, a contract, combination, or conspiracy clearly existed. The inquiry must next turn to a determination of whether the challenged practices of Respondent unreasonably restrained trade.

## **2. Whether There Was an Unreasonable Restraint of Trade**

To determine whether the challenged practices of Respondent unreasonably restrained trade first requires an evaluation of the nature of the challenged restraints. If such analysis indicates that the restraints are likely to be anticompetitive, a further determination of Respondent’s market power and the competitive effects of the restraints is made. Finally, where effects are found or presumed, Respondent’s procompetitive justifications are considered as part of a net effects assessment.

### **a. The Nature of the Challenged Policies**

#### **(i) Synopsis of the Relevant Facts**

##### **(A) Minimum Services Requirement**

Prior to its repeal in April 2007, discussed below, in order for a Realcomp listing to be considered an Exclusive Right to Sell (“ERTS”) listing, the broker was required to provide full brokerage services. (“Minimum Services Requirement”). F. 374-76. A full services listing, under Realcomp’s rules, is a listing agreement under which the listing broker is required to provide all of the following five services to the home 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. F. 66. Realcomp would not treat a listing as an ERTS listing if the listing broker failed to provide one or more of these services. F. 376. Moreover, if the home seller (rather than the broker) performed

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any duties that fell under the “full service” umbrella, the listing would be designated as limited service. F. 376.

The Complaint does not specifically delineate the Minimum Services Requirement as a challenged policy and Complaint Counsel has stated that it is “not a separate access restriction.” Complaint ¶ 7, CCRFF ¶ 141. However, the evidence demonstrates that the Minimum Services Requirement is clearly integrated into and is a component of both the Website Policy and the Search Function Policy. F. 379. Accordingly, the challenged “Realcomp Policies,” *i.e.*, the Website Policy and the Search Function Policy, encompass the Minimum Services Requirement.

**(B) Website Policy**

Realcomp transmits Realcomp MLS listing information to certain public Internet sites (“the Approved Websites”). F. 210-11, 350. These include Realcomp’s own website, MoveInMichigan.com, and Realtor.com, the website of the National Association of Realtors®. F. 211, 227, 231, 350. The MoveInMichigan website, in turn, is “framed” by ClickOnDetroit.com, another public website that contains a variety of information concerning the Detroit metropolitan area. F. 238, 352. In addition, Realcomp feeds listings to the individual websites of its member brokers through the Internet Data Exchange (“IDX”). F. 242-46, 353. Realcomp members that participate in the IDX system use and publish these listings on their own real estate websites. F. 353.

In 2001, Realcomp adopted the “Website Policy,” which provides that “[l]isting information downloaded and/or otherwise displayed pursuant to IDX shall be limited to properties listed on an exclusive right to sell basis.” F. 355, 359. Pursuant to Realcomp’s Website Policy, realtors were required to offer the full services described above, in order for their listings to be considered ERTS listings and be transmitted and displayed through the IDX. F. 359, 373.

**(C) Search Function Policy**

Realcomp members search the MLS for listed properties using Realcomp Online. F. 180. In or about the fall of 2003, Realcomp

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changed the Realcomp Online search program to default to Exclusive Right to Sell and “Unknown” listings (“Search Function Policy”). F. 361. Specifically, the search program requires a Realcomp member to select (by checking a box) any or all of the following listing types when preparing a search request: ERTS, EA (Exclusive Agent), MLS-Entry Only, and Unknown. F. 363. Pursuant to the Search Function Policy, the ERTS and Unknown types are pre-selected for each search query. F. 361. If a member wished to also search EA listings, for example, the member must either check the EA box or the “all listings” box on the search screen. F. 364. The necessary action required nothing more than a single click of the computer mouse. F. 367.

As noted in the Introduction, in April 2007, Realcomp repealed the Search Function Policy by a vote of its Board of Governors. F. 370-71. On July 31, 2007, the repeal of this policy as well as the Minimum Services Requirement, was memorialized by the parties pursuant to the “Joint Stipulation Regarding Respondent’s Search Function Policy,” appended hereto as “Attachment 1.”

**(ii) Arguments of the Parties**

The Complaint alleges that the challenged “rules constitute an anticompetitive concerted refusal to deal except on specified terms with respect to key inputs for the provision of residential real estate brokerage services.” Complaint at 1. Complaint Counsel contends that Realcomp’s Policies restrict competition in two ways. First, Complaint Counsel asserts that “the Policies tend to exclude competition from discount brokers by disadvantaging the use of their primary competitive tool- the Exclusive Agency listing agreement.” CCB at 47. Second, Complaint Counsel argues that the Policies limit competition among Realcomp members by eliminating their ability to offer a particular package of services -- Exclusive Agency listings with full exposure through the Approved Websites. CCB at 47. Thus, Complaint Counsel concludes, the Policies deny consumers the benefits of competition and a product that they desire. CCB at 47.

Respondent takes the position that there is no credible evidence that there has been any material reduction in the availability of Exclusive Agency contracts as a consequence of



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Respondent's policies. RB at 1. Respondent further argues that there is no evidence that its challenged policies have diminished consumer welfare. RB at 1. As such, Respondent avers that the Court should decline to enjoin a practice for which competitive harm has not been demonstrated.

**(iii) Analysis of the Nature of the Challenged Policies**

It should again be noted that there is no price-related restraint at issue in this case. Joint Stipulations of Law and Fact at 4-5; F. 189, 196-97, 203. Respondent does not in any manner determine or otherwise regulate the commissions or prices to be charged by listing brokers, or the discounts that any listing broker may offer. Joint Stipulations of Law and Fact at 4-5; F. 189, 196-97. Likewise, Respondent does not determine or regulate the offer of compensation to cooperating brokers for any listing in the Realcomp MLS. Joint Stipulations of Law and Fact at 4-5; F. 203. In addition, this case does not contain the elements necessary for a classic economic boycott. *See Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield*, 373 F.3d 57, 64 (1st Cir. 2004). Discount brokers who are members of Realcomp can, and do, list their Exclusive Agency listings on the Realcomp MLS. *Infra* Section m.E.2.c.; F. 163-64, 181. The analysis, thus, turns to an assessment of the nature of the Realcomp Policies with respect to excluding competition and eliminating consumer choice.

**(A) Whether the Nature of the Challenged Policies Indicate Likely Exclusion of Competition From Discount Brokers**

In evaluating whether the challenged conduct is “in the nature of a group boycott,” it should be first made clear that “[a] group boycott traditionally occurs when a particular group or individual is prohibited from joining an organization.” *Reifert v. S. Central Wisconsin MLS Corp.*, 450 F.3d 312, 320 (7th Cir. 2006). Further, the boycotting group traditionally “combines to deprive would-be competitors of a trade relationship which they need in order to enter (or survive in) the level wherein the group operates.” *Northwest Real Estate Bd., Inc. v. Multiple Listing Service, Inc.*, 1991 U.S. Dist. LEXIS 11809, \*6 (N.D. Ill. 1991)

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(citing *Phil Tokan Datsun v. Greater Milwaukee*, 672 F.2d 1280, 1282 (7th Cir. 1982)).

In the MLS context, courts have long recognized the anticompetitive potential of MLS rules that deny MLS membership to some brokers. *Realty Multi-List*, 629 F.2d at 1370-71; *Thompson*, 934 F.2d at 1580. In *Realty Multi-List*, the Fifth Circuit held that a “concerted denial of access to [defendant’s] listing service, when [its] members have agreed to pool and share their listings, amounts to a group boycott of the nonmember.” 629 F.2d at 1361. In *Thompson*, the Eleventh Circuit held that excluding brokers from the MLS “reduces the competition among brokers and could result in less competition for brokerage fees.” *Thompson*, 934 F.2d at 1580. But, as previously noted, *Realty Multi-List*, *Thompson*, and other MLS cases relied upon by Complaint Counsel, address MLS rules that exclude brokers from participating in the MLS. There are no such allegations in this case. Instead, the evidence shows that limited service brokers are allowed to and do, join Realcomp. F. 163-64, 433. The evidence further shows that limited service brokers are allowed to and do, place their non-ERTS listings on the Realcomp MLS. F. 181, 433.

The question, thus, is whether the challenged policies which do not fully exclude competition, are nevertheless anticompetitive on the grounds that they place discount brokers at an unreasonable disadvantage. Complaint Counsel, relying on *Northwest Wholesale Stationers*, argues that denial of some services of a competitor collaboration can lead to the same competitive harm as a denial of all services. CCB at 49. In *Northwest Wholesale Stationers*, under the rules of the competitor collaboration, a buying cooperative, members effectively purchased supplies at prices significantly lower than nonmembers. 472 U.S. at 286. Plaintiff, who had been expelled from the cooperative, challenged his expulsion as a group boycott. *Id.* at 288. Plaintiff was not wholly excluded from the cooperative, as he was still able to purchase through the collaboration, albeit at higher, nonmember prices. *Id.*

*Northwest Wholesale Stationers*, however, does not compel a finding that the challenged policies are likely to exclude competition under the facts of this case. The issue decided in *Northwest Wholesale Stationers* was not whether disparate rules

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for nonmembers are generally proscribed by the Sherman Act under the rule of reason. Rather, the relevant issue there was whether such treatment constituted a *per se* violation of the Sherman Act, and the Court ruled that it was not. 472 U.S. at 286, 298.

Moreover, the Court's observations regarding disparate treatment were made wholly in the context of addressing the question of whether the conduct could be properly characterized as a group boycott. 472 U.S. at 295 n.6 ("Because Pacific has not been wholly excluded from access to Northwest's wholesale operations, there is perhaps some question whether the challenged activity is properly characterized as a concerted refusal to deal."). The Court did not generalize its determination to condemn all such disparate treatment. Indeed, the Court observed that disparate treatment "*might justify per se* invalidation *if* it placed a competing firm at a *severe* competitive disadvantage." *Id.* (emphasis added). As discussed in Section III.E.2.c, *infra*, the challenged activity in this case did not place discount brokers at a severe disadvantage.

Finally, *Northwest Wholesale* was a membership exclusion case, and the conduct in question concerned whether the defendant had an obligation under the antitrust laws to deal with nonmembers on the same terms as members. *Id.* at 289. The issue here, however, is whether the Realcomp cooperative can establish different rules for different brokerage products. That is a very different question than the issue presented in *Northwest Wholesale*. Thus, Complaint Counsel's reliance on *Northwest Wholesale* does not compel a conclusion that the nature of Realcomp's policies indicate a likely, unreasonable restraint of trade.

By contrast, the nature of the restraint in *Cantor v. Multiple Listing Service, Inc.*, 568 F. Supp. 424 (S.D.N.Y. 1983) is similar to the nature of the challenged restraints here and may suggest a finding that the Realcomp Policies are likely to exclude competition from discount brokers. In *Cantor*, the challenged restriction was a rule that required all brokers who were members of the MLS to use only MLS-branded yard signs, to the exclusion of signs branded by the specific brokerage (*e.g.*, "Century 21"). *Id.* at 427. The court in *Cantor* found the restrictions unlawful

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because some brokers had been discriminatorily prevented from advertising their listings. *Id.* at 430. The court observed, the MLS “virtually conceded” that the intent and purpose of this rule was to remove the competitive advantage that some MLS members might have over other MLS members. *Id.* The MLS rules condemned by the court in *Cantor* were found to have prevented brokers from using effective means of gaining exposure for their listings. *Id.* Here, it is only upon further examination, Section III.E.2.c, *infra*, that the Court concludes that discount brokers do, in fact, have effective means of exposure for their listings.

With respect to the Search Function Policy, including the requirement that, in order to be considered an ERTS listing, an agent must provide full brokerage services, it is evident that the nature of such restraint is *not* anticompetitive. Complaint Counsel argues that the Search Function Policy had the effect of excluding non-ERTS listings from the MLS. CCB at 30. The evidence, however, belies this claim. For a Realcomp member to perform a Quick Search on the online MLS to access all listing types, required nothing more than the single click of the computer mouse on the button clearly labeled “all listings.” F. 363. If a member wished to search exclusively for EA listings, for example, the member was merely required to check the EA box on the search screen. F. 364. Similarly, if the member did not want to search ERTS listings, the member could de-select the ERTS box. F. 364. The search function screen is not hidden on the Quick Search page. F.362. Complaint Counsel’s witnesses and a modicum of common sense, indicate that it was no impediment for brokers to add one more mouse click to conduct an effective search of any and all listings. F. 367-68.

It is also possible for an individual member to change the initial defaults on the search screen so that a different combination of listing types (or no listing type) is pre-selected. F. 366. In addition, a search by MLS number pulls up the appropriate listing, including EA listings, without having to select listing type. F.365.

The facts here are hardly comparable to those in *United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1110, 1113 (7th Cir. 1985), cited by Complaint Counsel for the proposition that search defaults can have negative competitive effects even if they are easy to override. CCB at 50. First, *United Air Lines* is a

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decision issued in 1985, when widespread acceptance of computers in everyday business and living was a long way into the future, and the court's observation regarding computer skills is unquestionably tied to the time period in which it was made. In this case, the Realcomp Online MLS is entirely computer-based. F. 180. Thus, a minimal facility with computers and databases is essential for brokers to effectively participate in today's real estate business. F. 369,455. Second, the ruling in *United Air Lines* was not an adjudication as to whether a private entity's decision to implement a computer search default violated the antitrust laws. Rather, *United Air Lines* was a challenge to a Civil Aeronautics Board rulemaking that concerned, in part, "biasing" in computerized reservation systems. 766 F.2d at 1109-10. It thus offers the Court little, if any, guidance for purposes of the instant discussion.

"[P]laintiffs have a burden to show more than a *de minimus* restraint." *Tunis Bros.*, 952 F.2d at 728. "The Sherman Act was designed to prohibit significant restraints of trade rather than to 'proscribe all unseemly business practices.'" *Id.* (citation omitted). Realcomp's decision to set the search default to bring up only ERTS listings unless the agent specifically selected to see all listings or selected to see EA listings, can, at best, be characterized as a *de minimus* restraint.

**(B) Whether the Nature of the Challenged Policies Indicate Likely Elimination of Consumer Choice**

Complaint Counsel additionally argues that the challenged Policies eliminate Realcomp members' ability to offer a particular package of services - Exclusive Agency listings with full exposure through the Realcomp MLS. CCB at 47. Relying on *Indiana Federation of Dentists*, Complaint Counsel asserts that an agreement among competitors to withhold from their customers a particular service that they desire unreasonably limits consumer choice and thereby unreasonably restrains trade. CCB at 51-54.

In *Indiana Federation of Dentists*, a group of dentists formed for the sole purpose of resisting insurers' requests for X rays, thereby hindering insurers' efforts to implement alternative benefits plans. 476 U.S. at 451, 454. Central to every element of

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*Indiana Federation* was the naked character of the restraint. The Indiana Federation of Dentists had no purpose other than to organize and enforce the boycott of dental insurance companies. *See* 476 U.S. at 451, 454.

By contrast, multiple listing services like Realcomp are collaborations that are generally considered procompetitive. *See, e.g., Realty Multi-List*, 629 F.2d at 1356 (“the benefits offered by a multiple listing service are manifest”). Courts have acknowledged that MLSs may impose restrictions related to the efficient functioning of the venture. *E.g., Reifert*, 450 F.3d at 321 (competitive restriction on “stealing” properties listed by another member). Thus, the analogy of Realcomp Policies to the dentists’ refusal to provide X rays to insurers, a naked-boycott, is not a compelling one.

In this case, Complaint Counsel asserts that the Realcomp Policies eliminate a “product,” namely “Exclusive Agency listings with full exposure,” and describes the Realcomp Policies as an agreement to limit the offering of a “package” of such services. CCB at 51-52. Even if one were to assume that this “package” of services is distinct and valued by consumers, there is substantial evidence in this case that consumers have always had options under Realcomp MLS rules to purchase varying levels of unbundled discount brokerage services and are able to acquire such a package if they choose to do so. F. 479-81. Nevertheless, the Court cannot reach this conclusion without expanded analysis of the competitive effects evidence.

**(iv) Summary of the Nature of the Challenged Policies**

With respect to the Search Function Policy, and the requirement that in order to be considered an ERTS listing, an agent must provide minimum brokerage services, a review of the evidence does not establish that the nature of the restraint is such that it likely precluded discount brokers from competition or eliminated consumer choice. Because discount brokers are not excluded from the MLS and because the MLS is overwhelmingly the most important source for real estate exposure (Section, III.E.2.c., *infra*), the restraint imposed by the Search Function Policy is, in fact, quite negligible. The nature of a restraint that

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simply requires brokers to undertake an additional click of a mouse in order to find all listings or specific kinds of listings contained on an MLS does not rise to the level of an unreasonable restraint of trade under Section 5. No further analysis of the effects of such *de minimus* restraint need therefore be performed.

With respect to the Website Policy, and the requirement that in order to be considered an ERTS listing, an agent must provide minimum brokerage services, the nature of the restraint is such that it is likely to be anticompetitive. Such conclusion, though not intuitively obvious, necessarily requires an expanded inquiry into whether competition was, in actuality, unreasonably restrained. When the “anticompetitive effects of the challenged restraints are far from intuitively obvious,” an inquiry into Respondent’s market power and the effects of those restraints must be performed. *California Dental*, 526 U.S. at 759. Thus, a review of Respondent’s market power and an analysis of the competitive effects of the restraint is necessary and follows.

**b. Market Power**

“While . . . a trade group like a multiple listing service may create significant competitive advantages both for its members and for the general public, there exists the potential for significant competitive harms when the group, having assumed significant power in the market, also assumes the power to exclude other competitors from access to its pooled resources.” *Realty Multi-List*, 629 F.2d at 1370.

As previously concluded in the Relevant Market Section, III.C, *supra*, Respondent does in fact, have market power in the relevant market. The evidence demonstrates that Realcomp would be able to profitably increase commissions significantly above competitive levels without risking sellers of homes switching to FSBO and that Realcomp would be able to implement a “small but significant and non-transitory increase in price” for access to the MLS because few brokers could withdraw from participating in an MLS even if the fees or other costs associated with participation substantially increased. F. 295, 315, 324. Realcomp’s market shares for Wayne, Oakland, Livingston, and Macomb counties for 2002 to 2006 in terms of new listings was {■■■■} and in terms of unique listings was {■■■■}. F.

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340, 346. Respondent's market power is further enhanced by network effects and barriers to entry. F. 330-35. There is no effective substitute to Realcomp in the relevant market. F. 336. However, as previously noted, because the alleged restraints are not intuitively obvious, even with Realcomp's substantial market power, under the rule of reason the review must proceed to an examination of the competitive effects of the challenged restraints. Such analysis is set forth below.

**c. Effects on Competition**

"In order to prevail in the absence of *per se* liability, [Complaint Counsel] has the burden of proving that the [challenged restraint] violated the Sherman Act because it unreasonably restrained competition." *Jefferson Parish Hosp. v. Hyde*, 466 U.S. 2, 29 (1984). "That burden necessarily involves an inquiry into the actual effect of the [restraint] on competition." *Id.* "Proof that defendant's activities had an impact upon competition in the relevant market is 'an absolutely essential element of the rule of reason case.'" *Supermarket of Homes, Inc. v. San Fernando Valley Ed. of Realtors*, 786 F.2d 1400, 1405 (9th Cir. 1986) (citation omitted). The fact that a case proceeds under Section 5 of the FTC Act does not alter the requirement that anticompetitive effects must be proved with evidence. *See California Dental Ass'n v. FTC*, 224 F.3d 942, 958-59 (9th Cir. 2000) (FTC's failure to demonstrate substantial evidence of a net anticompetitive effect resulted in remand with direction that the FTC dismiss its case).

The evidence in this case, including expert empirical analyses, as summarized below, establishes that the challenged restraints have not substantially lessened competition by discount brokers in the relevant market or harmed consumers, by either depriving them of choice or resulting in significantly increased economic costs.

**(i) Realcomp's Website Policy Did Not Unduly Hinder Competition by Discount Brokers**

At trial, Complaint Counsel offered the testimony of five EA brokers who claimed to have been competitively disadvantaged by the Realcomp Policies: Mr. Craig Mincy



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(MichiganListing.com); Mr. Albert Hepp (BuySelf Realty); Mr. Jeff Kermath (AmeriSell Realty); and Mr. Gary Moody and Ms. Denise Moody (Greater Michigan Realty). The testimony of those witnesses, as well as other record evidence, belies the theory that the Realcomp Website Policy has had a significant adverse effect on competition. Indeed, the evidence shows that EA brokers successfully sell their discount brokerage services in Southeastern Michigan and that perceived “impediments” faced by EA brokers are chiefly attributable to factors other than the Realcomp Website Policy.

All of the EA brokers who testified for Complaint Counsel admitted that their businesses are growing, even in the face of a difficult local housing market. The limited service brokerage firm, MichiganListing.com, has grown since it began in 2004. F. 466. Between 2005 and 2006, its business increased 30%, and was trending upward in February 2007. F. 466. BuySelf Realty’s business has grown 10% to 35% since 2004 in Southeastern Michigan. F. 468. AmeriSell has grown substantially since 2003-2004, with over \$46 million in listings and more listings statewide than any other company. F. 465. Greater Michigan Realty had approximately 500 listings in 2006, when the industry average was 25, and the company generated \$23,275,000 in home sales in its first year of operation. F. 467. This evidence is clearly inconsistent with Complaint Counsel’s theory that EA brokers have been competitively impaired by the Realcomp Website Policy. If the Realcomp Website Policy was severely impairing the ability to offer EA and limited service brokerage contracts, one would expect brokers in the market to testify that their revenues and profits have similarly declined. The testimony, however, is quite the contrary. *See* F. 463-68. Complaint Counsel’s argument that BuySelf Realty, having only a referral business in the Realcomp Service Area, was deterred from entering the market and becoming a direct competitor of Realcomp “because of the Realcomp Policies,” (CCRB at 11) though acknowledged, is insufficient to rebut substantial evidence to the contrary. *See* F. 468. Similarly, the fact that firms like MichiganListing.com and AmeriSell Realty encouraged customers to spend additional money on EA or flat fee ERTS listings to better their sales prospects, F. 479-81, does not, on its face, demonstrate that the Website Policy unreasonably restrained EA brokerage services in the relevant market.

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No EA broker testified that he or she was forced to exit the market by the Realcomp Policies, with the sole exception of Wayne Aronson, the vice president and general manager of YourIgloo, Inc., an EA real estate company located in Florida which did business in Michigan beginning in 2001. F. 472-74. Mr. Aronson testified that, due to Realcomp's rules, YourIgloo stopped doing business in Michigan in 2004. F. 472, 474.

However, the record reveals that YourIgloo's operations faced material problems prior to exiting the market that had nothing to do with Realcomp. F. 475. Among these problems was increased competition. F. 475. Mr. Aronson testified that in 2001, when YourIgloo first entered the Michigan market, it faced few competitors, but by 2004, when YourIgloo decided to exit the market, competition had increased and "the industry became very competitive and very crowded . . . ." F. 475. YourIgloo was also plagued by bad relations between the company's management and Ms. Groggins, its sole broker for the state of Michigan. F. 475. Ms. Groggins was let go by YourIgloo management in 2004 for failing to come into the office during hours that she was expected to be available. F. 475. There is no evidence that Ms. Groggins was ever replaced. This fact can be regarded as having undoubtedly played a role in YourIgloo's decision to leave the state of Michigan the same year that Ms. Groggins was terminated from her employment. It does not take a leap of reason to conclude that YourIgloo, an out-of-state firm, would have great difficulty conducting business in Michigan without the presence of a local broker. In addition, YourIgloo had been a member of MiRealSource, and evidence exists in MiRealSource's Bylaw Committee minutes of March 25, 2004, that casts further doubt as to the reasons YourIgloo decided to leave not only MiRealSource, but the state of Michigan, F. 476. The evidence further shows that YourIgloo had also encountered problems doing business successfully in other states, pulling out of two of the nine states in which it is licensed, Pennsylvania and New Jersey. F. 477.

In light of this evidence, Mr. Aronson's statement that his decision to leave Michigan was "one-hundred percent" attributable to Realcomp's Policies, F. 472, lacks credulity and is only of limited weight in support of Complaint's Counsel's position that Realcomp's Policies forced a competitor to exit the market. Despite Complaint Counsel's contentions that YourIgloo,

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exited the market only when it no longer wished to provide real estate brokerage services itself, (CCB at 31) it would appear that, unlike the five witnesses who testified that their discount brokerage businesses are growing and competing in Southeastern Michigan, YourIgloo suffered from some serious management problems that made it an ineffective competitor.

Requisite competitive harm is established if “the effect upon competition in the marketplace is substantially adverse.” *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365, 375 (1967), *overruled on other grounds by Continental TV., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). The record here, establishes that EA brokers have successfully marketed their discount brokerage services in the Realcomp Service Area despite the Realcomp Policies. F. 465-67. The evidence also clearly demonstrates that consumers have an abundant and broad range of services from which to choose, depending on their needs and financial abilities. F. 479-81. EA brokers are able to and do provide a full menu of unbundled services, from MLS only, to assisting with negotiations and closing assistance. F. 479-81. Flat fee ERTS services, which offer full exposure on the IDX and Approved Websites, are also available to consumers at reasonable costs. F. 481. As such, the evidentiary record indicates that Dr. Williams’ theory that consumers are forced to substitute ERTS contracts for EA contracts and thereby pay substantially higher prices for brokerage services as a result of the Realcomp Policies is unfounded. Accordingly, Complaint Counsel has not presented reliable evidence that demonstrates actual adverse harm to competition as a result of the Realcomp Website Policy.

**(ii) Realcomp’s Website Policy Did Not Exclude  
Non-ERTS Listings from the MLS**

Complaint Counsel asserts that the Website Policy limits public exposure of non-ERTS listings because such listings are not uploaded to the IDX system or MoveInMichigan.com. CCB at 17. However, the evidence is clear that non-ERTS listings have significant exposure through the Realcomp Online MLS.

By placing their EA listings into the Realcomp Online MLS, limited service brokers reach a projected 80% of all home buyers. F. 431. If one combines that with the option of also placing those

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EA listings onto Realtor.com, at a minimal additional cost, the combination reaches approximately 90% of all home buyers. F. 435. Complaint Counsel offers no evidence to refute these estimates or otherwise show that they are not reasonably accurate.

The evidence clearly shows that the most important source of Internet exposure is that provided by the MLS. F.428-30. Mr. Hepp, for example, testified that the MLS is substantially more important than any other tool for the sale of residential real estate in Southeastern Michigan, and that in his opinion, the MLS generally finds a buyer three times more often than any other home selling tool. F. 432. Similarly, Mr. Aronson testified at deposition that the MLS is, by a considerable extent, the most effective means of promoting residential real estate in Michigan. F. 432. The fact that such online MLS exposure is limited to member brokers, and is not accessible by the general public, does not change these basic, unrefuted facts.

The fact that realtors are able to reach 80% of home buyers through the online MLS alone, leads to the inescapable conclusion that there are clearly suitable marketing alternatives to the Approved Websites. In *Schwinn*, among the factors the court considered in determining the challenged restraint of trade was not an “unreasonable” restraint was the fact that other alternative products were available in the market. *Schwinn*, 388 U.S. at 381.

A few courts, in evaluating whether the denial of membership in an MLS is an antitrust violation, have stated that participation in the MLS “is a practical economic necessity” for the survival of realtors’ business. *Marin County Ed. of Realtors, Inc. v. Palsson*, 549 P.2d 833, 844 (Cal. 1976); see *Pope v. Mississippi Real Estate Comm’n*, 695 F. Supp. 253, 269 (N.D. Miss. 1988). See also *Thompson*, 934 F.2d at 1577 (noting the considerable evidence that “multilist services are a necessity for brokers” in evaluating defendant’s market power). The facts in this case, however, show that while participation in the Realcomp Online MLS may be “a practical economic necessity” - as it reaches the overwhelming majority of home buyers - the display of listings on the Approved Websites - which reaches only a relatively small additional percentage of home buyers - is not. Thus, the basic and undisputed fact that discount EA listings were not excluded from the most effective marketing tool in the local service area, the

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Realcomp Online MLS, undermines Complaint Counsel's argument that the Realcomp Website Policy constituted an unreasonable restraint of trade.

**(iii) Realcomp's Website Policy Did Not Prevent Discount Brokers From Utilizing Public Websites**

The evidence establishes that EA home sellers and their listing agents, despite some competitive disadvantages, can and do, effectively market properties in the Realcomp Service Area to the public without direct access to the Approved Websites. F.434-54. Thus, Complaint Counsel's assertion that the Realcomp Website Policy unreasonably limits public exposure of non-ERTS listings because non-ERTS listings are not uploaded to the IDX system or the Approved Websites is without sufficient evidentiary support.

Without denying the importance of Internet marketing generally, or marketing listings on the Approved Websites in particular, the Court cannot draw a conclusion that all available websites are of equal importance. They are not. As Complaint Counsel notes, in national studies, 40-50% of home buyers reported visiting MLS websites, Realtor.com, and the websites of real estate companies and agents. CCB at 21. The record shows that the Approved Websites, though important marketing tools for reaching prospective home buyers, are but a few among numerous Internet sources from which the general public can obtain information about real estate listings. F. 446. Other publicly available websites, such as Google and Trulia, are quickly growing in popularity and usage and are an economically viable and effective channel for reaching the approximately 10% of additional prospective home buyers not exposed to listings from the online MLS and Realtor.com. F. 449.

This is true even if such sites do not receive a significant number of visits by buyers in comparison to the Approved Websites. F. 449. Further, the evidence does not support Complaint Counsel's assertion that there are "significant" costs associated with a broker having to individually send each listing to such a website and update the listings every time there is a change in information. Complaint Counsel's own industry expert, Mr. Steve Murray, testified that Google presently has a site that is

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open to EA listings, and that there is no charge for putting a listing into Google. F. 450. He further testified that Google has publicly announced that it intends to build as large and robust a real estate site as possible. F. 450. Although this does not suggest that Google is presently an equal substitute for the Approved Websites, it is clearly indicative of the market's growing response to meeting consumer demand for making discount listings widely available at reasonable or no cost.

Mr. Murray also noted that Trulia is a public website that does not charge for listings and that has grown substantially in the last several months, despite issues with capital funding for the project. F. 452. Similarly, Complaint Counsel's witness, Mr. Moody, testified as to the growing significance of Google Base. F. 451. Mr. Moody testified in his deposition regarding the popularity of different real estate websites. Specifically, he currently ranks Google Base number four in popularity, behind MoveInMichigan.com, Realtor.com, and the IDX. F. 451. He stated, however, that "in the near future, Google Base will be more important than IDX." F. 451. Although somewhat speculative, such testimony reflects Mr. Moody's personal observations and substantial experience regarding current trends in real estate databases in Southeastern Michigan. He testified that MLSs across Michigan are beginning to put their data onto Google Base and Trulia. F. 449. If Mr. Moody's prognostication proves correct, EA home sellers will soon be able to place their listings on two of the top three most popular real estate websites at little or no cost (*i.e.*, Realtor.com and Google Base).

As demonstrated, the Internet is a dynamic and ever-changing marketing tool and the question of which alternative sites provide the greatest value to real estate marketing efforts is, as Mr. Sweeney described, a "moving target." F. 445. As Complaint Counsel has shown, however, numerous studies since 2004, have concluded that the most visited websites by home buyers are MLS websites, Realtor.com, and the websites of real estate companies and agents. F. 447. Despite this evidence, the fact remains that there is no evidentiary basis to conclude that access to the Approved Websites is essential to the ability of discount brokers to compete in the Southeastern Michigan real estate market.

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Furthermore, the evidence establishes that EA brokers are in fact, able to place their listings on Realtor.com by “dual-listing” the property with other MLSs which have data-sharing agreements with the Realcomp MLS. F. 436-40. Dual-listing is a common, if not prevalent, practice among EA brokerage firms. F. 436. Complaint Counsel does not dispute that EA brokers in the Realcomp Service Area use the Ann Arbor, Shiawassee and Flint MLSs to get their EA listings on Realtor.com. CCRFF ¶ 107; F. 439. Effective in April 2007, EA agents can also place their listings on Realtor.com by listing them in the MiRealSource MLS, following the consent decree between MiRealSource and the FTC. F. 441.

While dual-listing EA listings on another MLS (in addition to Realcomp) is an inconvenience and undoubtedly requires additional costs, the evidence shows that such costs are not unduly burdensome. The MLSs used by EA brokers to bypass the Realcomp rules charge annual membership fees comparable to those assessed by Realcomp. F. 442. In addition to the annual membership fees, the fees to belong to these MLSs range from \$55 per month, in the case of Ann Arbor; \$99 per quarter for Flint; and \$29 per licensee and broker and \$24 per office after an initiation fee is paid in the case of MiRealSource. F. 442. The labor cost associated with dual-listing is also not onerous. For example, Mr. Mincy places his listings from the Realcomp Service Area on public websites through the Shiawassee MLS. F. 440. He charges his clients a minimum additional fee of \$100 for dual-listing. F. 444. Greater Michigan Realty only charges an additional \$50. F. 444. EA agents pay anywhere from \$7.00 to \$20.00 per hour for data entry. F. 443. It takes the Realcomp staff 10 to 15 minutes to enter a listing, and an additional one to five minutes to update a listing over its life. F. 443. Thus, the relatively nominal cost and administrative effort involved in dual-listing with an MLS with a data-sharing agreement, if not *de minimus*, is not prohibitively expensive when allocated among a brokerage’s EA contracts. As such, it does not constitute an unreasonable restraint for discount brokers or their home selling clients.

“The antitrust laws do not guarantee competitors the right to compete free of encumbrances . . . so long as competition as a whole is not significantly affected.” *Clorox Co. v. Sterling*

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*Winthrop, Inc.*, 117 F.3d 50, 59 (2d Cir. 1997) (finding no liability even though “it may well be that the restrictions . . . prevent [plaintiff] from competing as effectively as it otherwise might”). See also *United States v. Topco Assocs. Inc.*, 405 U.S. 596, 606 (1972) (Congress did not intend to prohibit practices that might “in some insignificant degree” restrain competition). A review of the evidence, here, supports the conclusion that Realcomp’s Website Policy does not prevent discount EA brokers from accessing and utilizing public real estate websites, nor does the cost to dual-list or data-share an EA listing with the Realcomp MLS amount to an unreasonable restraint on competition or consumer harm.

**(iv) The Local Economy and National Trends  
Regarding Discount Brokerage Models Are  
Largely Responsible For Any Adverse  
Effects in Southeastern Michigan**

There is little dispute that Detroit and the surrounding area of Southeastern Michigan, for at least the past three years, has been a “buyers market” - *i.e.*, a difficult market for home sellers due to the effect of the decline of the automotive industry on the local economy and the softening of the residential real estate market. F. 122-25. It is considerably worse than the national market and, consequently, it is very difficult for brokerages to do business there. F. 126-29. Homes are steadily losing value and listings are staying on the market for extended periods of time with very few sales. F. 127-28. Real estate agents are in fact leaving the business because of these conditions, with one estimate indicating that agents are down in volume as much as 20%. F. 129-30.

The evidence demonstrates that discount EA brokers sell a different type of brokerage “product” than traditional, ERTS brokers. Unlike traditional full service ERTS brokers, EA brokers do not provide a high-level of personal service. F. 89. EA brokers almost never meet customers face-to-face, have very limited personal contact with their customers, and do not compete well with full service brokers for trust and professionalism. F. 89. Moreover, the testimony of Mr. Sweeney indicates that in a declining or distressed market, where both the value of a home and the seller’s equity are declining, more home sellers would choose full service ERTS listings over EA listings because they



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want the professional marketing services of a full service broker. F. 96.

Complaint Counsel's attempt to discredit such testimony by portraying it as "a self-interested sales pitch for his own business model" (CCRFF ¶ 197) is unpersuasive and ignores Mr. Sweeney's credentials as a real estate professional in the Southeastern Michigan market. Mr. Sweeney's testimony that "exclusive agency type firms" are appearing in Southeastern Michigan, but there has not been a surge in growth is also consistent with national surveys regarding the decline of discount brokerage services, especially since 2005. F. 91, 131.

Though EA brokers who testified at the hearing indicated that their discount brokerage services were, in fact, growing and competing in the face of the difficult local economy, EA listings have not made substantial inroads in Southeastern Michigan. F. 131. This again, is consistent with national statistics. EA listings grew significantly on a national basis between 2003 and 2005, from 2% to 15% of listings, which has been attributed in considerable part to a "hot" real estate market, particularly on the coasts. F. 90, 93. However, between 2005 and 2006, national surveys indicate that the percentage of EA listings fell from 15% to 8%, which Complaint Counsel's industry expert witness, Mr. Murray, attributes to a shift from a strong seller's market in 2005 to a softening of the housing market in 2006, meaning it was more of a buyers' market with a decrease in sales and increase in inventory. F. 91.

Thus, national trends, at least since 2005, would seem to demonstrate a substantial, if not severe, downturn in the number of EA listings throughout the country. This is true despite Complaint Counsel's proffered testimony of Mr. Murray, that the real estate market in Southeastern Michigan "could" provide opportunities for limited service brokers because of the fairly high incidence of "short sales," which refers to homeowners who do not have much equity in their homes and would have to issue a check at closing to pay off the remaining balance on their mortgage. F. 97. Similarly, testimony by some limited service brokers in Southeastern Michigan indicates that their services "often" appealed to home sellers without equity in their homes. F. 98. Such evidence might well be true, but is difficult to quantify. In

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any event, it does not refute the national studies regarding current, nationwide trends in the real estate industry. These trends must be acknowledged in the context of evaluating whether Realcomp's Website Policy was responsible for any adverse effects on discount competition in the local service area and any speculative evidence which might suggest that home sellers with no equity in Southeastern Michigan *might* turn to EA brokerage contracts.

Competition among real estate brokers is, of course, local in nature. F. 83-85. Although Dr. Williams concluded that in the absence of artificial restrictions on competition, the market share of discount brokers would be expected to increase in the future, F. 469, Respondent's expert, Dr. David Eisenstadt, opined that he had "not seen any type of projection as to what the future likely market share of these discount brokers is over time." F.470. Certainly Dr. Williams appears to be correct when he concludes that "limited service brokers represent a relatively new business model" and that that model's "growth has been facilitated by the Internet." F. 469. Likewise, Mr. Murray enunciated several reasons why he expects to see continued growth in the limited brokerage model. F. 471. However, it is not clear from such evidence that the limited service brokerage model is, or in fact should be, performing any better at the current time in the relevant market of Southeastern Michigan, than the national surveys indicate it is in the rest of the country.

**(v) Complaint Counsel's Expert Testimony  
Fails to Demonstrate Significant  
Competitive Effects as a Result of  
Realcomp's Website Policy**

Complaint Counsel relies on the report and testimony of Dr. Williams in an effort to give substance to the purported linkage between the Realcomp Policies and the alleged adverse effects on competition in the Southeastern Michigan real estate market. Dr. Williams testified that the effect of Realcomp's Website Policy is to restrict EA listings from the Approved Websites, and that, in combination with the Search Function Policy and the Minimum Services Requirement, "every" channel through which a potential home buyer could see an EA listing is affected. F. 508. Dr. Williams concluded that, combined, the Realcomp Policies

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effected a 5.5% reduction in the usage of EA listings, resulting in a decline of competition from limited service brokers. F. 510.

Dr. Williams' conclusions emanate from three sets of analytical work. The first technique was based on what he describes as a "time series" (*i.e.*, before-and-after) analysis. There, Dr. Williams observed that the percentage of EA listings on the Realcomp MLS declined after the Realcomp Policies were implemented. F. 484-85. Next, in his "benchmark analysis," 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 during 2002 through 2006, to that in MSAs (including Southeastern Michigan) where such restrictions did exist during that period. F. 509, 512-14. Dr. Williams made these comparisons 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 MLS. F. 514. As a result, he concluded that the weighted average percentage of EA listings is higher in MLSs without restrictions than in those MLSs that do employ such restrictions. F. 514. Thirdly, Dr. Williams utilized a statistical regression model ("probit analysis") to compare the prevalence of EA listings among the same previously-described groups of MSAs in an attempt to hold constant certain factors that may account for differences in the raw percentages of EA listings. F. 544, 547. As a result of this analysis, Dr. Williams testified to a statistically significant difference between the two groups, from which he concluded that the Realcomp Policies have reduced the share of EA listings compared to what would have existed had those policies not been in effect. F. 552.

Upon review of the entirety of the empirical evidence, the Court concludes that Dr. Williams' analyses are, in many areas, methodologically unsound as they make certain flawed assumptions, utilize arbitrarily selected MSA comparisons, and fail to control for certain economic and demographic factors likely to affect the prevalence of EA listings. As such, his conclusions regarding the adverse effects of the Realcomp Policies are, in large part, unreliable. Respondent's expert, Dr. Eisenstadt, whose analyses, in part are similarly flawed, nevertheless presented sufficient contradictory findings and testified specifically to the weaknesses and deficiencies in Dr. Williams' analysis. Upon

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rebuttal, Dr. Williams failed to credibly refute significant portions of Dr. Eisenstadt's accepted testimony sufficient to persuade the Court as to the asserted adverse effects of the challenged practices on competition.

**(A) Dr. Williams' Time Series Analysis Does  
Not Support a Finding of Adverse  
Effects**

In his before and after, time series analysis, Dr. Williams ascertained that the Realcomp Policies were responsible for certain adverse effects, based on his determination that the average monthly share of new EA listings (*i.e.*, as a percentage of total new listings) declined approximately 0.75 percentage points, from approximately 1.5% to approximately 0.75%, over the period of May 2004 to October 2006. F. 484-87. As such, it offers support for Dr. Eisenstadt's conclusion that, using Dr. Williams' data, Realcomp's Policies' effect on non-ERTS listings was found at most to account for a 1% decrease in the percentage of non-ERTS listings. F. 488.

Moreover, Dr. Williams indicated 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. F. 489. The greater weight of evidence, however, strongly suggests that this assumption is without proper foundation. Indeed, the preponderance of economic and factual evidence would indicate that in a continuing distressed market such as Southeastern Michigan, F. 123-30, one might well anticipate the relative percentage of EA listings to decline over time. F. 96. As noted, the evidence, with some exceptions, indicates that as the value and equity of a home declines, home sellers generally prefer to utilize full service brokerages. F.96. Though there is, as previously discussed, limited, unquantifiable testimony to the contrary, F. 97, no reliable empirical evidence refutes this fundamental, factual proposition. Upon review, Dr. Williams' time series, ratio analysis and specifically his attempt to factor a monthly average of new EA listings, neither fully accounts, nor reliably reflects this prevailing fact. Dr. Williams' conclusions regarding his time series analysis are, thus, unpersuasive and do not lend support to Complaint Counsel's

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competitive effects argument, as they failed to sufficiently consider the likely impact of declining economic conditions in the relevant market. Accordingly, Dr. Williams' time series analysis cannot be relied upon by the Court in determining whether there were significant adverse effects on competition as a result of the Realcomp Website Policy.

**(B) The Comparative MSA Analyses Are Unreliable Due to Significant Flaws in Analytical and Selection Methodologies**

Dr. Williams' remaining analyses rely on comparisons of the prevalence of EA listings in various MSAs from 2002 to 2006. F. 512-14. He compared "Control MSAs," those where the local MLSs did not have restrictions, to "Restriction MSAs," those where the local MLSs, including the Realcomp MLS, did have restrictions. F. 512-14. Analyzing the assumptions underpinning the conclusions emanating from these analyses, the Court concludes that material and fundamental errors occurred in Dr. Williams' methodology, both in the selection criteria for the Control MSAs, and the apparent arbitrariness of the selection of the Restriction MSAs.

Dr. Williams testified that he selected the Control MSAs (Charlotte, Dayton, Denver, Memphis, Toledo, and Wichita) on the basis of seven economic and demographic characteristics that he believed were "likely to affect the level of non-ERTS listings." F. 512, 515. Through this process, he selected the six Control MSAs by ranking his possible choices according to their respective closeness to Detroit across all of the economic and demographic characteristics. F. 520. This was done by computing the difference in standard deviation units from Detroit for each of the characteristics and then summing the absolute value of those differences for each MSA. F. 521.

It is not clear from the record, and Dr. Williams never adequately explained, why he would assume his economic and demographic criteria would impact the home seller's choice of an EA contract, or why he accorded all such factors equal weight. F. 517. As noted by Dr. Eisenstadt, there are several problems associated with Dr. Williams' methodology and its implementation. First, Dr. Eisenstadt concluded that "weighting

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each factor the same would only make sense if each factor had the same effect on the share of non-ERTS listings, a condition which is both theoretically implausible and counterfactual.” F. 517. To the extent that Dr. Williams did try to elucidate in his expert report why giving equal weight to all the several factors was the “prudent approach,” (CCRFF ¶ 201) his explanation is unconvincing. F. 517. Nor has Complaint Counsel provided additional empirical evidence to satisfy the Court that the “equal weight” criticism is not of sufficient validity to cast doubt on the reliability of Dr. Williams’ findings.

Additionally, the Court notes that the list of potential cities from which Dr. Williams selected his Control MSAs inexplicably omits such seemingly naturally comparable venues like Pittsburgh, Cleveland, and Milwaukee; cities that might intuitively be thought more similar to Detroit in terms of being Midwestern industrial “rust belt” areas than, for example, the Southern and seemingly thriving cities of Charlotte or Memphis. F. 518. Complaint Counsel’s explanation for why these cities were not part of the Control MSAs sheds no light on this lingering question. Its supposition that these cities were not included in the Control MSAs, in part, because the MLSs serving those cities could have restrictions similar to Realcomp’s restrictions, (CCRFF., 202) would lead a reasonable person to surmise that such venues might therefore be incorporated into the Restriction MSAs. However, they were not. *See* F. 529. In fact, Dr. Williams testified on cross-examination that he did not even have data for the cities in question and they were not included in his analysis. F. 519. Further, he did not seek to show why these cities were less similar to Detroit than every other city in his Control MSAs. F. 519. Such significant and unresolved doubts about the questionable selection of Dr. Williams’ comparable Control MSAs weigh heavily against the Court’s acceptance of such analyses as empirically reliable.

These doubts appear borne out by the seemingly disparate fluctuations in the percentage of EA listings within the Control MSAs. The percentages contained within the Control MSAs vary from a low of approximately 1% in the Dayton MLS to a high of almost 14% in the Denver MLS. F. 522. Dayton, the MSA closest to Detroit under Dr. Williams’ methodology, had an EA share (1.24%) only slightly above what Dr. Eisenstadt concluded was

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Realcomp's share (1.01%). F. 523. The next lowest MLS, Toledo, had an EA share (3.4%) nearly three times that of Dayton. F. 524. The MLS with the highest EA share, Denver, which was 5th (out of 6) in closeness to Detroit, had a share more than 10 times that of Dayton. F. 525.

It would seem that if Dr. Williams had correctly identified economic and demographic factors that determine the share of EA contracts at the MSA level, one would expect the EA shares of the Control MSAs to be very similar. Instead, the wide variation indicates that Dr. Williams has not accounted for the factors that are actual determinants of the EA shares in the Control MSAs. F. 526. Complaint Counsel seeks to belie such conclusion, arguing that even Dr. Eisenstadt acknowledges that the values of the seven variables used as sample selection criteria vary across MSAs in the control sample. CCRFF, 204. Despite such acknowledgment by Dr. Eisenstadt, the wide variation in Dr. Williams' Control MSAs makes the analyses appear biased, most notably as shown by RX 161-page 36, which demonstrates that MSAs that are statistically closest to the Detroit MSA, despite other factors, have lower EA shares than Control MSAs that are statistically more distant. F. 526. Table III of Dr. Eisenstadt's Supplemental Report shows there is a significant sample variance, as measured by the sample coefficient of variation, for several of Dr. Williams' economic and demographic factors. F. 527. Dr. Eisenstadt's conclusion that some of the characteristics used by Dr. Williams to create the control ranking were not statistically significant is empirically sound.

In addition, Dr. Williams' selection of Restriction MSAs was arbitrary and not the result of independent analysis. The Court thus concludes any findings based on a comparison to them to be outwardly unreliable. In addition to Detroit, Dr. Williams' group of Restriction MSAs includes Green Bay, Williamsburg, and Boulder, all of which are significantly smaller urban areas than Detroit. F. 529. The MSA in which Williamsburg is located ranks 28th in terms of closeness to Detroit, significantly more distant than any of the Control MSAs. F. 533. This alone casts doubt on the trustworthiness of Dr. Williams' selected Restriction MSA group. Equally notable is the fact that the Green Bay-Appleton and Boulder MSAs each have populations less than 500,000, a

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fact that would have disqualified them for inclusion in Dr. Williams' Control MSAs. F. 533.

Dr. Williams explained at trial that he could not use the same methodology he had used for the Control MSAs because there existed too few MLSs with restrictions. F. 532. This inconsistency in methodological approach is perhaps better explained, however, by the fact that the "selection" of the Restriction MSAs was not even made by Dr. Williams, but by Commission staff based on data from three MLSs which had entered into consent decrees with the FTC. F. 531. Dr. Williams "didn't pick anything," and thus did not independently look at any other data with respect to his Restriction MSA selections. F. 530. Consequently, Dr. Williams could describe no criteria nor defend the rationale for the selection process of the Restriction MSAs other than to assert that this was the information that had been made available to him by Commission staff. F. 530-31.

Dr. Williams' failure to select Restriction MSAs based on consistently applied, objectively researched and empirically tested economic variables calls into question the reliability of his MSA analyses with respect to his comparisons between the Control MSAs and Restriction MSAs. Though not disqualifying in and of itself, Dr. Williams' sole reliance on Commission generated Restriction MSA data, without more, casts heavy and unresolved doubt on Dr. Williams' conclusion that any such differences between these comparison groups could reliably be attributable to the Realcomp Policies, rather than other possible economic and demographic factors. Complaint Counsel's citation to Dr. Williams' numerous other statistical analyses affirming these results does not alter this fundamental conclusion with respect to his MSA analytical and methodological deficiencies. As such, they are of only limited probative value to the Court.

**(C) Dr. Williams' Comparison of Average  
EA Shares for the Control MSAs and  
Restriction MSAs is Not Probative**

As noted, Dr. Williams compared the shares of EA listings in MLSs with restrictions to the shares of EA listings in MLSs without restrictions over time. Dr. Williams calculated the difference in EA shares between the two types of MLSs to be



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between 5 and 6 percentage points. F. 535. Dr. Williams testified that the average EA percentage in the Restriction MSAs for the time period studied was 1.4%, and the average EA percentage in the Control MSAs was approximately 5.6% on average. F. 536. Dr. Williams explained that his calculation of the average EA percentage share for the Control MSAs and the Restriction MSAs was weighted based on the number of listings. F. 538. The data set he used had a total of over 1.08 million listings. F. 537. He stated that he used a weighted average because Realcomp is a large MLS; thus, to the extent that the size of the MLS matters, he concluded the bigger MLSs are more comparable to Realcomp. F. 539. Dr. Williams thus counted the larger MLSs more toward the average than the smaller MLSs. Further, by pooling or combining all Control MSAs together, 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 between EA shares in the two types of MSAs. F. 540.

Denver, a larger MSA than Dayton, is both (a) the second most *dis-similar* Control MSA to Detroit and (b) the MSA with the highest EA share. F. 541. Although Dr. Williams’ method of analysis gave identical weight to MSA listings, he inexplicably gave Denver, as a whole, more weight in this comparison of Control MSAs to Restriction MSAs than, Dayton - the Control MSA most similar (in Dr. Williams’ analysis) to Detroit; but having the smallest EA share among the Control MSAs. F. 542.

Thus, it is wholly unsurprising that Dr. Williams was able to conclude that the Control MSAs had a higher percentage of EA listings. Unfortunately, such comparative MSA analysis cannot be relied upon by the Court to draw probative conclusions about the competitive effects of the Realcomp Website Policy as they appear, upon examination, to overstate such effects. Dr. Williams’ only opinion as to why Denver should have more influence in this analysis than Dayton or any of the other Control MSAs was that Denver was a bigger MLS. F. 539, 542. Without sufficient empirical explanation of this deviation, such analysis cannot be considered to be based on objective, scientific methods. It cannot be accorded substantial weight by the Court and therefore does not support Complaint Counsel’s allegations in this case.

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The Court notes that Respondent's expert, Dr. Eisenstadt, also performed direct comparisons of the Detroit MSA to Dr. Williams' Control MSAs. F. 543. Dr. Eisenstadt testified that, using Dr. Williams' rankings of the Control MSAs, it would be most logical to compare Realcomp to Dayton, the MSA most statistically similar to Detroit in terms of demographic and economic traits. F. 543. Doing so, it would appear Dayton's percentage of EA listings (1.24%) was not significantly different from Realcomp's EA share during the same period (1.01 %). F. 543. Complaint Counsel's rebuttal argument that it "makes no sense" to compare the Dayton and Realcomp MSAs, CCRFF ¶ 214, is without sufficient empirical foundation.

Dr. Eisenstadt also observed that the only MSA utilized by Dr. Williams in his study that had a period of time both without restrictions and with restrictions was the Boulder MSA. F. 495. Dr. Williams' data showed that Boulder had a pre-restriction average EA share of 2.03%, compared to an average EA share during the restriction period of 0.98%. F. 497. He also noted that there appeared to be a downward trend in the share of EA listings on the Boulder MSA during the last three months of the pre-restriction period, presumably for reasons unrelated to the restrictions, which had not yet taken effect. F. 498. Dr. Eisenstadt concluded that if those last three months were used as a benchmark, rather than the entirety of the pre-restriction period, the reduction in EA listings would be even smaller than one percentage point. F. 498. No evidence exists in the record to refute this observation.

Dr. Williams' comparative MSA analyses thus appear fundamentally flawed in the areas noted and leave the Court with substantial questions regarding the effect the Realcomp Website Policy actually had on the prevalence of EA listings in the Realcomp MLS. These questions remain as the Court continues with a review of Dr. Williams' statistical regression analyses.

**(D) Dr. Williams' Statistical Regression  
Analyses Are Instructive, But Not  
Conclusive**

Though cognizant that Dr. Williams' statistical regression analyses are based on the same data as the flawed MSA study, the

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Court finds them nevertheless instructive, though not conclusive, as to whether Realcomp's Website Policy likely affected the prevalence of EA listings in the Realcomp Service Area. In his probit analyses, Dr. Williams relied on statistical regressions to determine the effects of the Realcomp Policies. F. 544, 547. In all, Dr. Williams conducted a total of ten statistical analyses. F. 549. The first three regressions were contained in Dr. Williams' Initial Report and controlled for seven variables. F. 550. In his Surrebuttal Report, Dr. Williams controlled for approximately 25 variables. F. 550. Through the three statistical analyses in his Initial Report, Dr. Williams concluded that Realcomp's Policies are associated with a reduction in the share of EA listings of 5.51, 5.47 and 6.15 percentage points. F. 551. In his Surrebuttal Report, his analyses show that Realcomp's Policies are associated with a reduction in the share of EA listings of 5.55528 and 5.774. F. 551. From these analyses, Dr. Williams predicts that the percentage of EA listings in Realcomp would be higher, and the percentage of ERTS listings would be lower, in the absence of the Realcomp Policies. F. 552.

In drawing these conclusions, however, the evidence indicates that Dr. Williams did not adequately consider the economic and demographic differences between and among the MSAs he selected for his study (that is, the economic characteristics of each local housing market and the demographic characteristics of home buyers and sellers in each market). F. 553. Dr. Eisenstadt described the manner in which such factors ordinarily would be addressed in economic analysis, and the errors introduced into Dr. Williams' probit analyses by Dr. Williams' failure to do so. F. 553. Further, when Dr. Eisenstadt corrected Dr. Williams' perceived 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. F. 554.

Statistical regression analysis (such as probit analysis) is a tool to measure the effects of different factors (called independent variables) on a particular outcome (called the dependent variable). F. 545. As Respondent suggests, in designing a regression analysis, the analyst should attempt to identify independent variables likely to have a significant effect on the dependent variable and include them in the analysis. If important independent variables are omitted from the analysis, their effects

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on the dependent variable may end up being attributed to those independent variables that are included, which may overstate the causal relationship between the included independent variables and the dependent variable. RB at 31-32.

Here, the dependent variable of interest is the likelihood that a home seller will choose an EA listing contract. F. 546. The independent variables are the numerous economic and demographic variables that affect the choice of an EA contract versus an ERTS contract. F. 546. In his Surrebuttal Report, Dr. Williams added several, but not all, of the economic and demographic variables that Dr. Eisenstadt believed should be considered and re-estimated the regression model. F. 555-56. As such, Dr. Williams presented statistical analyses controlling for certain factors using both his data set and Dr. Eisenstadt's data set. F. 555. In doing so, the Court notes that these further analyses, though relatively consistent, leave open the question of what extent any excluded relevant independent variables might have caused Dr. Williams to overstate the relationship between the presence of restrictions and the choice of listing contract type.

As discussed above, in evaluating and selecting the MSAs to be used as comparators for his analysis (*i.e.*, the Control MSAs), Dr. Williams identified seven economic and demographic factors that he believed are "likely to affect the level of [EA] listings." F. 515. In other words, Dr. Williams believed that each of the seven factors "theoretically may be related to the use" of EA listings, and therefore are "economically plausible criteria" affecting home sellers' choice of listing contract type (*i.e.*, EA or ERTS). F. 515. Nonetheless, it is not clear to what extent Dr. Williams actually used these factors as independent variables in his probit analysis. F. 548. It is quite plausible that Dr. Williams believed that the seven factors affected the choice of listing contract type, but did not isolate the effects of those seven factors from the existence or absence of MLS restrictions in trying to decide whether MLS restrictions affected the use of EA contracts in the MSAs. Moreover, as Dr. Eisenstadt testified, although Dr. Williams reran his statistical analysis adding economic and demographic variables that Dr. Eisenstadt believed were significant, he did not utilize all of Dr. Eisenstadt's explanatory variables, F. 556, which Respondent contends would have accounted for different

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economic and market results at the MSA and local levels. This mayor may not be, however, empirically significant.

Further, Dr. Eisenstadt testified at trial that such variables should have been analyzed not only at the MSA level, but at the county and local zip code level to measure local, neighborhood effects which might impact a home seller's decision as to what type of listing contract to enter into. F. 560. Dr. Williams did not think it necessary to include such local variables after measuring characteristics at the MSA level, F. 559, but is unpersuasive in his explanation as to why such an approach would be so completely duplicative as to be of no empirical value.

Although the Court takes note of the plausibly different empirical conclusions which might well have resulted had Dr. Williams factored in the excluded demographic variables as discussed by Dr. Eisenstadt, it is also cognizant that many of Dr. Eisenstadt's criticisms were confined to the analyses performed by Dr. Williams in his Initial Report and did not fully speak to the conclusions reached in Dr. Williams' Surrebuttal Report. Such fact, therefore, cannot render Dr. Williams' probit analyses completely unreliable, as argued by Respondent, but neither does it persuasively establish that the Realcomp Website Policy is principally responsible for the effects on EA listings in the Realcomp Service Area, as suggested by the totality of Dr. Williams' statistical analyses. The empirical review must therefore continue with the re-evaluation of Dr. Williams' analyses by Dr. Eisenstadt.

**(E) Dr. Eisenstadt's Regression Results Cast  
Doubt on Dr. Williams' Probit Analysis  
and Shows No Significant Adverse Effect  
on EA Shares**

As noted, Dr. Eisenstadt implemented the same basic probit regression model that Dr. Williams used, but added separate independent variables for several of the economic and demographic factors that Dr. Williams identified as relevant to the prevalence of EA listings (excluding, however, the variables of population and population density), as well as several other economic and demographic factors which Dr. Eisenstadt identified as likely to affect contract choice both across and within

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the MSAs. F. 557. Dr. Eisenstadt took into account the following variables which were only partially 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, percent change in days on market over the prior year at the MSA and county level. F. 558. Dr. Eisenstadt's re-estimation of Dr. Williams' work suggests, at least indirectly, that additional economic and demographic characteristics should have been considered as independent variables by Dr. Williams, because a high number of them proved to be statistically significant at the generally accepted level of confidence. F. 562.

As argued by Complaint Counsel, if such demographic variables like median income, or race matter at all, they should only matter at the level of the individual home seller, which it argues was not controlled for by Dr. Eisenstadt. CCRFF ¶ 228. Such theory, however, remains just that, as Dr. Eisenstadt testified that home sellers would take into account the expected characteristics of home buyers that they seek to attract to purchase their property when choosing what type of listing to use. F. 563. Such consideration appears to the Court to be not only economically plausible, but reasonable. F. 563.

When other such 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 significant (*i.e.*, it was not predictably different from zero). F. 564. Moreover, Dr. Eisenstadt estimated the same basic regression equation with the inclusion of a separate "RULE" variable for each of the Restriction MSAs, which isolated the effects (on choice of listing contract type) of the Realcomp Policies from the effects of the restrictions in the other Restriction MSAs. F. 565. This analysis found that the adverse

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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 also not statistically significant. F. 566.

Additionally, as previously indicated, the weight of the evidence persuades the Court that Dr. Eisenstadt's variables are not duplicative merely because they measure demographic and economic variables at both the MSA metropolitan level and the local county or zip code level. F. 560. Rather, Dr. Eisenstadt presents persuasive testimony as to the propriety of measuring how both MSA and local neighborhood characteristics of home buyers and sellers should be controlled for without "measuring the same variable twice" and how it is "not completely duplicative." F. 561. Having so concluded, the Court need not further address Complaint Counsel's arguments that such variables are, in fact, duplicative, which may implicate a "multicollinearity" problem as surmised by Dr. Williams. (Williams, Tr. 1669).

As with the conclusions drawn by Dr. Williams, the Court weighs the previously noted flaws in the MSA data set, used also by Dr. Eisenstadt in his regression results, including his analysis of several additional economic and demographic variables, and finds such conclusions to be, nevertheless, of some limited probative value. To that extent, Dr. Eisenstadt's analyses cast a further degree of doubt on Dr. Williams' contrary conclusions that a large portion of the difference between the percentage of EA listings in the Realcomp Service Area, and the average EA share for Control MSAs is not due to local economic and demographic factors, but the restrictive Realcomp Policies. F. 567. Further confirmation of Dr. Eisenstadt's conclusions is found in his analysis of Dr. Williams' Control MSA findings.

**(F) Dr. Eisenstadt's Regression Analysis of the Control MSAs Shows the Detroit MSA Has More EA Listings Than Would be Expected**

The evidence shows that Dr. Eisenstadt performed a regression analysis not only using the additional economic and demographic variables noted above, but by utilizing only the data from the six Control MSAs selected by Dr. Williams. F. 568. He

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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. F. 568. Applying the economic and demographic characteristics of the Realcomp Service Area, Dr. Eisenstadt's predicted percentage of EA listings in the Realcomp Service Area in the absence of the Realcomp Policies is about 0.3 percent. F. 569. The actual percentage of EA listings in the Realcomp Service Area, however, was approximately three times larger (1.01%) for the corresponding time period. F. 569. This casts significant doubt on Dr. Williams' theory that Realcomp's Policies have had a substantial effect on the share of EA listings. *See* F. 570. It also indicates that additional factors other than the restrictive Realcomp Policies, *i.e.*, certain demographic characteristics of the Realcomp Service Area, might well therefore be responsible for the percentage of EA listings on the Realcomp MLS. F.570.

This additional, empirical evidence by Dr. Eisenstadt, which is unrebutted by reliable, probative evidence to the contrary, must be given significant weight in determining whether the statistical analyses done by Dr. Williams is sufficiently reliable to support Complaint Counsel's burden of proof. Complaint Counsel's attempt to disparage such evidence on the argument that it is but a "clever use of statistics . . . used to manipulate data in order to achieve a desired result . . . and . . . means that there is no procompetitive justification for collective action to impose restrictions aimed at competition from unbundled, discount brokers" (CCRFF ¶ 231), is merely argumentative and contrary to the preponderance of the empirical evidence. Such argument therefore offers little guidance to the Court.

**(vi) Realcomp's Website Policy Did Not Significantly Harm Consumers or Price Competition**

**(A) Dr. Williams' Analyses Do Not Demonstrate Direct Harm to Consumers**

Dr. Williams' various analyses sought to measure the effect of the Realcomp Policies, including the Minimum Services Requirement, on the prevalence of EA listings in the Realcomp Service Area. F. 571. Dr. Williams concluded from his



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*prediction* of reduced EA output that consumers, by necessity, pay substantially higher prices for brokerage services. F. 572. As Dr. Eisenstadt explained, however, Dr. Williams' analyses only provide an indirect test for anticompetitive effect regarding higher brokerage costs incurred by those consumers who, as a consequence of the Realcomp Policies, substitute ERTS contracts for EA contracts. F. 572. Dr. Williams did not investigate other such direct effects, *e.g.*, whether sellers of residential properties who used EA listings on the Realcomp MLS received higher or lower sales prices for their properties. F. 573. Also, Dr. Williams did not attempt to measure the effect of Realcomp's restrictions on the number of days that homes remain on the market before sale or whether commission rates on ERTS listings are higher when MSAs impose restrictions akin to the Realcomp Policies. F. 574. These are relevant factors to a determination of whether consumers actually pay appreciably higher prices as a consequence of the Realcomp Website Policy. Thus, Dr. Williams' analyses are insufficient to demonstrate that the Realcomp Website Policy caused measurable harm to consumers or to price competition between traditional and limited service brokers. F. 575.

**(B) Dr. Eisenstadt's Days on Market Does Show Lack of Consumer Harm**

The absence of consumer harm, at least to home sellers, is clearly indicated by Dr. Eisenstadt's "days on market" analysis. Days on market is a measure of the time it takes for a listing, once it is on a Multiple Listing Service, to be sold. F. 577. Dr. Williams agrees that when one looks at the justifications for the Realcomp Policies and is attempting to determine the effect of these restrictions from the consumer's standpoint, home sellers would be concerned about selling their houses in a timely fashion. F. 576.

Mr. Murray testified that he has seen no data or information concerning days on market distinguishing between EA listings and ERTS listings. F. 578. Nevertheless, he testified that it is generally expected that the more exposure a property is given, the better the chance the home will sell faster. F. 579. This conclusion, however, is not prefaced on data or an actual analysis of information of days on market in the Realcomp system

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distinguishing between EA listings and ERTS listings. F. 579. Likewise, Dr. Williams performed no analysis of days on market. F. 580.

The only expert who did analyze days on market was Dr. Eisenstadt, who performed a statistical analysis which controlled for a limited sample of non-ERTS homes on this issue and concluded that in the Realcomp MLS, the average days on market for EA listed homes was 17% *less* than for comparable ERTS listed homes. F. 581. Although Dr. Eisenstadt did not control for whether homes had been remodeled or recently painted, F. 583, it is not clear that this would have significantly altered the outcome. Dr. Eisenstadt found that the average days on market for Realcomp EA properties to be 118, compared to approximately 142 for ERTS properties, based upon data analyzed from January 2005 through October 2006. F. 582-83. Dr. Eisenstadt's empirical findings were not inconsistent with the factual testimony of Mr. Mincy, an EA agent, who stated that he knew of no difference in the days on market between EA listings and ERTS listings, but had done no comparison of the two. F. 584.

No EA broker offered contrary testimony and Complaint Counsel has not, through empirical evidence, contradicted the conclusion that the Realcomp Website Policy has not disadvantaged EA listed properties in terms of days on market. Thus, Dr. Eisenstadt's days on market analysis offers further probative support for the conclusion that Complaint Counsel has not met its burden of showing the requisite competitive harm to prove a violation of Section 5.

**(vii) Respondent's Evidence on Higher Sales  
Prices and Argument on Dr. Williams'  
Analysis on the Effect of the Combined  
Policies Lacks Merit**

**(A) Dr. Eisenstadt's Sales Price Regressions  
Do Not Establish Lack of Consumer  
Harm**

Dr. Eisenstadt conducted two regression studies in an effort to directly estimate the effects of the Realcomp Policies on the sales prices of homes sold under EA listings. These analyses are flawed

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in many respects and thus cannot support Respondent's theory that EA home sellers actually benefitted from Realcomp's Policies.

In his April 2007 report, Dr. Eisenstadt compared home sales prices for EA listed residential properties for the years 2005 and 2006 in the Realcomp Service Area against those in the Ann Arbor MLS (an MLS without policies comparable to the Realcomp Policies) during the same period. F. 587. Dr. Eisenstadt sought to account for differences in home characteristics and location characteristics that might affect sales prices, as well as the use of EA versus ERTS listing types, by means of statistical regression. F. 592. Dr. Eisenstadt then attempted 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 sales prices of ERTS listed properties in the two areas. F. 592. Dr. Eisenstadt postulated that all else being equal, if home sellers in the Realcomp Service Area using EA listings were harmed by the Realcomp Policies, then, after controlling for differences between sales prices of ERTS properties in the two areas, they should realize lower sales prices for their homes than home sellers of EA listed properties in Ann Arbor. F. 586. Contrary to his hypothesis, his conclusions indicated that EA listed properties realized *higher* sales prices in the Realcomp MLS than in the Ann Arbor MLS. F. 587.

In his May 2007 report, Dr. Eisenstadt compared EA listed home sales prices in the Realcomp Service Area against those in five of Dr. Williams' Control MSAs. F. 597. One of Dr. Williams' six Control MSAs was not used in this analysis because that MLS did not provide sale price data. F. 597. Dr. Eisenstadt concluded that EA listed properties realized *higher* sales prices in the Realcomp MLS than in the Control MLSs. F. 587. Dr. Eisenstadt utilized the same methodology in both his April 2007 and May 2007 reports. F. 600.

As noted by Complaint Counsel, there are fundamental methodological deficiencies with Dr. Eisenstadt's approach that render his conclusions largely unreliable. Specifically, in preparing his analyses, Dr. Eisenstadt removed all of the approximately 25,000 to 27,000 Detroit city limits listings from

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the Realcomp Service Area data for his sales price regressions. F. 588-89. He did so because he believed that home sellers who lived in very densely populated areas such as Detroit might place a different value on certain home characteristics when they are buying a home than home sellers who live in more suburban areas and because he wanted to compare a suburban area to another suburban area, such as Washtenaw County. F. 591. Dr. Eisenstadt also removed all listings for properties outside of Washtenaw County from the Ann Arbor MLS. F. 588. He did so because the Ann Arbor MLS is used as a bypass for non-ERTS listings located in the Realcomp Service Area (including Detroit). F. 499-500. As a result of this methodology, Dr. Eisenstadt ended up comparing only part of the Realcomp MLS to part of the Ann Arbor MLS. F. 588. In addition, Dr. Eisenstadt did not control for whether the home had a remodeled kitchen or bathroom or was recently painted. F. 593. Complaint Counsel asserts that such methodological flaws render the sales regression analyses inherently untrustworthy.

True, as a result of his methodology, Dr. Eisenstadt ended up with a very small sample: only 100 or so properties that sold under EA listings in the remaining Realcomp MLS data and 24 or 25 such properties in the remaining Ann Arbor MLS data. F. 589-90. However, Dr. Eisenstadt provided compelling reasons for so doing. F. 500, 591. Such sample, despite the scope of the survey and questions regarding an element of the regression equation as it related to a particular coefficient error, F. 595, is not without some probative value.

The overwhelming flaw in Dr. Eisenstadt's sales price regression, however, is that it does not show a "causal" connection or "measure the effects of the Realcomp Policies on sales prices of EA listed properties." F. 596. At most, it shows a "correlation" between sales price and the presence of Realcomp's Policies. Although Dr. Eisenstadt believed, "there is theory that [would] expect it to be a causal relationship," F. 596, in the absence of a demonstrated economic basis for interpreting such correlation as causation, Dr. Eisenstadt's regression can only show that the higher sales prices and the Realcomp Policies both happen to exist in those limited parts of the Realcomp Service Area that Dr. Eisenstadt examined. It does not demonstrate that the Realcomp Policies actually *benefitted* consumers and certainly

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does not prove, as Respondent asserts, that home sellers of EA properties listed on Realcomp realized higher prices than those listed on the Ann Arbor MLS or in the Control MSAs.

Due to the substantial reliability questions concerning Dr. Eisenstadt's methodology, the Court need not address Dr. Eisenstadt's estimate of whether the supposed beneficial effect of higher sales prices for EA listed properties predicted by his analyses would be offset by higher brokerage fees caused by an artificial substitution of ERTS contracts for EA contracts or whether consumer welfare of home sellers in the Realcomp Service Area actually improved during the relevant period when the Realcomp Policies were in effect.

Dr. Eisenstadt's uncertain methodology, including errors in certain coefficient data, renders his sales price regression conclusions unreliable to the extent that such estimated effects on sale price were found to be higher for Realcomp EA listings. However, Complaint Counsel has offered no evidence to show that home sellers of EA properties listed on Realcomp realized lower sales prices than home sellers of EA properties listed on the Ann Arbor MLS or on the Control MSAs. The lack of the latter showing further weighs against a finding of anticompetitive effects.

**(B) Dr. Williams Analyzed The Combined  
Effect of Realcomp's Acts, Practices and  
Policies**

Respondent criticizes Dr. Williams' analyses for purporting to measure only the combined effects of *three* Realcomp Policies (Website Policy, Search Function Policy, and the Minimum Services Requirement), on the prevalence of EA listings, rather than assessing the effects of anyone policy by itself. RB at 36-37; RRB at 46. Such argument is rejected, however, as lacking merit.

As previously noted by the Court, the Minimum Services Requirement is *not* a separate, stand-alone access restriction. Rather, it was incorporated into the Website Policy and Search Function Policy. The fact that Dr. Williams testified that he could not "disentangle" the effects of the Search Function Policy,

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Website Policy, and Minimum Services Requirement, F. 505-07, is of no consequence to the Court's competitive effects analysis.

With regard to the Search Function Policy, the Court has determined that it was not anticompetitive in nature, so no assessment of the effects specifically attributable to it, whether separately or otherwise, is germane to the Court's competitive effects analysis. Moreover, Respondent erroneously implies that the Complaint challenges only the Website Policy and Search Function Policy. *See* Tr. 1922-23. The Minimum Services Requirement, however, falls clearly within the totality of the "acts, practices and policies" challenged in the Complaint with respect to the Realcomp MLS rules. The Minimum Services Requirement, being incorporated into the Website Policy, is directly relevant to the Court's competitive effects analysis, but need not be assessed separately in order to isolate the actual effects of the Website Policy itself.

The fact that Dr. Williams cannot determine whether all or a significant portion of the effects he purports to observe are due to anyone of the Realcomp Policies standing alone, or whether the repeal of any of these policies alters the significance of his testimony, does not detract from the probity of his analyses. Respondent fails to offer compelling argument to persuade the Court not to consider Dr. Williams' conclusions for what, in effect, is Complaint Counsel's reduced request for relief as to the Website Policy standing alone.

**(viii) Summary of Competitive Effects**

The Sherman Act "was designed to prevent restraints of trade which [have] a significant effect on . . . competition." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.15 (1940). The totality of the evidence in this case, empirical and otherwise, establishes that Realcomp's Website Policy, despite its anticompetitive nature, has not resulted in measurably significant competitive effects. Rather, the evidence shows that: (1) the Website Policy did not unduly restrict competition in the Realcomp Service Area as to EA discount brokers. Indeed, EA brokers continue to compete and grow in the Realcomp Service Area, despite the troubled local economy; (2) the Website Policy did not exclude non-ERTS listings from the MLS, which exposes

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such listings to approximately 80% of all buyers; (3) the Website Policy did not prevent EA brokers from utilizing alternative public websites, as the evidence shows that EA home sellers effectively market properties without direct access to the Approved Websites. Moreover, EA brokers can and do, place their listings on Realtor.com through dual-listing and data-sharing arrangements and on the Approved Websites through flat fee ERTS listings, without incurring unduly burdensome additional costs; (4) consistent with national trends, the competitive problems EA brokers face in Southeastern Michigan are principally due to the local economy and their business model; and (5) the empirical evidence presented by Complaint Counsel's economic expert does not demonstrate a significant effect on competition as: (a) the time series analysis is based on a fundamentally flawed assumption; *i.e.*, it failed to account for the likely impact of declining conditions in the relevant market; (b) the comparative MSA analyses are unreliable, due to significant flaws in the selection methodology, including the arbitrariness of the Restriction MSA selections; and (c) the probit analysis is instructive, but not conclusive, as to whether the Website Policy adversely affected the prevalence of EA listings in the relevant market.

Further empirical evidence in this case, though in part also flawed, is nevertheless instructive and: (1) casts doubt on Complaint Counsel's expert's probit analysis by demonstrating no significant effect on EA listings as a result of the Website Policy; (2) shows that additional economic and demographic factors other than the Website Policy might well be responsible for the percentage of listings on the Realcomp MLS; and (3) concludes that the Website Policy did not result in significantly increased costs for consumers or unreasonably restrain competition for discount brokerage services.

**d. Procompetitive Justifications**

As noted in *California Dental*, 526 U.S. at 774, and in conjunction with the Court's aforesaid conclusions with respect to (a) the nature of the challenged Website Policy; (b) market power; and (c) the competitive effects of such policy, it is useful to examine, as part of a net effects assessment, Respondent's procompetitive justifications. Generally, once a plaintiff has

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carried its burden of proving a substantial anticompetitive effect, the burden shifts to the defendant to come forward with a sufficiently procompetitive objective. *NCAA*, 468 U.S. at 113; *Brown Univ.*, 5 F.3d at 669. “[T]he rules must be shown to be justified by the legitimate competitive needs of the association.” *Realty Multi-List* 629 F.2d at 1374. Further, the “requirements of the rules themselves must be reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end.” *Id.* at 1375. If the defendant does produce evidence of procompetitive virtues, then the plaintiff must show that the challenged conduct is not reasonably necessary to achieve the stated objective. *Brown Univ.*, 5 F.3d at 669; *K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995).

Although Complaint Counsel has not demonstrated significant competitive effects of the Website Policy, it *has* shown that the nature of the Website Policy is such that it could be anticompetitive and that Realcomp has market power in the relevant market. If, under *Brown Univ.*, 5 F.3d at 669, the Court were to presume effects applying an abbreviated review standard, the analysis would need to consider whether Realcomp can demonstrate that the challenged policy promotes a sufficiently procompetitive objective. Thus, an analysis of Respondent’s proffered procompetitive justifications ensues.

Respondent asserts two procompetitive justifications for the Website Policy: the elimination of a free rider problem and the creation of certain efficiencies, namely to increase participation of cooperating brokers and to address a “bidding disadvantage” concern. RB at 42-47. Respondent further asserts that the restraints are appropriately tailored to these limited objectives. RB at 48. Complaint Counsel disputes these contentions and specifically argues that the Website Policy not only fails to address an actual free riding problem, but that the asserted justification has been previously rejected by the Commission. CCB at 68-70. Such arguments, however, are unpersuasive.



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**(i) Realcomp's Website Policy Addresses a Free Rider Problem**

The parties agree that free riding can be basically defined as the diversion of value from a business rival's efforts without payment. *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667,675 (7th Cir. 1992). "It costs money to make a product attractive against other contenders for consumers' favor. Firms that take advantage of costly efforts without paying for them, that reap where they have not sown, reduce the payoff that the firms making the investment receive." *Id.* at 674. The Supreme Court has recognized that the control of free riding is an accepted justification for cooperation in antitrust jurisprudence. *Polk Bros., Inc. v. Forest City Enters., Inc.*, 776 F.2d 185, 189-90 (7th Cir. 1985) (citing *Monsanto*, 465 U.S. at 762-63; *Continental TV*, 433 U.S. at 55-57).

To the extent consumers obtain information from one retailer who invests in advertising costs and staff in order to provide product information to consumers, but then purchase the product from a second retailer, who does not, the second retailer is considered to free ride on the first retailer's investment in customer service. *See Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937-38 (7th Cir. 2000) ("What the manufacturer does not want is for the shopper to visit the attractive store with highly paid, intelligent sales help, learn all about the product, and then go home and order it from a discount warehouse or (today) on-line discounters. The shopper in that situation has taken a 'free ride' on the retailer's efforts; the retailer never gets paid for them, and eventually it stops offering the services.").

Complaint Counsel argues that the free riding issue here is nothing more than Realcomp's attempt to justify the Website Policy which, Complaint Counsel argues, is designed essentially to protect a traditional cooperating broker's right to receive the unilateral offer of compensation if they procure a buyer for property. CCB at 68-69; CCRB at 37-39. As such, Dr. Williams testified that there can be no free riding because home sellers using EA listings do not free ride on: (1) listing brokers, as such brokers are paid for their listing services; (2) cooperating brokers, as they receive exactly what they pay for from the MLS, which is an opportunity to earn a commission for finding a buyer; or (3)

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the MLS, as the MLS is compensated for its services by member fees, which all brokers, including discount brokers, pay. F. 613-15.

The relevant component of Dr. Williams' testimony here is his conclusion that home sellers using EA listings do not free ride on Realcomp cooperating brokers. F. 614. As Dr. Williams stated, if a buyer independently finds a home on the Realcomp affiliated Website, "a cooperating broker is not entitled to receive a commission from the home buyer or the home seller if a non-ERTS listing is used. Therefore, the fact that a commission is not paid to the cooperating broker does not constitute a free rider problem by either buyer or the home seller; and Realcomp's access restrictions based on this rationale are not economically justified." (CX 498-052). Dr. Williams further opined that there is not a free riding issue because: (1) cooperating agents benefit by having the opportunity to participate in the transaction; (2) most brokers are both cooperating and listing brokers; and (3) 80% of the time a cooperating broker participates in a non-ERTS transaction. F. 614.

Complaint Counsel further denies the free rider justification, asserting "[h]ome 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." (CCRF ¶ 242; Williams, Tr. 1098 (emphasis added)). Such contentions, however, are incorrect, as they misstate both the real world competitive situation and the actual justification put forth by Respondent.

Specifically, the free riding problem that is of concern here is free riding by EA home sellers on Realcomp cooperating agents, not for their *services*, as Complaint Counsel and its expert opine, but in the fact that such home sellers seek member benefits in order to *compete* with Realcomp cooperating agents for *buyers*. F. 616. EA home sellers have an incentive to act as their own cooperating agent. If they sell their house without having to pay a cooperating agent a commission, they retain that compensation for themselves. F. 608. Thus, EA home sellers seek the benefits of being a full-fledged Realcomp "member," specifically the benefit derived from Realcomp's advertising of properties on the Internet

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through the IDX, *see* F. 604-05, to further their ability to compete with Realcomp cooperating brokers to attract buyers.

However, EA home sellers do not pay membership dues, or offer any type of compensation to Realcomp for the right to compete for buyers and serve as their own cooperating agent. F. 606. To the extent that such home sellers would receive, without charge, the benefits derived from Realcomp's advertising of properties on the Approved Websites, they would free ride on the Realcomp members who invest and participate in the MLS through the payment of dues and who otherwise undertake to support the cooperative endeavor of the MLS. F. 610. Realcomp members should not be required to subsidize or otherwise facilitate transactions that directly conflict with Realcomp's legitimate business purpose. F. 611. The Website Policy thus provides a plausible economic justification by insulating Realcomp's dues paying members from having to provide, free of charge, the costs that EA home sellers would normally have to incur themselves to compete with Realcomp members for such buyers. F. 609-10.

Dr. Williams' testimony that home sellers successfully act as their own cooperating brokers approximately 20% of the time confirms the presence of a free rider problem. F. 614. More importantly, however, Dr. Williams' analysis never addressed the fundamental point of Realcomp's argument regarding EA home sellers seeking IDX benefits in order to compete with Realcomp cooperating agents for buyers. F. 616. His conclusions, particularly his assertion that Realcomp cooperating brokers would not be subsidizing EA listings if they were allowed to go from the Realcomp MLS to the Approved Websites, therefore fail to refute the actual free riding justification put forth by Realcomp.

Moreover, Dr. Williams' contention that the Realcomp Policies benefit only cooperating brokers, and not consumers, is similarly unpersuasive. As Dr. Eisenstadt explained, the Website Policy could also benefit those home buyers who wish to work with a cooperating broker to purchase an EA property by enhancing the incentives of those brokers to show and promote EA properties to their buyer-clients. F. 631. Such justification, as further explained in the "bidding disadvantage" analysis which follows, is sufficiently plausible under *California Dental* to allow

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the Court to determine that such policy could well be procompetitive.

Complaint Counsel's additional arguments on the free rider issue are similarly unpersuasive. First, it cites to Dr. Williams' conclusions that even if a free rider problem does exist, the Website Policy does not eliminate the problem because a cooperating broker who belongs to an MLS other than Realcomp, or participates in data-sharing arrangements with another MLS cannot assure that a Realcomp cooperating broker will participate in a given transaction. F. 617. Such argument fails to acknowledge, however, that Realcomp's data-sharing arrangements are reciprocal, meaning they run both ways and that Realcomp members receive actual, mutual benefit from having their listings placed onto other MLSs. F. 617. No such mutual benefit exists for Realcomp members with respect to EA home sellers.

Second, Complaint Counsel's argument that the free rider justification is a *post-hoc* rationalization of the Website Policy, which was never raised in contemporaneous documents prior to trial, is misleading. The Realcomp "Call to Action Regarding Public Website Policies" (CX-89), is the only document that the Realcomp Board of Governors has approved stating the rationale for the Website Policy. F. 618. Though not gauged in precise legal language, and created only in response to the issued FTC Complaint, the "Call to Action" document nevertheless speaks implicitly to the central theme of the free rider justification when it describes Realcomp's "services" (including, no doubt, those benefits relating to the IDX and Approved Websites) as being "in high demand by consumers"; advocates that Realcomp is being forced to potentially compromise the "purpose of the cooperative," which ensures member compensation; and states that "use of this website should be reserved specifically for the purpose of marketing properties represented by Realtors." F. 619. Such statements no doubt encompass the clear, but broadly stated intent of the Realcomp Website Policy not to authorize EA home sellers access to Realcomp Internet services in order to compete with member agents for buyers without compensation to the cooperative.

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Thirdly, Complaint Counsel argues that Realcomp, in 2006, attempted to use such rationalizations to persuade the National Association of Realtors (“NAR”) not to amend its IDX rules to require MLSs to include all current listings in their IDX feeds, F. 424, but that NAR, through its general counsel, rejected such overtures. F. 426. Though certainly correct, such evidence must be considered in the appropriate context. Despite the fact that NAR officially concluded that EA listings on these feeds would not detract from the purposes of the MLS, F. 426, NAR’s vice president explained that the reason NAR changed its IDX Policy was that, in light of the FTC’s enforcement actions initiated against various MLSs around the country, the organization decided, “it wasn’t worth fighting about.” F. 427. Thus, the official NAR position, though clearly relevant, must be considered not only on the merits, but in the light of the litigation environment surrounding NAR at the time the position was taken.

Finally, Complaint Counsel argues that the Commission has previously rejected this very free rider justification. CCB at 69-70. In support of this assertion, Complaint Counsel relies on “*Analysis of Agreements Containing Consent Orders to Aid Public Comment*,” *In the Matter of Information and Real Estate Services. LLC*, File No. 06-10087 (2006) (“*Analysis*”). Such reliance, however, is misplaced. It is well established that consent decrees have no force or effect in law and are thus of no precedential value. “[T]he circumstances surrounding . . . negotiated [consent decrees] are so different that they cannot be persuasively cited in a litigation context.” *E. I. du Pont*, 366 U.S. at 331 n.12. Indeed, the related, but separate *Analysis* cited by Complaint Counsel here, is of even lesser probative value than the actual consent decree which it addresses. The *Analysis* acknowledges that its purpose is to “facilitate comment on the proposed consent orders [and] . . . does not constitute an official interpretation of the agreements and proposed orders.” *Analysis* at 1. For these reasons, Complaint Counsel’s argument fails.

“The free ride can become a serious problem for a partnership or joint venture because the party that provides capital and services without receiving compensation has a strong incentive to provide less, thus rendering the common enterprise less effective.” *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 212-13 (D.C. Cir. 1986). Here, Realcomp faced the

## Initial Decision

very real problem of EA home sellers taking advantage of the services provided by Realcomp without paying dues required of Realcomp members (including discount brokers) and without providing any reciprocal benefit. Realcomp legitimately addressed this free riding concern by excluding EA listings from its feed to the Approved Websites. As such, Realcomp has demonstrated that implementation of its Website Policy was economically justified and plausibly procompetitive in effect.

In addition to the free rider justification, Respondent advances efficiency justifications for the Website Policy, as discussed below.

**(ii) Realcomp's Website Policy Created An Additional Efficiency**

In evaluating plausible procompetitive justifications, courts have accepted justifications which created operating efficiencies. *E.g.*, *Supermarket of Homes*, 786 F.2d at 1407 (enhancing ability of brokers to match homes and buyers); *Montgomery County Ass'n of Realtors, Inc. v. Realty Photo Master Corp.*, 783 F. Supp. 952,963 (D. Md. 1992) (“adverse [e]ffects [were] greatly outweighed by the benefits and opportunities the new database offers the real estate industry and the public”), *aff'd*, 993 F.2d 1538 (4th Cir. 1993) (unpublished opinion).

Here, Realcomp offers argument, through the testimony of Dr. Eisenstadt, on two alleged additional efficiencies created by the Website Policy. RB at 46-47; RRB at 44-45. One is shown to be of limited merit. The other is not. Addressing the latter first, it is noted that a multiple listing service is a cooperative arrangement by real estate brokers through local boards for the pooling of listings - the sharing of information about properties for sale so that all subscribers to the service may have an opportunity to act as subagents in procuring a buyer. *Realty Multi-List*, 629 F.2d at 1368.

As stated by Dr. Eisenstadt, 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. F. 620. These platforms connect (*i.e.*, bring together) two distinct groups of users (in this case, real

## Initial Decision

estate listing brokers and cooperating brokers). F. 620. 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. F. 621. 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. F. 621.

As Dr. Eisenstadt explained, 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. F. 622. He cited to the example of an anchor department store in a shopping mall which 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. F. 622. He thus concluded that different rules for promoting ERTS listings versus EA listings could be expected to increase the participation of cooperating brokers, because cooperating brokers would be expected to place more value on the number of traditional, full service ERTS brokers who belong to the MLS than on the number of EA brokers, even if EA and ERTS contracts each offer cooperating brokers identical commission rates. F. 623. These factors, he asserts, support the conclusion that cooperating agents would prefer a platform that favors ERTS listing contracts. F.624. For these reasons, he concludes that the Realcomp Policies promote this result and thereby the efficiency of the cooperative MLS platform. F. 624.

Dr. Eisenstadt's conclusions, however, are not supported by the evidence. First, he himself concedes that most brokers compete as both listing and cooperative brokers, which would indicate that a member of an MLS will typically be on both sides of the two sided platform he described. F.626. The testimony of Mr. Mincy shows this to be the case in Southeastern Michigan. F. 626. Moreover, Dr. Eisenstadt's argument rests on an unfounded assumption that limited service brokers contribute only an equivalent number of EA listings to the platform. F. 627.

Dr. Eisenstadt's analysis is undermined by his admission that more listings attract more brokers and his own report, which shows that EA brokers bring more listings than full service brokers. F. 627-28. Under his own reasoning therefore, EA

## Initial Decision

brokers should theoretically be more attractive to an MLS. As such, Dr. Eisenstadt's conclusions are not reliable and do not demonstrate how the Website Policy, in this regard, created an additional efficiency.

With respect to Respondent's second alleged efficiency argument, however, the Court finds that the Website Policy promotes limited efficiency by reducing the so called "bidding disadvantage" for buyers who are represented by a cooperating broker. F. 629. As explained by Dr. Eisenstadt, 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. F. 629. Because the home seller must pay a commission when a buyer uses a cooperating broker, the rational home 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. F. 629.

From a real world perspective, it might logically follow that buyers have more incentive to use the services of selling agents when they acquire ERTS properties than when they acquire EA properties. F. 630. Although this conclusion is not based on any economic findings, to the extent the Website Policy does not promote EA properties to the same extent as ERTS properties, such might well 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. F. 631.

Complaint Counsel's assertion that any disadvantage to the buyer using a cooperating broker simply reflects that the buyer must pay for the services of the cooperating broker (CCRFF ¶ 188), though true, does not negate the prospect that an EA home seller, when confronted by competing, equal offers from represented and unrepresented buyers, is by necessity, forced to factor in the cooperating agent's commission in computing net proceeds, which could well influence his selling decision. F. 629. Thus, by reducing any such bidding disadvantage incurred by home buyers who use cooperating brokers when they bid on EA listed properties, the Website Policy could plausibly promote the economic efficiency of the cooperative. F. 631.



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An even greater efficiency might occur to the extent the Website Policy values ERTS contracts over EA contracts due in part to the fact that cooperating brokers must deal directly with EA home sellers rather than with listing brokers. As such, cooperating brokers may often be forced to provide (though reluctantly), necessary transactional services that would ordinarily be performed by full service listing brokers. F. 632. In such circumstances, the Court could well imagine that the Website Policy might efficiently work to limit cooperating agents' exposure to legal liability as a result of being forced to provide such additional, professional services. As explained by Dr. Eisenstadt, Realcomp is treating listing agents who use ERTS listings more favorably than those using non-ERTS listings, because ERTS listings are more effective at attracting cooperative agents. F. 625.

**(iii) Realcomp's Website Policy Is Narrowly Tailored**

The effects of the information exchange through the MLS have been characterized as "enormously procompetitive." *Realty Multi-List*, 629 F.2d at 1368. "Certainly the antitrust laws must allow reasonably ancillary restraints necessary to accomplish these enormously procompetitive objectives." *Id.* However, the challenged restraints must be narrowly tailored to the accomplishment of legitimate goals. *Realty Multi-List*, 629 F.2d at 1375.

Here, the Website Policy is narrowly tailored to prohibit the distribution of EA listings to the Approved Websites, which directly addresses the free rider and the efficiency justifications described above. Realcomp's Policies are not so broad as to deny membership in the MLS to EA brokers or prevent brokers from placing EA listings on the MLS. F. 163-64, 181.

When a respondent has shown that the challenged conduct promotes a sufficiently procompetitive objective, Complaint Counsel has the burden of proving that the restraint is not reasonably necessary to achieve the stated objective. *Brown Univ.*, 5 F.3d at 669; *K.M.B. Warehouse Distribs.*, 61 F.3d at 127 (requiring plaintiff to show that any legitimate objectives could be achieved in a substantially less restrictive manner). Here,

## Initial Decision

Complaint Counsel has failed to do so. Based on the evidence discussed herein, the Court thus concludes that the Website Policy was reasonably necessary to the “legitimate competitive needs of the association” and “narrowly tailored to that end.” *Realty Multi-List*, 629 F.2d at 1375. It is, therefore, lawful under established antitrust precedents.

### 3. Summary of Liability Under Section 5

As noted in the Introduction, the Complaint in this case alleges that Respondent, in violation of Section 5 of the FTC Act, restrained competition in the provision of residential real estate brokerage services by combining or conspiring to hinder unreasonably, the ability of discount EA brokers to offer residential brokerage services on terms other than those contained in a traditional ERTS listing. Complaint ¶ 7. The Complaint charges Respondent with restraint of trade through two formal policies which are alleged to limit the publication and marketing of EA listings on approved Internet and IDX sites: the Search Function Policy and the Website Policy. A related policy, the Minimum Services Requirement, was imposed on Realcomp members and affected the implementation of the two stated policies, but is not separately evaluated.

The Court has determined that review of the challenged policies can only properly be conducted through a full rule of reason analysis. Upon such analysis, the evidence shows that Complaint Counsel has made a *prima facie* showing regarding the anticompetitive nature of the alleged restraints with respect to the Website Policy, but not with respect to the Search Function Policy. As such, the Court need not address the empirical evidence and Respondent’s procompetitive justifications as they pertain to the actual competitive effects of the Search Function Policy.

However, analyzing such evidence, including the empirical evidence of the competitive effects of the Website Policy, Complaint Counsel has not demonstrated that Realcomp, despite having market power in the relevant market, unreasonably restrained or substantially lessened competition, thereby resulting in consumer harm. Discount brokers in the relevant market have been shown to viably compete without having to labor under

## Initial Decision

unreasonable, competitive disadvantages. EA listings are sufficiently accessible on public Internet sites and the Realcomp MLS, which continues to serve as the most important marketing vehicle for the sale of real estate in Southeastern Michigan and which offers near-maximum exposure for such listings.

The Realcomp Website Policy, which restricts dissemination of EA listings to the Approved Websites and the IDX, was implemented *inter alia*, to address the free rider problem of EA home sellers who sought to utilize the marketing benefits of such sites to compete with Realcomp cooperating brokers for buyers, without offering compensation or reciprocal benefits to the cooperative. In addition, it provided one limited efficiency of reducing the bidding disadvantage for buyers who are represented by a cooperating broker. Thus, the Website Policy is found to be a narrowly crafted, procompetitive justification for this concern and thus, reasonably necessary for the competitive needs of the association.

The evidence further indicates that consumers in the Realcomp Service Area can select from a wide-range of bundled or unbundled real estate brokerage services depending on their needs. As such, Complaint Counsel has not demonstrated that the Realcomp Website Policy has unreasonably restrained competition or resulted in consumer harm in violation of Section 5 of the FTC Act.

#### IV. CONCLUSIONS OF LAW

1. The parties have stipulated that Respondent is subject to the jurisdiction of the Federal Trade Commission. Joint Stipulations of Law and Fact, June 14, 2007 at 9.
2. The parties further stipulate that Realcomp is a corporation, as “corporation” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44; that Realcomp is engaged in commerce, as “commerce” is defined in Section 4 of the FTC Act, 15 U.S.C. § 44; and that Realcomp’s acts and practices have been or are in or affecting commerce, as “commerce” is defined in the FTC Act. *Id.* at ¶ 9. *See also Freeman v. San Diego Ass’n of Realtors*, 322 F.3d 1133,

## Initial Decision

1144 (9th Cir. 2003) (holding the MLS has a substantial effect on interstate commerce).

3. Under Commission Rule of Practice 3.43 (a), “[c]ounsel representing the Commission . . . shall have the burden of proof, but the proponent of any factual proposition shall be required to sustain the burden of proof with respect thereto.” (The APA further establishes the preponderance of evidence standard for formal administrative adjudicatory proceedings.)
4. The burden is on the antitrust plaintiff “to define the relevant market within which the alleged anticompetitive effects of defendant’s actions occur.” *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 962 (6th Cir. 2004).
5. Based upon established legal standards, the analysis provided by Complaint Counsel’s expert is sufficient to meet Complaint Counsel’s burden in defining the relevant market.
6. There are two relevant product markets shown in this case: (1) the market for residential real estate brokerage services; and (2) the market for the supply of multiple listing services to real estate brokers.
7. The relevant geographic market in this case is shown to be the four counties in Southeastern Michigan of Wayne, Oakland, Livingston and Macomb.
8. The traditional rule of reason analysis is the most appropriate standard for the Court to analyze the challenged policies in this proceeding.
9. To determine whether Complaint Counsel has established that Respondent’s actions violate Section 5 of the FTC Act, the issues to be determined are: (1) whether there was a contract, combination, or conspiracy; and (2) whether the contract, combination, or conspiracy unreasonably restrained trade. *Law v. NCAA*, 134 F.3d 1010, 1016 (10th

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Cir. 1998) (identifying elements of a violation of Section I of the Sherman Act).

10. Respondent has stipulated that it “is a combination of its members with respect to the policies at issue.” Joint Stipulations of Law and Fact at 10.
11. To determine whether the challenged practices unreasonably restrain trade, requires an evaluation of the nature of the challenged restraints. If such analysis indicates that the restraints are likely to be anticompetitive, a further determination of Respondent’s market power and the actual effects of the restraints on competition is made. Where effects are found or presumed, Respondent’s procompetitive justifications are considered as part of a net effects assessment.
12. With respect to the Website Policy, and the requirement that in order to be considered an ERTS listing, an agent must provide full brokerage services, the nature of the restraint is such that it is likely to be anticompetitive. This finding requires an expanded inquiry into whether competition was unreasonably excluded through a determination of Respondent’s market power and the competitive effects of the restraints.
13. With respect to the Search Function Policy, including the requirement that in order to be considered an ERTS listing, an agent must provide full brokerage services, it is evident that the nature of such restraint is *not* anticompetitive. No further analysis of the effects of such restraint need therefore be performed.
14. Realcomp has market power in the relevant market.
15. Assessing the effects on competition as a result of the Website Policy, the relevant evidence, including the empirical evidence, demonstrates that the challenged restraints have not unreasonably restrained trade as they have not been shown to substantially lessen competition by discount brokers in the relevant market or been shown to result in significant increased costs to consumers.

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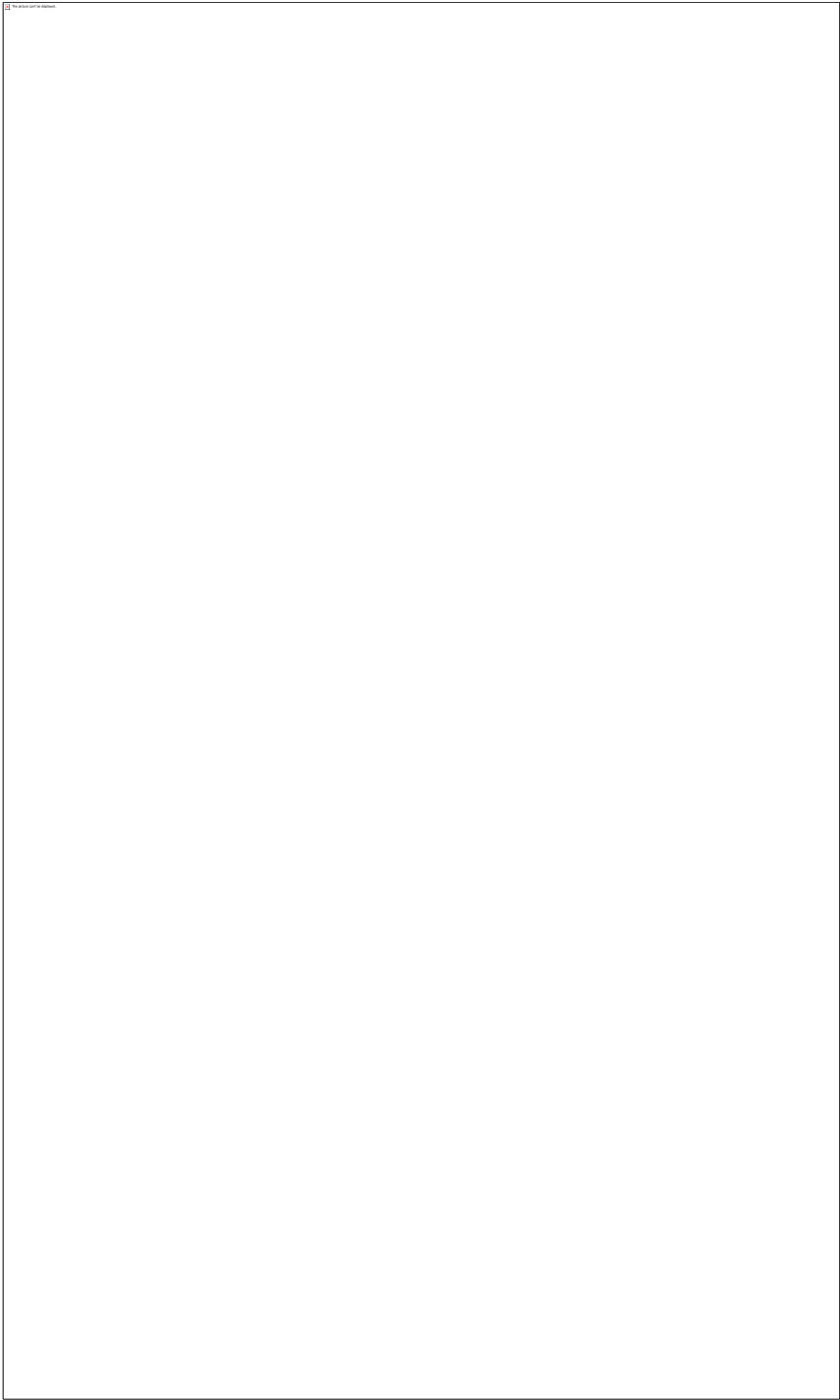
16. Although Complaint Counsel has not demonstrated significant competitive effects as a result of the Website Policy, it has shown Realcomp has market power in the relevant market. As such, if competitive effects could be presumed under an abbreviated review standard, the burden shifts to Respondent to show whether the challenged policies have a plausible, procompetitive justification.
17. A review of the evidence, including the empirical evidence, demonstrates that the Website Policy addresses a free rider problem by EA home sellers competing with Realcomp brokers for buyers and is, thus, plausibly procompetitive.
18. The Website Policy created a further, limited efficiency by addressing a bidding disadvantage problem that existed for Realcomp cooperating agents in competing with unrepresented home buyers for EA listed homes.
19. The Website Policy, to the extent it has been found procompetitive and efficient, is reasonably necessary to the competitive needs of the association and is narrowly tailored to that end.
20. Upon review of the totality of the evidence in this proceeding, it is determined that Complaint Counsel has not met its burden of demonstrating that the Realcomp Policies have unreasonably restrained or substantially lessened competition in the relevant market. As such, Complaint Counsel has not shown that such policies have resulted in actionable consumer harm in violation of Section 5 of the FTC Act.

**ORDER**

Accordingly, for the above-stated reasons, the Complaint in this proceeding is DISMISSED.

Initial Decision

**Attachment # 1**



Initial Decision





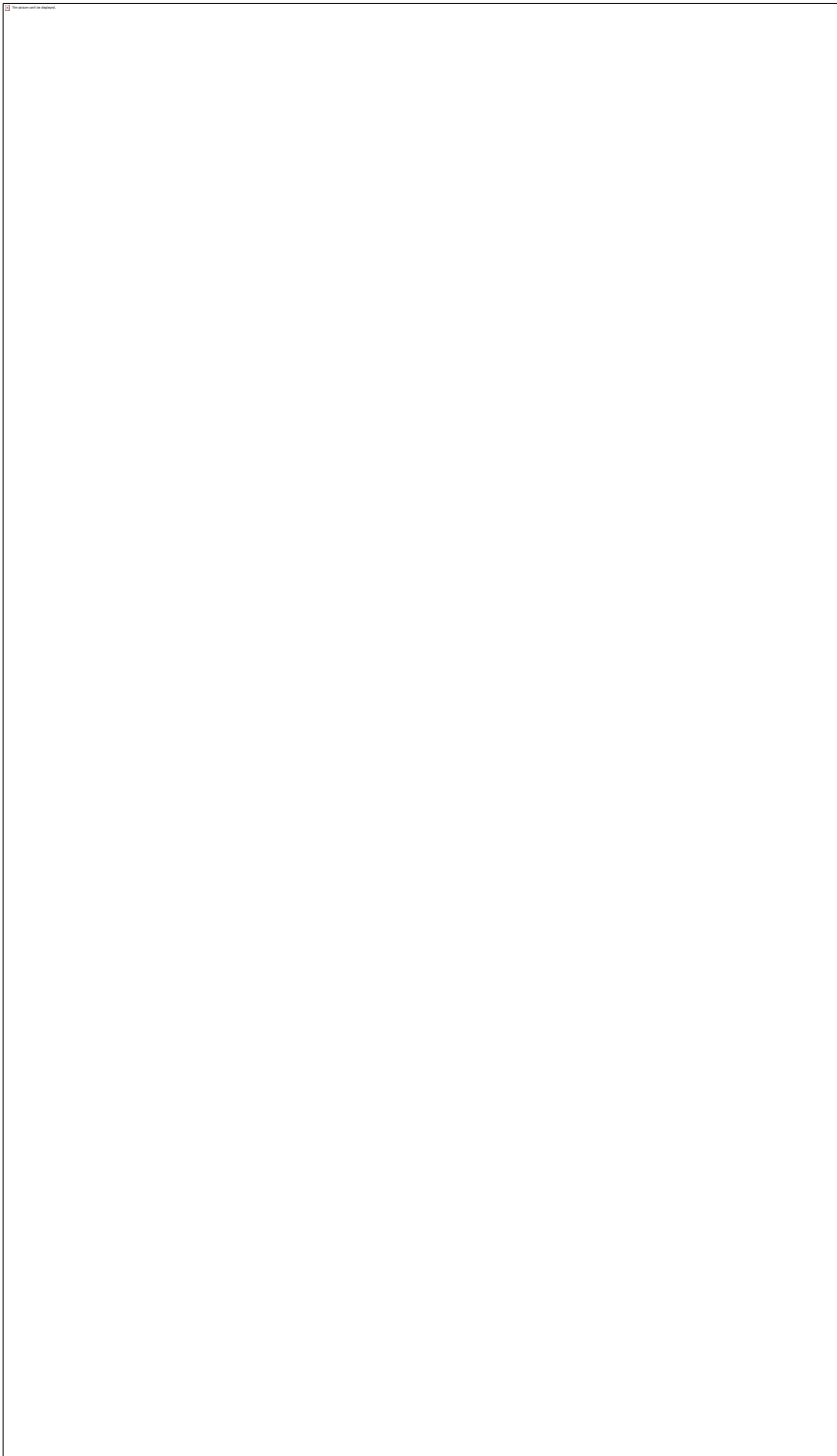
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Initial Decision



Opinion of the Commission

**OPINION OF THE COMMISSION**

By Kovacic, Commissioner, For A Unanimous Commission:

For many consumers, the purchase or sale of a home is one of life's most important and memorable experiences. Realty transactions often entail great financial stakes and summon the deepest personal emotions that accompany leaving a beloved dwelling or acquiring a place that one hopes will be a reassuring retreat from the press of a daily routine. These characteristics imbue the conveyance of residential real estate with extraordinary national significance.

In this matter the Commission returns to issues associated with the operation of an integral element of the U.S. real estate sector – the multiple listing service.<sup>1</sup> Here the Commission considers whether an association of real estate brokers with market power may adopt rules and practices that restrict the ability of members to offer consumers products that create “price pressure” on more expensive products that most of the association's members provide. In doing so, we continue the Commission's efforts to clarify the application of antitrust standards governing concerted action by competitors.

We find that the practices at issue improperly limit consumers' access to information about the availability of these lower-priced alternatives, and we conclude that the association's acts and practices unreasonably restrain trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. We reverse the

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<sup>1</sup> Real estate services, and the development of the multiple listing service, have occupied a substantial amount of the agency's attention as an adjudicatory tribunal and policymaking body in recent decades. Relevant FTC competition cases have included *Port Washington Real Estate Board, Inc.*, 120 F.T.C. 882 (1995); *Puget Sound Multiple Listing Service*, 113 F.T.C. 733 (1990); *Multiple Listing Service of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985). Noteworthy examples of the Commission's policy work include U.S. Department of Justice & Federal Trade Commission, *COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY* (Apr. 2007) (available at <http://www.ftc.gov/reports/realestate/V050015.pdf>); Federal Trade Commission, *THE RESIDENTIAL REAL ESTATE AND BROKERAGE INDUSTRY: LOS ANGELES REGIONAL OFFICE STAFF REPORT AND THE BUTTERS REPORT* (1983) (available at [http://www.ftc.gov/bc/realestate/work\\_shop/index.htm](http://www.ftc.gov/bc/realestate/work_shop/index.htm)).

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Initial Decision dismissing the complaint and enter a cease and desist order.

**I. Background**

Homes are not fungible commodities. Within a given price range in a specific geographic area, there can be many housing options. The array of possibilities concerning price, style, and location is so great that the search for the right match between the seller and the buyer requires considerable effort and knowledge. Most individuals engage a licensed real estate broker to guide them through the often daunting process of selling or buying a home. The conveyance of residential real estate is one of a number of transactions in which consumers turn to knowledgeable intermediaries to assist them in sorting through an abundance of complex information about product or service offerings. In real estate and other sectors that feature substantial information complexity, the contributions of, and competition among, expert intermediaries play crucial roles in helping consumers satisfy their preferences. Competition law has a major stake in seeing that rivalry presses expert intermediaries to improve the range of options from which consumers can choose.

Real estate brokers advise on marketing and sales strategy and, most important, provide access to the local multiple listing service (“MLS”). The MLS is a closed database system accessible only to member brokers and, in more limited form, to the general public through data feeds to various public websites. IDF 106, 117-118.<sup>2</sup> Each MLS listing includes details about the property for sale, (*e.g.*, the number of bedrooms and bathrooms, square footage), the type of listing agreement, and a description of the services provided by the listing broker, as well as an offer of compensation to any broker who procures a buyer for the property. IDF 109. The MLS enhances the sharing of information

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<sup>2</sup> We use the following abbreviations to refer to matters in the case record:

ID	Initial Decision
IDF	Initial Decision’s Findings of Fact
RPF	Respondent’s Proposed Findings of Fact
RRPF	Respondent’s Reply to Complaint Counsel’s Proposed Findings

## Opinion of the Commission

among its members and provides systematic, enforceable rules governing the sale of listed properties. IDF 103-105.

The development of the MLS has made major contributions to improvements in the economic performance of the real estate sector. The MLS is generally acknowledged to be a superior platform for matching home buyers and sellers. IDF 289, 432. Its effectiveness is unrivaled by other advertising methods, such as newspaper ads, flyers, and “For Sale” signs planted on a home’s front lawn. The MLS database itself, however, is not the only information-sharing product that real estate associations provide. The development of the Internet and the substantial increase in the number of broker websites have spurred these associations to create data feeds based on information the MLS contains. IDF 114, 117, 218. These data feeds are provided to certain websites available to the general public, though without all the information available in the MLS database. Through these data feeds, MLS associations today routinely supply home listing information to public websites, including their broker members’ own websites and to Realtor.com, the public website of the National Association of Realtors (“NAR”). IDF 117, 226. Buyers can access these websites, search for homes that meet their needs, and then either work with their own broker to pursue these leads or, if unrepresented by a broker, directly contact the seller’s broker.

The Internet and public access to MLS listings are not the only forces to change the real estate industry in recent years. In the traditional brokerage model, sellers pay approximately six percent of the sales price to their brokers. This amount usually is split between the seller’s broker and the broker who brings a buyer, or is kept entirely by the seller’s broker if the buyer is unrepresented. IDF 53, 54. Today the traditional model faces competition from brokers who discount their fees by offering lower commission rates, accept flat fees, or unbundle real estate services previously available only as a package. The limited service model offered by agents who unbundle their services is typically less expensive than the traditional model, and it allows consumers to customize a package of services that best fits their needs.

The changes sketched here illustrate how technological dynamism and organizational innovation can place enormous pressure on traditional business models and create possibilities for



## Opinion of the Commission

“the new commodity, the new technology, the new source of supply, the new type of organization”<sup>3</sup> that can transform markets. Because technological and organizational dynamism are powerful stimulants for economic progress, an especially important application of antitrust law is to see that incumbent service providers do not use improper means to suppress innovation-driven competition that benefits consumers.

Complaint counsel alleges that Realcomp II Ltd. (“Realcomp”) reacted to new forms of competition by adopting policies that (1) prohibited discount real estate broker listings from being distributed from Realcomp’s MLS to public websites and (2) limited the exposure of these listings on the closed MLS database. In the Complaint issued on October 10, 2006, the Commission alleged that Realcomp’s actions improperly restrained trade and competition in the provision of residential real estate brokerage services in southeastern Michigan and violated Section 5 of the FTC Act by:

- Prohibiting information about Exclusive Agency (EA) Listings and other forms of nontraditional listings from being transmitted from Realcomp’s Multiple Listing Service (MLS) to publicly accessible real estate Web sites;
- Excluding EA listings and other nontraditional listings from the default search setting in the Realcomp MLS; and
- Implementing a Minimum Service Requirement, which compelled brokers to provide full brokerage services in order to have their listing included in data feeds to public websites and the default search setting in the Realcomp MLS, and to gain access through Realcomp to publicly accessible real estate websites.

Complaint ¶¶ 13-16.

The Administrative Law Judge (“ALJ”), Stephen McGuire, held hearings over eight days in June 2007. He heard live testimony from eight witnesses and admitted into evidence

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<sup>3</sup> Joseph A. Schumpeter, CAPITALISM, SOCIALISM, AND DEMOCRACY 84 (1942).

## Opinion of the Commission

deposition testimony excerpts from 28 witnesses and over 800 exhibits. In an extensive Opinion issued on December 10, 2007, Judge McGuire found that Realcomp's policies did not violate Section 5 of the FTC Act, and he dismissed the complaint. ID 2, 126-129. Complaint counsel filed a timely appeal, and Respondent did not cross-appeal. Oral argument took place on April 1, 2008.

In hearing this appeal, we exercise *de novo* review of the facts and the law. We base our review on careful study of the record, Judge McGuire's initial decision, and the written and spoken presentations of the parties. For reasons set out below, we reverse the Initial Decision and enter a cease and desist order.

## II. Facts

We adopt the ALJ's findings of fact to the extent that they are not inconsistent with our Opinion.<sup>4</sup>

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<sup>4</sup> We note, however, that substantial portions of the section of the Initial Decision labeled as "Findings of Fact" actually represent inferences that the ALJ drew from the facts or his opinions or legal conclusions. We adopt some, but not all, of those inferences, opinions and conclusions. *See infra*, note 11. As discussed below, we conclude that many of the ALJ's conclusions are inconsistent with governing law, established antitrust policy, or economic logic. We explain the basis for our disagreement with such conclusions in Section V of this Opinion.

Thus, for example, we decline to endorse the section headings in sections II.G, II.H, or II.I of the Initial Decision, which are argumentative in tone and appear to represent the ALJ's opinions or conclusions rather than findings of fact. *See, e.g.*, ID at 64 (§ II.H.3, "Complaint Counsel's Expert's Testimony on Non-ERTS Share is Flawed"); *compare* Section V.D.2, *infra* (explaining why the ALJ's analysis of the expert economic and econometric testimony was faulty and unsound). We also decline to endorse the purported "findings of fact" in certain numbered paragraphs that contain the ALJ's inferences or conclusions, rather than statements of fact. *See, e.g.*, IDF 442-443 (characterizing certain costs as "nominal" rather than simply stating the amount of such costs); IDF 511 (according "little weight" to complaint counsel's expert's opinion because, in the ALJ's view, certain of the methodologies he used were "flawed"); IDF 601 ("Realcomp's Website Policy has procompetitive effects \* \* \*").

In addition, the findings of fact in many of the numbered paragraphs in the Initial Decision – especially those in section II.H of the Initial Decision – summarize the opinions expressed or analysis conducted by an expert witness.

## Opinion of the Commission

***Real Estate Brokers/Agents***

A real estate broker is a licensed real estate professional who acts as a representative for either a home buyer or a home seller, and who is authorized to engage in the sale of real estate and provides services in conjunction with the sale. A real estate agent is a licensed real estate professional who works for, or under the supervision of, a real estate broker. IDF 3-4.<sup>5</sup>

More than 80 percent of homeowners hire a real estate broker to assist with some or all tasks associated with the typical real estate transaction. IDF 13. A residential real estate transaction usually involves two brokers: (1) a “listing broker,” whom the home seller retains and; (2) a “cooperating broker,” who assists home buyers. IDF 18.

***Listing Broker Services and Agreements***

A listing broker may provide a wide variety of services to a home seller. Among other activities, the listing broker may determine the home’s initial asking price, show the property to prospective buyers, present and explain purchase offers to the seller, list the home on a multiple listing service, advertise the listing on the Internet, hold open houses, put a “For Sale” sign in the yard, and assist the home seller with the closing of the sale. IDF 21.

The contract between a listing broker and a home seller is called a “listing agreement.” This contract defines the relationship between the listing broker and the home seller. The listing agreement usually specifies the contract’s duration and the

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We adopt those findings to the extent that they simply summarize such testimony or analysis, but without any implication that we endorse such opinions or analyses. *See, e.g.*, IDF 482 (“Realcomp’s antitrust economic expert, Dr. Eisenstadt testified 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.”). We accept this as an accurate factual summary of what Dr. Eisenstadt said, but we do not necessarily endorse the conclusion he expressed.

<sup>5</sup> Because a real estate agent is the broker’s agent, this Opinion does not refer separately to real estate agents.

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compensation to be paid to the listing broker. A listing contract typically includes an offer of compensation to any cooperating broker who obtains a buyer for the home. IDF 24-25. Listing agreements use different ways to pay listing brokers. Some agreements specify a commission based on a percentage of the home's selling price to be paid at closing. Others provide a flat fee paid at the time the listing agreement is signed. Still others use a combination of these methods. IDF 28.

Most compensation arrangements are commission-based. Full service listing brokers in Realcomp's service area typically charge a commission rate of approximately six percent of a home's selling price. IDF 53, 67. The offer of compensation to a cooperating broker commonly calls for the listing broker to share the commission with the cooperating broker. Although the home seller usually is responsible for paying the listing broker's brokerage commission, a home buyer bears part of the cost of the brokerage fee to the extent that the sale price of the home incorporates some or all of the commission. IDF 30.

This case focuses on two types of listing agreements. The first is an Exclusive Right to Sell ("ERTS") listing agreement. This type of agreement requires a home seller to appoint a real estate broker as the seller's exclusive agent for a designated time to sell the property on the seller's stated terms. IDF 50, 51. The seller agrees to pay the broker a commission when the property is sold, whether the sale occurs through the efforts of the listing broker, the owner, or another broker, or even if a buyer independently approaches the seller. IDF 51. Traditionally, brokers offering ERTS listings provide a full set of real estate brokerage services. These services are "bundled" in the sense that sellers must buy the entire package; sellers cannot customize contracts to pick and choose among the services offered. IDF 52.<sup>6</sup>

The second type of listing agreement is an Exclusive Agency ("EA") agreement. Under an EA listing, the listing broker acts as the seller's exclusive agent, but the seller reserves the right to sell

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<sup>6</sup> We refer to brokers offering ERTS listings as "full service brokers" and call their listings "full service listings."

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the property without further assistance from the listing broker.<sup>7</sup> IDF 58. An EA listing agreement calls for an initial, nonrefundable payment – in many instances, \$500 – to the listing broker. The seller owes the listing broker nothing more if a buyer approaches the seller directly without a cooperating broker’s assistance. IDF 60. With an EA listing, the seller need not pay for the services of a cooperating broker when an unrepresented buyer purchases the property. IDF 59. EA sellers are, however, obligated to pay cooperating brokers who procure a buyer for the home. Unlike ERTS brokers, brokers who offer EA contracts often provide an unbundled menu of brokerage services from which the home seller may choose. IDF 62. These contracts meet a “consumer demand for lower cost brokerage services where consumers are willing to carry out some of the homeselling tasks themselves that otherwise would be performed by real estate professionals.” CX 533-041. In general, EA listings and other unbundled services offered by limited service brokers offer consumers a low-cost alternative to traditional brokerage services. IDF 69.

One variant of the ERTS listing -- the flat-fee ERTS -- resembles the EA listing in some respects. The flat fee ERTS compensates the listing broker with a fixed fee, rather than a commission based on a percentage of the selling price. The fee set in a flat fee ERTS agreement ordinarily is higher than the fee established in an EA listing. For example, AmeriSell Realty charges \$200 more for a flat-fee ERTS listing than for a non-ERTS listing. IDF 57. As mentioned below, flat-fee ERTS listings offer 3 percent compensation to a cooperating broker who procures a buyer for the property. IDF 54.

***Cooperating Brokers***

A cooperating broker works with consumers who are interested in buying a home. IDF 31. Cooperating brokers assist the buyer in a number of ways. They search an MLS for homes that meet the buyer’s criteria, they tour homes and neighborhoods, and, once the buyer finds the right home and reaches an

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<sup>7</sup> We refer to brokers offering EA listings as “limited service brokers” and to their listings as “limited service listings.”

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agreement to purchase that home, they assist the buyer during the closing of the sale.

The listing broker ordinarily pays the cooperating broker. Regardless of the listing's form (ERTS or EA), the listing broker makes an offer of compensation to any cooperating broker who finds the buyer who purchases a house which the listing broker has offered. IDF 40, 43, 45-46, 193-194. The offer of compensation is unconditional, other than requiring the cooperating broker to find the buyer who purchases the house. IDF 42. Under a traditional ERTS listing, the listing broker's commission is bundled with the cooperating broker's commission. IDF 77. Thus, a sale of a home listed under an ERTS agreement and involving a cooperating broker would require the seller to pay a six percent listing commission; the listing broker would retain three percent and would pay the cooperating broker three percent. IDF 54. If no cooperating broker is involved in the transaction, the listing broker retains the entire six percent commission. IDF 55, 52. In contrast, home sales involving EA or flat-fee ERTS contracts require home sellers to pay a commission only if a cooperating broker finds the buyer who purchases the house. IDF 78. No additional commission or compensation is due to the listing broker under an EA or flat-fee ERTS agreement. IDF 60.

EA listings and flat-fee ERTS listings thus differ in an important respect when the seller obtains a buyer without the intervention of a cooperating broker. Under an EA listing, the seller pays the listing broker only the fixed fee negotiated in the listing agreement. The EA listing broker does not receive the commission that otherwise would have been paid to the cooperating broker. By contrast, under an ERTS flat fee arrangement, the listing broker absorbs the commission that would have been paid to a cooperating broker had the seller not procured the buyer through the seller's own efforts.

***A Multiple Listing Service ("MLS")***

As noted above, an MLS is an information sharing service that provides data about homes listed for sale by its member brokers within a geographic area. IDF 102-110. MLS listings contain details about a property's features, an offer of compensation to a cooperating broker, and other information concerning the

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purchase and sale of a home. IDF 109. By centralizing this information, the MLS makes the marketplace for homes more efficient and orderly. IDF 103, 105.

The creation of the MLS system has been one of the most significant competitive developments in the real estate industry. IDF 428. It is the most effective marketing tool and substantially more important than any other method of promoting the sale of residential real estate in southeastern Michigan. IDF 430. An MLS exposes listings to all other MLS members, “dramatically increasing” the listing brokers’ marketing reach. RX 154-A-026-027; Sweeney Tr. 1315 (the MLS provides “a huge buyer stream available” for brokers’ listings).

The Realcomp MLS accepts listings of all kinds, whether limited service or full service. IDF 181. Realcomp does not, however, provide equivalent services for the different types of listings. Realcomp’s Search Function Policy excluded EA listings from the default MLS search results. IDF 364. Realcomp’s Website Policy also excludes EA listings from data feeds to public websites. IDF 349-350.

Realcomp requires that all listings contain an offer of compensation to cooperating brokers, although it does not require that a cooperating broker be involved in a home sale. IDF 190, 193.

The MLS is an example of what economists call two-sided markets with network effects. IDF 620-628. In this framework, the MLS product is a “platform” for which there are two types of users. Each group of users regards the platform as more desirable if the platform succeeds in attracting the other category of users. “Network effects” are present when a product’s value to a purchaser depends on the number of other users. As we will see later in this Opinion, the value of an MLS increases as the number of properties listed on the MLS grows.

***Public Websites, Including IDX Websites***

In addition to operating a closed database of information about properties for sale listed by its members, an MLS ordinarily disseminates listing information to certain websites that members

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of the public can search. IDF 114, 218-221. Publicly available websites include NAR's Realtor.com, websites operated by the local MLS association itself, and member broker and agent websites, known as Internet Data Exchange ("IDX") websites. IDF 211. Using an IDX feed, broker websites can display listing information from their local MLS database. This practice allows consumers to visit the broker's website and search for properties listed for sale by all participating MLS members. IDF 120.

Not all listing information available in the MLS is provided in its feeds to public websites. Realcomp's IDX feeds, for example, do not provide information about the type of listing agreement under which a home is being sold (whether ERTS or EA), and the offer of compensation may also be omitted. IDF 116. A central focus of this case is Realcomp's practice of excluding EA listings completely from its IDX feeds to public websites.

***Realcomp***

Respondent Realcomp is a corporation organized, existing and doing business under, and by virtue of, the laws of the state of Michigan. Realcomp was founded in November 1993 and began doing business in January 1994. Its office and principal place of business are located in Farmington Hills, Michigan. IDF 132-134. Realcomp has over 2200 office members in Southeastern Michigan and a total of approximately 14,000 members. IDF 157-158. Realcomp is the largest MLS in Michigan and counts almost half of all realtors in Michigan as members. IDF 159. Realcomp's members consist of real estate brokers and real estate agents who compete with one another to provide residential brokerage services to customers. Most Realcomp members are full service brokers and their agents. IDF 90-91, 158.

Realcomp is currently owned by seven shareholder realtor boards and associations, each of which in turn consists of competing realtor members. IDF 136, 138. Realcomp's business and affairs are conducted by its Board of Governors, whose members are selected by the shareholder boards and associations. IDF 140. Each Realcomp Governor must be a realtor, and one Governor from each shareholder must be "actively practicing real estate." IDF 141.



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Realcomp serves a region within southeastern Michigan that includes Livingston County, Oakland County, Macomb County and Wayne County. IDF 175. Realcomp permits agents who offer discount services to become Realcomp members. All Realcomp members, including brokers and agents who offer limited services, pay the same fees to Realcomp. IDF 164, 176-177.

***Realcomp's Services***

Realcomp's primary member service is its MLS. IDF 179. The Realcomp MLS online system allows members access to the Realcomp MLS from any computer with Internet access. IDF 180. A key benefit of the Realcomp MLS is access to Internet advertising on "Approved Websites," which include MoveInMichigan.com, Realcomp's own site; IDX participant websites; and Realtor.com. IDF 210, 218, 231. Realcomp MLS listings also appear on ClickOnDetroit.com, a website operated by a television station which "frames," and takes its data exclusively from, MoveInMichigan.com. IDF 211, 237-240.

***Importance of Realcomp's Approved Websites***

In today's commercial environment, the Internet is vital to the marketing and sale of homes, and thus to brokers' earning of commissions. IDF 218; Murray Tr. 145-46, 206; RX 154-A-035 (explaining that the Internet has "revolutionized" the real estate brokerage industry). The Internet is the leading source of information to consumers when buying or selling a home. According to Realcomp's Chief Executive Officer, Karen Kage, the "majority of home buying and selling now begins on the Internet," so "[i]f you miss that consumer connection, you miss a lot of potential commissions and fees." CX 221-001. Most home buyers and sellers want to be able to search for homes on the Internet before they engage in a transaction. IDF 220. Realtors benefit from having their listings shown on the Realcomp Approved Websites, and sellers benefit from the additional exposure their listings gain. IDF 219; CX 254-02. Many Realcomp members advertise their ability to market homes on the Internet to potential home sellers. CX 357; CX 310-006, 013; CX 287; CX 43 (Hardy Dep.), at 80-81, 82-83; CX 288-001; CX 40 (Elya Dep.), at 30-32; CX 109-001.

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At the request of its broker members, Realcomp began offering its members the option of providing IDX feeds of MLS listing information to public real estate websites. IDF 223, 225. Eighty-two percent of Realcomp's members authorized their listing data to be included in the IDX feed. IDF 354. Ninety-one percent of broker websites contain searchable property listings, and those sites obtain their information about other broker's listings from IDX feeds. IDF 121.

No other MLS in Southeastern Michigan provides the geographic reach or membership size of Realcomp. IDF 159. Realcomp emphasizes the importance of its data feeds, including Realtor.com, MoveInMichigan.com, and, through MoveInMichigan.com, ClickonDetroit.com. IDF 221-222, 232, 234-235. One Realcomp document describes how Realcomp's MLS enables listing brokers to reach: (1) approximately 15,000 Realcomp MLS subscribing realtors; (2) millions of Internet users shopping for homes on MoveInMichigan.com, Realtor.com, and the Realcomp IDX websites; and (3) over 1,250,000 cable TV viewers in approximately 350,000 households subscribing to Comcast's Digital Cable-TV in Southeastern Michigan. CX 272.

Public websites provide great value to an MLS, its member brokers, and consumers. Marketing homes on certain key websites, such as MoveInMichigan.com, Realtor.com, and IDX websites, is "significant to a broker's ability to compete effectively because it exposes homes for sale to potential buyers who are now using the Internet as an integral part of their home search." RX 154-A-005; Murray Tr. 210-13 (explaining that the Realcomp IDX feed is significant because it feeds the websites "where the buyers are"). A paper prepared in 2006 by NAR explains that "[t]he brokerage firm of the future will need to embrace the realities of the new world order and learn to convert internet leads to paying customers in order to compete effectively." CX 380-008. Median brokerage firms derive 7 percent of their actual sales from leads generated by the firms' website, a "big chunk of business" to be derived from one marketing channel. Murray Tr. 218-19.

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***The Realcomp Policies***

Beginning in 2001, in response to entry by limited service brokers into its service area, Realcomp adopted a set of policies relating to the exposure of certain listing data available through its MLS. Realcomp first adopted a Website Policy, which prohibited the distribution of limited service listings from the Realcomp MLS to Approved Websites – i.e., Realtor.com, MoveInMichigan.com (and, through it, ClickOnDetroit.com), and the IDX. IDF 349-355. Realcomp began active enforcement of the Website Policy in 2004, after Realcomp had adopted its Minimum Service Requirement and amended a third policy, the Search Function Policy, to exclude discount listings from the default search results for those directly accessing the Realcomp MLS. IDF 355, 361-363, 372-374.

The Website Policy remains in place. Realcomp enforces the Policy with a range of penalties that includes fines of up to \$2,500 for each violation, lengthy suspension from the MLS, and expulsion from Realcomp. IDF 380-387; CX 6-014; CX 7-015.

In 2003, Realcomp adopted the “Search Function Policy.” By this measure, the default setting on the Realcomp MLS searched only full service listings and listings classified as “unknown.” IDF 361. Realcomp amended its policy manual in 2004 to require members to identify the listing type in their MLS submissions, which eliminated the “unknown” category of listings. Under the amended Policy, Realcomp refused to accept a listing into the Realcomp MLS unless the type of listing was specified. IDF 372-373. In other words, the default settings excluded properties listed by limited service brokers.

The Search Function Policy remained in place until April 2007. IDF 370. Until then, in order to see all of the available listings typed into Realcomp’s MLS (*e.g.*, EA or non-ERTS listings), Realcomp members needed to select the specific listing types they wished to see or to choose the button labeled “select all listings.” IDF 363. Thus, a broker who wished to see EA listings needed either to select “all listings” or the “EA listings” button. IDF 364. If a broker did not wish to see ERTS listings, the broker needed to de-select the “ERTS listings” button. IDF 364.

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Until April 2007, Realcomp also had a Minimum Service Requirement, which compelled brokers who listed properties to provide full brokerage services in order to qualify their listing as an ERTS listing. IDF 374-375. Until then, brokers had to provide all of the following services in order for a listing to be considered an ERTS listing: (1) arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) accept and present to the sellers offers to purchase procured by cooperating brokers; (3) advise the sellers as to the merits of the offers to purchase; (4) assist the sellers in developing, communicating, or presenting counteroffers; and (5) participate on behalf of sellers in negotiations leading to the sale of listed property. IDF 66.

The combined effect of Realcomp's three Policies was to limit exposure of EA listings to brokers searching the MLS for homes to present to potential buyers, and to consumers searching public websites for homes to purchase. The Search Function Policy operated to suppress EA listings from the MLS's default search results and thus limit their exposure to brokers. IDF 361, 364. In conjunction with the Minimum Service Requirement, the Search Function Policy also operated to exclude all brokers who did not have full service listings from disclosure on the MLS default setting. IDF 363, 374. In conjunction with the Minimum Service Requirement, the Website Policy excluded brokers without an exclusive right to sell from exposure, through Realcomp, to the general public through publicly available websites such as Realtor.com, MoveInMichigan.com, and broker websites. IDF 349-350, 374.

***The National Association of Realtors***

Beginning in 2001, in response to entry by limited service brokers into its service area, Realcomp adopted a set of policies relating to the exposure of certain listing data available through its MLS. Realcomp first adopted a Website Policy, which prohibited the distribution of limited service listings from the Realcomp MLS to Approved Websites – i.e., Realtor.com, MoveInMichigan.com (and, through it, ClickOnDetroit.com), and the IDX. IDF 349-355. Realcomp began active enforcement of the Website Policy in 2004, after Realcomp had adopted its Minimum Service Requirement and amended a third policy, the Search Function Policy, to exclude discount listings from the

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default search results for those directly accessing the Realcomp MLS. IDF 355, 361-363, 372-374.

In November 2006, Realcomp's Board of Governors tried unsuccessfully to persuade NAR to postpone its rule change. IDF 424; CX 233, 234, 235. The Realcomp Board argued that, without the Website Policy, the MLS would become a public utility. IDF 424-425. NAR rejected Realcomp's request and responded that including EA listings on the IDX feeds would not detract from the purpose of an MLS. IDF 426. Nonetheless, in April 2007, the Board voted against adopting NAR's new IDX policy. IDF 423.

***The Relevant Product and Geographic Markets and Market Power***

There is no dispute in this appeal about the dimensions of the relevant market and Realcomp's significance within the relevant market. There are two relevant product markets in this case. The first consists of the supply of residential real estate brokerage services, in which Realcomp's broker members compete. IDF 285-286. The ALJ's decision referred to these services as the output market. The second relevant market consists of multiple listing services; Realcomp is a participant in this market. *Id.* The MLS is a vital input into the supply of residential real estate brokerage services.

The relevant geographic market in both product markets is local. It consists of four Michigan counties: Oakland, Livingston, Macomb, and Wayne. IDF 321, 328.

The ALJ determined that, within the relevant market, Realcomp enjoyed market shares that courts traditionally have relied upon to infer the presence of market power. ID 84-85; IDF 340-348. The ALJ also found that high barriers to entry protected Realcomp's market position. ID 85; IDF 329-338. Realcomp's position also is reinforced by "network effects" inherent in the cooperative nature of an MLS. The value or quality of the service to each MLS user rises as the number of other users of the MLS

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service increases. ID 85; IDF 305-310.<sup>8</sup> For these reasons, Judge McGuire concluded that Realcomp has “substantial market power” in the relevant market for multiple listing services. ID 84-85, 97. In this appeal, Realcomp does not contest the ALJ’s finding that the association has substantial market power in the relevant markets. Oral Argument Tr. 72-73.

***Competitive Pressure Exerted by Limited Service Brokers***

Real estate brokers compete to obtain listings and to represent home buyers. IDF 79. Brokers offering limited services and brokers offering traditional full services compete with one another for new listings. IDF 81. Limited service brokers are a fairly new and increasingly important form of competition in the real estate industry. RX 154-A-015-16; CX 534-039, 041. Brokers offering unbundled services (limited service brokers such as those using EA listing agreements) offer a low cost alternative to consumers of residential real estate brokerage services and put “price pressure” on full service brokerage commissions. IDF 69, 99. In effect, the limited brokerage service model allows home sellers to buy a subset of the full range of brokerage services while supplying other services by themselves. IDF 69, 72. Limited service brokers compete not only by unbundling listing services, but also by unbundling the commission structure. Sellers using a limited service broker can save significantly on the price of a commission. IDF 75-78.

Limited service brokerages grew from a 2 percent nationwide market share in 2003 to a 15 percent share in 2005, an increase partly attributable to the use of the Internet. IDF 90, 92. NAR explained that “a growing percentage of consumers are asking agents to reduce their commissions. This has been sparked by awareness of discounted online and limited-service models, and remains a challenge for full service agents.” IDF 100-101.<sup>9</sup>

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<sup>8</sup> Realcomp highlights to consumers the “market power and benefits of Multiple Listing Service.” CX 78-003.

<sup>9</sup> The ALJ found that the nationwide market share of limited service brokers fell in 2006 to about 8 percent, which he attributed to a softening of the housing market. IDF 91, 96. His finding rested principally on the opinion of a single full service broker. It is not so evident to us that a softening of the housing market would necessarily yield this result. A number of brokers

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**III. The Initial Decision**

The ALJ found that Realcomp had substantial market power in the supply of multiple listing services to real estate brokers in southeast Michigan, and stated, with respect to Realcomp's Website Policy and Minimum Service Requirement, that "the nature of the restraint is such that it is likely to be anticompetitive." ID 97, 128. The ALJ did not find that the Search Function Policy was likely to have an anticompetitive effect. *Id.* Despite his findings that Realcomp possessed substantial market power and that two of Realcomp's policies likely had anticompetitive effects, the ALJ ruled that Realcomp's practices did not violate Section 5 of the FTC Act and dismissed the complaint.

In reaching his conclusion about Realcomp's behavior, the ALJ rejected the use of any abbreviated rule of reason analysis. He declined to apply the analytical framework that the Commission articulated, and which the Court of Appeals endorsed, in *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005). ID 89. The ALJ instead conducted what he called a "traditional rule of reason analysis" and required complaint counsel to provide proof of "actual competitive effects." ID 90. On the basis of that "expanded inquiry," ID 97, the ALJ concluded that "the challenged restraints have not substantially lessened competition by discount brokers in the relevant market or harmed consumers, by either depriving them of choice or resulting in significantly increased economic costs." ID 98.

In requiring a more elaborate rule of reason analysis, the ALJ distinguished the use of truncated analyses in prior MLS cases on the ground that they involved membership requirements or other restrictions that entirely excluded discount brokers from the MLS.

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(including that very same full service broker) testified that, in a softening housing market, the demand for limited service brokers can be expected to increase as home sellers try to save on commissions by finding a buyer themselves. IDF 97-98. If the nationwide market share of limited service brokers actually declined after 2005, it is at least as plausible that any such decline reflects the fact that, before November 2006, NAR permitted members like Realcomp to adopt policies of the type challenged in this case. IDF 418-419.

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The ALJ emphasized that Realcomp's Policies do not entirely exclude discount listings from the MLS service. ID 88-89.

The ALJ also expressed skepticism that the Commission's *Polygram* framework was generally accepted among courts outside the D.C. Circuit. ID 89. He also interpreted *Polygram* to apply only to express agreements by co-venturers to cease price competition on products outside the joint venture. The ALJ characterized the restraints imposed by Realcomp as non-price in nature and therefore not governed by the *Polygram* approach. *Id.*

Proceeding under what he described as a full rule of reason analysis, the ALJ concluded that Realcomp's Policies did not violate Section 5 of the FTC Act because complaint counsel had not proven that the challenged Policies had an actual adverse effect on competition. ID 97-119, 126-27. In particular, the ALJ concluded that, despite some competitive disadvantages, limited service brokers can and do market their listings to the public in the Realcomp service area, without having direct access to Realcomp's Approved Websites. Further, the ALJ found that sellers who could not obtain access through Realcomp to Realtor.com could dual-list their listings with other MLSs and gain access to Realtor.com with relatively nominal cost and administrative effort. ID 101-03.

The ALJ found that any reduction in discount brokers' business could be attributed to local economic conditions and national trends, and not necessarily to Realcomp's Policies. ID 103-04. He said that expert testimony demonstrated no significant anticompetitive effects resulting from Realcomp's Policies. He was not persuaded that any of the three analyses performed by Dr. Darrell Williams, complaint counsel's economic expert, supported a finding of adverse effects. ID 105-19.

The ALJ also accepted two of Realcomp's proffered justifications for its Policies.<sup>10</sup> According to Realcomp, the

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<sup>10</sup> The ALJ correctly found without merit Realcomp's claim that, aided by the two-sided nature of the MLS platform, Realcomp's Policies can be expected to result in an efficiency-enhancing increase in its MLS participation. ID 123-24. Realcomp had argued that because listing brokers will have more demand for an MLS that attracts more cooperating brokers, its Policies promote a more efficient MLS because they are expected to result in more participation



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Policies addressed a free rider problem stemming from competition between home sellers using EA listings and cooperating agents. The ALJ accepted this argument. ID 120-23. According to the ALJ, allowing EA listings to be distributed to public websites and to appear on the default MLS search results would allow home sellers who were not Realcomp members to avail themselves of Realcomp's advertising services without paying dues or other fees to Realcomp, thus "free riding" on the cooperative efforts of Realcomp's member brokers.

The ALJ also agreed that the Realcomp Policies eliminated a "bidding disadvantage" faced by home buyers represented by cooperating brokers when bidding against an unrepresented home buyer for a home sold under an EA listing. ID 124-25. Because a home seller selling a home under an EA listing must pay a commission to the represented buyer's broker but not to the unrepresented buyer, all other things being equal, the seller is more likely to sell the home to the unrepresented buyer in order to save the cost of the commission.

Finally, the ALJ concluded that the restraints were narrowly tailored to address the problems raised by EA listings. ID 125-26. According to the ALJ, the restraints did not deny membership to EA brokers or prevent EA listings on the MLS and thus did not deprive them completely of Realcomp's services. Furthermore, the ALJ found the restraints reasonably necessary to support the cooperative nature of the MLS.

#### **IV. Question Raised on Appeal**

Complaint counsel argues that Realcomp's Policies are by their nature anticompetitive and, in combination with Realcomp's

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by cooperating brokers. The ALJ rejected this reasoning, first because the evidence shows that most brokers compete as both listing and cooperating brokers, so that each Realcomp member is typically operating on both sides of that two-sided market. Moreover, the ALJ rejected Realcomp's assumption that EA listings will result in fewer cooperating brokers, because the evidence shows that EA brokers bring in more listings, which should be more attractive to an MLS. ID 124. Realcomp did not pursue this argument on appeal.

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market power, are likely to harm competition and are unlawful under the Rule of Reason. We address this question *de novo*.<sup>11</sup>

## V. Analysis

### A. Summary of Analysis and Conclusions

In assessing whether the challenged Realcomp Policies violate Section 5 of the FTC Act, we follow the authoritative direction of the Supreme Court under Section 1 of the Sherman Act in a long series of cases culminating in *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999).<sup>12</sup>

Although the methodological instruction of those cases is clear, lower courts, scholars, and agencies have not always been consistent in the terminology they have used to describe the methodology laid out by the Supreme Court. In Section V.B., therefore, we review the case law and methodology we rely on in this Opinion.

We then analyze the Realcomp Policies using several related, although distinct, variations of the antitrust “rule of reason.” In Section V.C., we consider whether the Realcomp Policies can be

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<sup>11</sup> The *de novo* standard of review with regard to findings of facts and inferences drawn from those facts, as well as conclusions of law, is compelled by the Administrative Procedure Act, 5 U.S.C. § 557(b), and the FTC Act, 15 U.S.C. § 45(b) & (c). Consistently, the Supreme Court has confirmed that, unlike the standard that applies to courts of appeals reviewing district courts’ factual decisions, an agency has plenary authority to reverse ALJ decisions on factual as well as legal issues, including factual findings “based on the demeanor of a witness.” *FCC v. Allentown Broadcasting Corp.*, 349 U.S. 358, 364 (1955). Moreover, under the Administrative Procedure Act, the “highly deferential standard of review is not altered merely because the [Agency] disagrees with the ALJ, and [the courts] defer to the inferences that the [Agency] derives from the evidence, not to those of the ALJ.” *Varnadore v. Sec’y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998) (citations omitted). See also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 494 (1951).

<sup>12</sup> The Commission’s authority under Section 5 of the FTC Act extends to conduct that violates the Sherman Act. See, e.g., *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *Fashion Originators’ Guild of America, Inc. v. FTC*, 312 U.S. 457, 463-64 & n.4 (1941); *California Dental*, 526 U.S. at 762 n.3. In the case at hand, our analysis under Section 5 is the same as it would be under Section 1 of the Sherman Act.

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condemned under the “inherently suspect” mode of analysis. We conclude that they can be -- in part because they closely “resemble[] practices that \* \* \* [the Supreme] Court has in the past stated \* \* \* are unlawful *per se*.” *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986). We also consider in that section the “procompetitive justifications” that Realcomp offers in support of its Policies--a critical issue that must be addressed under either the “inherently suspect” analysis or one of the forms of rule of reason that considers anticompetitive effects. We assess whether those purported justifications are legitimate (*i.e.* “cognizable” and “plausible”); whether they are supported by evidence in the record; and whether the restraints they impose are a reasonably necessary means to achieve a legitimate, procompetitive end. We conclude that Realcomp has failed to satisfy its burden and that its proffered justifications are unconvincing. Nonetheless, we do not rest our decision solely upon the “inherently suspect” methodology. In Section V.D., we consider the anticompetitive effect of the challenged Policies on the relevant markets under a more elaborate rule of reason framework. The Supreme Court has instructed that such effect can be established either by evaluating market power, the nature of the conduct, and the characteristics of the market, or through direct evidence of effect. Accordingly, in Section V.D.1. we assess the first type of evidence, and in Section V.D.2. we consider the second.

Our conclusion, based on the rule of reason analytical framework summarized in the following section, is that the Realcomp Policies constitute unreasonable restraints on competition and are not justified by countervailing procompetitive considerations. Accordingly, we conclude that the Policies violate Section 1 of the Sherman Act and therefore Section 5 of the FTC Act, and we issue an order enjoining these practices. The remedy we adopt is discussed in Section VI below.

## **B. Overview of the Rule of Reason**

The Supreme Court’s development of the rule of reason – from *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), through *Indiana Federation*, to *California Dental* – has been extensively recounted in this Commission’s and the D.C. Circuit’s decisions in the *Polygram* case. See 136 F.T.C.

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at 325-52; 416 F.3d at 33-37. We do not repeat that history in detail here. For present purposes, two major features of the Court's modern jurisprudence stand out. First, the Court has generally distinguished between practices deemed "*per se* unlawful" because of their "pernicious effect on competition and lack of any redeeming virtue," *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5 (1958), and those that require more detailed analysis.<sup>13</sup> Second, in evaluating restraints that require more detailed analysis, the rule of reason calls for "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," with the aim of reaching "a confident conclusion about the principal tendency of a restriction." *California Dental*, 526 U.S. at 781. Thus, the Court has generally "backed away from any reliance upon fixed categories and toward a continuum." *Polygram v. FTC*, 416 F.3d at 35.

The Court's two most recent cases that explore this issue -- *Indiana Federation* and *California Dental* -- warrant further elaboration, because their teachings provide the foundation for our analysis in the present case. *Indiana Federation* concerned a group of dentists who agreed to withhold x-rays from dental insurance companies that requested their use in benefits

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<sup>13</sup> Even with respect to restraints that superficially appear to be *per se* unlawful, the Court has been open to efficiency justifications that might call for rule-of-reason treatment, observing that "there is often no bright line separating *per se* from Rule of Reason analysis." *California Dental*, 526 U.S. at 779 (citing *National Collegiate Athletic Ass'n v. Board of Regents of the Univ. of Okla.*, 468 U.S. 85, 104 n.26 (1984) ("NCAA")). For example, in *NCAA* and in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979) ("*BMP*"), the Court considered potential economic benefits of the challenged practices and concluded that they should be evaluated using the rule of reason, despite the practices' close resemblance to established *per se* unlawful categories. By contrast, in *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) and *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990), the Court carefully considered the defendants' proffered justifications for their practices, but ultimately rejected them and evaluated the practices using *per se* standards. The Court also has ruled that certain types of arguments are not cognizable as arguments for rule-of-reason treatment. These include the contention that the prices set by a cartel were "reasonable," *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); or that competition itself is contrary to the public interest, *Professional Engineers*, 526 U.S. at 695-96. See generally Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 Geo. L.J. 165 (1988).

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determination. The Court applied a rule of reason analysis and concluded -- affirming our finding -- that the practice violated Section 1 of the Sherman Act. In applying the rule of reason, the Court condemned the practice on two alternative grounds, and implicitly acknowledged and endorsed the existence of a third possible route to condemnation under the rule of reason (albeit one not applicable to the facts it confronted). Thus, the Court outlined three distinguishable -- but, as we shall see, not fully distinct -- modes of analysis under the rule of reason.

First, the Court held that it was faced with a type of restraint that, by its very nature, required justification even in the absence of a showing of market power. 476 U.S. at 459-60. According to the Court, because the practice was “a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire,” then “no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.” *Id.* at 459 (quoting *Professional Engineers*, 435 U.S. at 692). Accordingly, the practice “require[d] some competitive justification even in the absence of a detailed market analysis.” *Indiana Federation*, 476 U.S. at 460 (quoting *NCAA*, 468 U.S. at 110).<sup>14</sup> It is this form of analysis – assessment of “inherently suspect” restraints without proof of market power – that we explored in depth in our decisions in *Polygram* and *North Texas Specialty Physicians*, 140 F.T.C. 715 (2005), *aff’d*, *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1313 (2009).<sup>15</sup> We will briefly recapitulate the steps of that analysis in Section V.C. below.

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<sup>14</sup> In *NCAA*, the Supreme Court confirmed that “[t]here was no need for [plaintiffs] to establish monopoly power in any precisely defined market \* \* \* in order to prove the restraint unreasonable. \* \* \* [N]o matter how broadly or narrowly the market is defined[,] [defendants’] restrictions have reduced output, subverted [consumer] choice, and distorted pricing. Consequently, unless the controls have countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power \* \* \*.” 468 U.S. at 110 n.42.

<sup>15</sup> Antitrust tribunals have used a variety of terms to address this approach, including “abbreviated,” “truncated,” or “quick look” analysis. See *California Dental*, 526 U.S. at 770-71 (collecting cases). For simplicity, we adhere to the “inherently suspect” terminology we used in *Polygram*.

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Second, the Court held that even if the restriction in question was “not sufficiently ‘naked’ to call this principle [of a restraint being anticompetitive by its very nature] into play, the Commission’s failure to engage in detailed market analysis [was] not fatal to its finding of a violation of the Rule of Reason,” because the record contained direct evidence of anticompetitive effect. 476 U.S. at 460. The Court reasoned that “[s]ince the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, ‘proof of actual detrimental effects, such as a reduction of output,’ can obviate the need for an inquiry into market power, which is but a ‘surrogate for detrimental effects’.” *Id.* at 460-61 (quoting 7 P. Areeda, ANTITRUST LAW ¶1511, at 429 (1986)). Significantly, the evidence that the Court accepted as direct proof of adverse effect did not involve elaborate econometric “proof that it resulted in higher prices,” 476 U.S. at 462, but rather simply that in two localities, over a period of years, insurers were “actually unable to obtain compliance with their requests for submission of x rays.” *Id.* at 460.

Third, the Court’s discussion of the “proof of actual detrimental effects” prong of the analysis made clear by implication that the traditional mode of analysis – inquiring into market definition and market power to determine whether an arrangement has the potential for genuine adverse effects on competition – was still available, although not applicable to the case before it because the Commission had not attempted to prove market power. Although the Court did not explore this mode of analysis in detail, it did observe that “the purpose of the inquiries into market definition and market power is to determine whether an arrangement *has the potential* for genuine adverse effects on competition. *Id.* (emphasis added). Numerous lower courts have confirmed that the Court’s conclusion in *Indiana Federation* that market power is “a surrogate for detrimental effects” logically compels the result that, if the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition. *See, e.g., United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel v. Christian Hospital*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewiston Hospital*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v.*

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*National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

*California Dental* dealt specifically with the abbreviated rule of reason analysis. That case concerned a professional association's ethical canon against deceptive advertising that, as interpreted and enforced by the association, effectively prohibited members from advertising price discounts in most cases, and entirely precluded advertising regarding the quality of services. The FTC and the Ninth Circuit had concluded that the restrictions resulting from this rule were tantamount to naked restrictions on price competition and output, 526 U.S. at 762-64, and therefore applied an "abbreviated, or 'quick look' rule of reason analysis," and found them unlawful without a "full-blown rule of reason inquiry" or an "elaborate industry analysis." *Id.* at 763 (citing *NCAA*, 468 U.S. at 109-10 & n.39).

The Supreme Court agreed that restrictions with obvious anticompetitive effects, such as those in *Professional Engineers*, *NCAA*, and *Indiana Federation*, do not require a "detailed market analysis" and may be held unlawful under a rule of reason framework unless the defendants proffer some acceptable "competitive justification" for the practice. Such analysis is appropriate if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 468 U.S. at 769, 770. The Court found, however, that the particular advertising rules under review in that case might plausibly "have a procompetitive effect by preventing misleading or false claims that distort the market," particularly given the "disparities between the information available to the professional and the patient" and the "inherent asymmetry of knowledge" about the service. *Id.* at 771-72, 778. Thus, while "it is also \* \* \* possible that the restrictions might in the final analysis be anticompetitive[,] \* \* \* [t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.* at 778.

While the Court accordingly called, in that case, for a "more sedulous" market analysis, *id.* at 781, it took pains to add that its ruling did "not, of course, necessarily \* \* \* call for the fullest

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market analysis. \* \* \* [I]t does not follow that every case attacking a less obviously anticompetitive restraint (like this one) is a candidate for plenary market examination.” *Id.* at 779. Rather, the Court stated, “[w]hat is required \* \* \* is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.” *Id.* at 781. The Court further warned against undue reliance on labels and categories: “The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like ‘per se,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.” *Id.* at 779. Even a term like “spectrum” or “sliding scale,” the Court warned, deceptively “suggests greater precision than we can hope for \* \* \*.” *Id.* at 780 (quoting *Areeda, supra*, ¶1507, at 402).

The latter warning is particularly apt in this case, where the traditional mode of analysis – requiring a proof of market power (in addition to the anticompetitive nature of the restraint) in order to draw an indirect inference that the challenged practice has anticompetitive effects – is even more straightforward than the direct mode of “proof of actual detrimental effects” on competition, *Indiana Federation*, 476 U.S. at 460 (quoting *Areeda, supra*, ¶1511, at 429), because respondent has conceded that it possesses market power in the relevant market. *See* Transcript of Oral Argument (Apr. 1, 2008), at 72-73.

In this Opinion, we analyze respondent’s conduct under each of these modes of analysis, and we explore the case law in more detail in the section devoted to each. It is important to note, however, that we could reasonably select just one of these modes of analysis and, if such a methodology supported a finding that the Policies are unlawful, it would be unnecessary for us to engage in the other versions of the rule of reason analysis. For example, if we conclude that the Policies are “inherently suspect” and have not been justified, we could condemn them without proof of market power or actual effects, as we did in *Polygram*. Alternatively, where market power is conceded and the Policies are shown to have “the potential for genuine adverse effects on competition,” *Indiana Federation*, 476 U.S. at 460, we could condemn them on that ground, without any need to establish actual marketplace effects. Finally, if we conclude that actual marketplace effects have been shown, as in *Indiana Federation* itself, that would be a basis for condemnation regardless of



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whether market power is shown. Here, for completeness, we address all three of these modes of analysis. Moreover, and perhaps more significantly, although it is convenient to treat each of these modes of analysis separately, the Court's decisions, particularly *California Dental*, also make clear that all of these forms of analysis are simply different means to pursue the same "essential inquiry \* \* \* – whether or not the challenged restraint enhances competition." 526 U.S. at 780 (quoting *NCAA*, 468 U.S. at 104). Further, the fact that the inherently suspect nature of the restraint, the indirect evidence, and the direct evidence all lead to the same result reinforces our conclusion that the restraints at issue are anticompetitive.

**C. Analysis of the Realcomp Policies Under *Polygram*'s  
"Inherently Suspect" Framework**

As we discussed above, "not all trade restraints require the same degree of fact-gathering and analysis." *Polygram*, 136 F.T.C. at 327 (citing *Standard Oil Co.*, 221 U.S. 1, 65 (1911)). Indeed, "*BMI*, *NCAA*, and [*Indiana Federation*] indicated that the evaluation of horizontal restraints takes place along an analytical continuum in which a challenged practice is examined in the detail necessary to understand its competitive effect." *Polygram*, 136 F.T.C. at 336; *see also California Dental*, 526 U.S. at 781 ("What is required \* \* \* is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint"). Thus, in *Polygram*, we held that in a limited but significant category of cases – when "the conduct at issue is inherently suspect owing to its likely tendency to suppress competition" – our "scrutiny of the restraint itself \* \* \* without consideration of market power" is sufficient to condemn the restraint, unless the defendant can articulate a legitimate justification (*i.e.* a "cognizable" and "plausible" procompetitive benefit) for that restraint. 136 F.T.C. at 344-45. *See also North Texas Specialty Physicians v. FTC*, 528 F.3d at 362 (physicians group's collective negotiations of fee-for-service contracts "bear a very close resemblance to horizontal price fixing" such that inherently suspect analysis was appropriate).

We also noted in *Polygram* that "inherently suspect" conduct "ordinarily encompasses behavior that past judicial experience and current economic learning have shown to warrant summary

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condemnation.” 136 F.T.C. at 344-45. Apparently misconstruing this language -- and, perhaps more importantly, judging a lack of urgency for application of the *Polygram* framework in light of the ALJ’s uncontested finding that Realcomp possessed substantial market power (*see* Oral Argument Tr., at 9) -- complaint counsel in this case disclaimed reliance on this mode of analysis, on the basis that courts have not had much experience with the particular restraint at issue here, albeit acknowledging that they have had a great deal of experience with closely analogous restraints. Complaint counsel is mistaken in this regard. First, our *Polygram* language was not intended to set up a threshold bar on this mode of analysis in cases where the exact challenged restraint had not been previously analyzed and adjudged to be anticompetitive. Such a bar would in fact run counter to the teachings of the Supreme Court, in cases such as *Indiana Federation* and *California Dental*, regarding the flexibility of the rule of reason analysis. Indeed, the Supreme Court in *Indiana Federation* applied the “quick look” analysis to a restraint that courts had not precisely seen before. Furthermore, as complaint counsel acknowledged, when Realcomp’s challenged policies are viewed, as they should be, as restraints on discounters’ advertising and on the dissemination of information to consumers regarding discounted services, there is ample judicial (and Commission, *see supra*, note 1) experience as to their competitive impact. We discuss such experience in more detail below.

At any rate, we are not bound by complaint counsel’s apparent concession, both because deciding the proper legal framework in any case is the province of the Commission, and because respondent has had a full opportunity to litigate over whether the challenged restraint was “inherently suspect,” and in fact did so before the ALJ and the Commission (*see, e.g.*, Complaint ¶¶25-26; RPF 280, 287-288; Respondent’s Post-Hearing Reply Brief (Aug. 17, 2007), at 10-34; Answering Brief of Respondent (Feb. 29, 2008), at 44-45).

### 1. Realcomp’s Policies are Inherently Suspect

Accordingly, applying *Polygram*’s “inherently suspect” framework, we conclude that Realcomp’s Policies and related requirements can reasonably be characterized as “giv[ing] rise to an intuitively obvious inference of anticompetitive effect.”

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*California Dental*, 526 U.S. at 781.<sup>16</sup> As we detail below, both accepted economic theory and past judicial experience with

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<sup>16</sup> The ALJ appeared to question whether the *Polygram* framework had gained enough acceptance among the federal courts to supply a suitable basis for application in the case before us. ID 89. We do not understand either his doubts or his apparent belief that those doubts were permissible considerations for his decision. To begin, none of the cases the ALJ relied on to question *Polygram* is contrary to that decision.

In *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004), the Sixth Circuit confirmed that – as the Supreme Court made clear in *California Dental* and consistent with our analysis in *Polygram* – an “extensive market and cross-elasticity analysis is not necessarily required” in order to use an “abbreviated or ‘quick-look’ analysis.” *Id.*, 388 F.3d at 961; accord, *California Dental*, 526 U.S. at 769-71; *Polygram*, 136 F.T.C. at 344-45. The court declined to rely on an abbreviated or “quick look” analysis in the *Worldwide Basketball* case because it found that the contours of the product market at issue in that case were not “sufficiently well-known or defined to permit the court to ascertain \* \* \* whether the challenged practice impairs competition.” 388 F.3d at 961. This is not inconsistent with *Polygram*, in which the Commission and the D.C. Circuit recognized that judicial experience and familiarity with a class of restraints may be important factors in deciding whether to utilize an “inherently suspect” analysis. See, e.g., *Polygram v. FTC*, 416 F.3d at 36-37.

Similarly, in *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 512 (4th Cir. 2002), the Court of Appeals declined to use an abbreviated rule of reason analysis because of the plausibility of defendants’ proffered justifications. Again, this is not inconsistent with the *Polygram* framework, in which, if and when the defendant “advances \* \* \* cognizable and plausible justifications” for the challenged conduct, the plaintiff must “make a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition.” 136 F.T.C. at 345, 348. And likewise, in *Brookins v. Int’l Motor Contest Ass’n*, the Court of Appeals held that an auto racing governing body’s rule modification, which resulted in the exclusion of a particular supplier’s product, could not be condemned summarily because, in the absence of evidence of the body’s collusion with rival suppliers, the plaintiff’s exclusion was merely “the incidental result of defining the rules of a particular game.” 219 F.3d 849, 854 (8th Cir. 2000). Accord, *Polygram*, 136 F.T.C. at 328, 347-48 n.42 (recognizing that restraints that are “ancillary” to legitimate collective conduct may constitute, or be linked to, cognizable procompetitive justifications for challenged restraints).

*Polygram* reflects a careful interpretation of decisions by the Supreme Court and the Courts of Appeals since the mid-1970s. The D.C. Circuit in *Polygram* and the Fifth Circuit in *North Texas Specialty Physicians* emphasized the soundness of the FTC’s interpretation in upholding the Commission’s decision. See also *Major League Baseball Properties, Inc. v.*

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analogous restrictions support our finding that “the experience of the market has been so clear about the principal tendency” of these restrictions so as to enable us to draw “a confident conclusion” that -- absent any legitimate justification advanced by Realcomp -- competition and consumers are harmed by Realcomp’s challenged Policies. *Id.* We need not rest our decision solely on such analysis, however, for, as we discuss in the next section, the application of a rule of reason analysis encompassing consideration of market power and competitive effects yields the same judgment as to Realcomp’s Policies.

**a. The Nature of Realcomp’s Policies**

Realcomp is an entity composed of horizontal competitors. IDF 285-286. The formation and existence of this collaboration among rivals are not at issue in this case. Antitrust doctrine recognizes that multiple listing services produce genuine efficiencies and improve economic performance in the sale and purchase of homes. *See, e.g., Realty Multi-List*, 629 F.2d at 1356. As a centralized information sharing service, an MLS provides benefits to consumers by facilitating the matching of home buyers and home sellers. Without the Realcomp MLS, home buyers and cooperating brokers in Southeastern Michigan, and home sellers and their agents, would have to rely on a variety of less comprehensive sources of information, including newspaper ads, television advertising, sales flyers, and word-of-mouth advertising.

The existence of a legitimate joint venture does not preclude antitrust scrutiny of all measures the venture undertakes. An association composed of horizontal rivals may adopt reasonable rules to control its membership and to determine the services it

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*Salvino, Inc.*, 542 F.3d 290, 338 (2d Cir. 2008) (Sotomayor, J., concurring) (citing *Polygram* favorably). These appellate decisions provide reliable indications that the federal courts regard the analytical approach of *Polygram* as sound. And of course, as a matter of administrative law, “once the agency has ruled on a given matter, \* \* \* it is not open to reargument by the administrative law judge[.]” *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993) (Ruth Bader Ginsburg, J.) (citation omitted). ALJs thus are “entirely subject to the agency on matters of law.” Antonin Scalia, *The ALJ Fiasco – A Reprise*, 47 U. Chi. L. Rev. 57, 62 (1979).

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will provide its members. Yet it may not use the collaboration as a means to impose inappropriate limits on individual competitive initiative. *See, e.g., NCAA*, 468 U.S. at 99; *Professional Engineers*, 435 U.S. at 692-93, 696; *Major League Baseball*, 542 F.3d at 338-40 (Sotomayor, J., concurring). The issue in this case is whether Realcomp has adopted policies that unreasonably hinder the ability of some competitors to advertise, and disseminate information about, their service offerings.

The ALJ's Findings of Fact establish that Realcomp sent full-service listings, but not exclusive agency listings, to MLS-approved websites. IDF 349-360, 380-387. Realcomp also excluded EA listings from the default results of its internal search function. IDF 361-371. Realcomp's rules and policies, thus, discriminated against members who offer a product that creates "price pressure" against the offerings of other members. IDF 99. In our view, as discussed below, these policies improperly constrain competition and impede the emergence of a new business model that has considerable benefits for consumers.

**b. The Market Context: Threats to the Traditional Full-Service Brokerage Business Model Posed By Emerging Lower-Priced Brokerage Models and By Consumers' Use of the Internet**

Realcomp's adoption of the challenged practices took place amid market changes that threatened to upset, and perhaps, topple, the traditional, commission-based system for compensating real estate service providers. The rigidities of the traditional fee structure -- an unchanging six percent commission that was split evenly between the listing and cooperating brokers -- and consumer demand for a more flexible and less costly one, had induced some brokers to offer alternative fee structures. IDF 69, 73, 100. The EA listing, with its fixed fee and its relinquishment of the cooperating broker's portion if the seller procured a buyer independently, was the most dramatic experiment of this kind. Equally important was the development of the Internet as a conduit of information about listings. IDF 92. The posting of real estate offerings on the web greatly increased the ability of sellers and buyers to collect information without the assistance of a broker.

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Real estate brokers understood that these developments had the capacity to upset the traditional business model. In a paper issued in 2003, the National Association of Realtors said that limited service brokerages have “the potential to change the competitive landscape of residential real estate brokerage.” CX 533-040; IDF 88. NAR went on to observe that, even though some limited service brokers “may not currently command significant market share \* \* \* their significance goes beyond size. They may be serving a customer need that is not currently being served by the dominant players. In addition, they may play a larger role in selected markets or may serve a particular consumer segment better than the dominant models.” CX 533-038; IDF 88.

The ALJ found that brokers offering limited services, such as brokers with EA listings, compete for new listings with brokers offering traditional full services. IDF 81. He also found that limited service brokerages “put price pressure on full service brokerage commissions,” which typically are fixed at six percent. IDF 99-101, 53-55. The “price pressure” to which the ALJ referred -- which limited service brokers would normally exert absent Realcomp’s restraints -- promised to be a significant force in the future development of the real estate services sector in Southeastern Michigan. This price pressure is especially significant given the lack of price competition that currently exists among traditional full service brokers. There is little economic evidence that competition among traditional service brokers has led to significant reductions in the amount of brokerage commissions paid; most studies of full service brokerage show substantial rigidity in percentage brokerage rates. CX 498-A-11.<sup>17</sup>

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<sup>17</sup> The actual amount of brokerage commission paid in dollar terms also has closely tracked changes in housing prices. For example, it is reported that between 1991 and 2004, commission rates declined from 6.1 percent to 5.1 percent of the sale price, an apparent decrease of 16 percent. However, during this same period, the average brokerage commissions paid in dollar terms actually increased by 30 percent in response to housing price increases of 55 percent. CX 498-A-11; *see also* U.S. Department of Justice & Federal Trade Commission, COMPETITION IN THE REAL ESTATE BROKERAGE INDUSTRY, at 38-42 (Apr. 2007) (available at <http://www.ftc.gov/reports/realestate/V050015.pdf>).

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The pricing pressure imposed by the newly emerging business model intensified with the expanded use of the Internet as a means for sellers and buyers to directly perform research and acquire knowledge that previously had been the province of real estate professionals. Realcomp understood that the Internet could play a major role in accelerating the development of the limited service brokerage business model. As the ALJ found, the Internet is increasingly important to competition in the marketing and sale of homes. IDF 218-223, 428. Full-service brokers could no longer rely on being the sole conduit of information regarding the availability of homes for sale. The ALJ found that Realcomp disseminated certain information on its MLS by feeding it directly or indirectly to “Approved Websites,” including NAR’s Realtor.com and MoveInMichigan.com, and the Realcomp IDX participant websites. IDF 210, 224. He found that as of January 2007, 82 percent of agents were licensed to brokers who said they would participate in Realcomp’s IDX, and that for the 91 percent of firm websites that contain searchable property listings, the IDX feed is how these firms obtain listings other than their own. IDF 121, 249. Additionally, he found that Realcomp’s promotional activities have emphasized the competitive benefits of these Approved Websites. IDF 222-23, 234-35, 247.

**c. The Anticompetitive Tendency of Realcomp’s Policies: Penalizing Lower-Priced Competitors By Restricting the Availability of Competitively Significant Information to Consumers**

In sum (and as documented by the sources cited in the preceding paragraphs), the full-service real estate brokers who constituted a majority of Realcomp’s members perceived the possible expansion of limited service brokerage, in combination with consumers’ direct access to MLS listings via Internet websites, to pose extremely serious threats to their traditional business model. In this setting, Realcomp adopted the policies at issue in this case, which singled out the new limited-service brokerage business model and put it at a considerable competitive disadvantage, particularly in the context of the increasing competitive importance of certain key Internet websites to disseminate listing information to consumers. Through the Realcomp Policies, rival real estate firms agreed to limit the advertising of exclusive agency listings and to deny consumers

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information and service options that such consumers desire. The circumstances surrounding the establishment of the policies, and Realcomp's evident aim of retarding the emergence of a new business model, underscore the exclusionary impact of those policies. The policies would have their effect by limiting access to an input -- i.e. full exposure on the approved websites -- necessary for limited service brokers to compete effectively.

Seen in the context in which they arose, the restraints in question raise serious competitive concerns. In restricting the ability of the limited-service, lower-cost brokers to have the same level of exposure on the increasingly popular Internet websites as the full-service brokers, it is easy to see how "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 770. Although not exactly the same conduct, the Realcomp Policies do bear a "close family resemblance," *Polygram v. FTC*, 416 F.3d at 37, to conduct that courts previously have treated with acute suspicion and, at times, have condemned without an assessment of the defendant's market power, or indeed without an opportunity for the defendant to offer any mitigating justifications. As we noted in *Polygram*, "[r]estrictions on truthful and nondeceptive advertising harm competition, because they make it more difficult for consumers to discover information about the price and quality of goods or services, thereby reducing competitors' incentives to compete with each other with respect to such features." 136 F.T.C. at 354-55.

In *Indiana Federation*, the Supreme Court condemned an agreement to deny insurers information about patient x-rays, even absent proof of market power, when there was no evidence of a procompetitive justification. 476 U.S. at 459-64. The Court also did not require proof of actual anticompetitive effects, such as higher prices, because the agreement was "likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence." *Id.* at 461-62. In the Court's view, "even if the desired information were in fact completely useless," competitors were "not entitled to pre-empt the working of the market by deciding for [themselves] that [their]



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customers do not need that which they demand.” *Id.* at 462. *See also Professional Engineers*, 435 U.S. at 692-93 (condemning “[o]n its face” restriction on the availability of information regarding costs of engineering services as “imped[ing] the ordinary give and take of the market place”).

When restrictions on advertising are aimed exclusively at rival discounters, with the effect of punishing their discounting behavior, some courts accordingly have treated them as if they were direct and naked restrictions on price or output. In *Denny’s Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217, 1219-20 (7th Cir. 1993), the plaintiff alleged that the defendants, rival “marine dealers in the same market who compete with Denny’s to sell boats to Indiana consumers,” had excluded plaintiff from two annual trade shows “because its policy was to ‘meet or beat’ its competitors’ prices at the shows.” The district court granted defendants’ summary judgment because plaintiff failed to “make a sufficient showing of a potential market-wide impact resulting from defendants’ actions.” *Id.* at 1219 (internal quotation marks omitted). The Court of Appeals reversed. It held that, should it be proven at trial on remand, a “[c]oordinated action by dealers to protect themselves from price competition by discounters constitutes horizontal price fixing,” which can then be condemned without any further market inquiry as “*per se* an unreasonable restraint of trade.” *Id.* at 1221, 1220.

Restrictions on rivals’ modes of operations also have been found anticompetitive without extensive market analysis. In *Detroit Auto Dealers Ass’n v. FTC*, 955 F.2d 457 (6th Cir.1992), the Sixth Circuit upheld the FTC’s ruling that the restraint at issue – an agreement among competitors to restrict their showrooms’ hours of operation – was anticompetitive. *Id.* at 469-72.<sup>18</sup> The

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<sup>18</sup> The *Detroit Auto Dealers* panel majority, while affirming the Commission’s conclusion that the auto dealers’ limitation on showroom hours was an unlawful restraint of trade, expressed reservations about the Commission’s “inherently suspect” mode of analysis because it perceived that analysis to “arise[] from a *per se* approach” and believed that a rule of reason analysis should have been used instead. 955 F.2d at 470-71. Judge Ryan, in a separate opinion concurring in part and dissenting in part, agreed with the panel majority’s affirmance of the FTC’s bottom-line conclusion, but disagreed with the majority’s characterization of the FTC’s analytical framework. Judge Ryan stated that, in his view, the Commission “did not use a *per se* analysis” and that

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court found “legal basis and support for \* \* \* the Commission’s conclusion that hours of operation in this business is a means of competition [among dealers], and that such limitation [on hours of operation] may be an unreasonable restraint of trade.” *Id.*, 955 F.2d at 472. Significantly, the Sixth Circuit affirmed “the Commission’s conclusion on restraint of trade despite lack of [direct] evidence of increased prices” (*id.* at 472 n.15; *see also id.* at 471 n.13) or reductions in output (*see id.* at 470) -- without requiring proof of a relevant market or market power.<sup>19</sup> Like the restraint at issue in the present case -- and like the x-ray restriction in *Indiana Federation* -- the auto dealers’ concerted agreement to restrict showroom hours had the effect of limiting the availability of competitively relevant information to consumers or raising the cost of obtaining such information.<sup>20</sup>

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there was no need for it to have “conducted a full rule of reason analysis in this case.” 955 F.2d at 474 (Ryan, J., concurring in part and dissenting in part); *see also id.* at 475 (“Under a *per se* analysis, the agreement would have been invalid without any consideration of its procompetitive effects. The FTC, however, did consider the efficiency justifications offered by the respondents before concluding that the agreement had an anticompetitive effect.”). It is also significant that *Detroit Auto Dealers* was decided prior to the Supreme Court’s 1999 *California Dental* decision, and prior to the D.C. and Fifth Circuit decisions holding that the FTC’s “inherently suspect” analytical framework was fully consistent with *California Dental* and other recent Supreme Court decisions. *Polygram v. FTC*, 416 F.3d at 373-75; *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 359-363 (5th Cir. 2008). *See also Mass. Board of Registration in Optometry*, 110 F.T.C. 549, 602-04 (1988) (followed in *Detroit Auto Dealers Ass’n*, 111 F.T.C. 417, 493-94 (1989), as well as in *Polygram* and *North Texas Specialty Physicians*).

<sup>19</sup> By contrast, in the present case, it is undisputed that Realcomp has market power, ID 84-85; *see infra* Section V.D.1; and there is substantial evidence that Realcomp’s restrictive policies have had anticompetitive effects such as price increases and reductions in output. *See infra* Section V.D.2.

<sup>20</sup> The Commission had found that the auto dealers’ agreement “raises the opportunity cost to consumers of car shopping. This increase in costs encourages consumers to spend less time comparing prices, features, and service, and thereby reduces pressure on dealers to provide the prices, features and services consumers desire.” 111 F.T.C. at 495; *see also Indiana Federation*, 476 U.S. at 457, 461-62 (“The Federation’s collective activities resulted in the denial of the information the customers requested in the form that they requested it, and forced them to choose between acquiring that information in a more costly manner or forgoing it altogether. \* \* \* A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular

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Further, Realcomp's policies directly limited the publication and distribution of EA listings and, in effect, operated as a restraint on advertising. Courts have long treated agreements among competitors to restrict advertising as posing serious dangers to competition and as having a great capacity to affect prices. *See, e.g., California Dental*, 526 U.S. at 773 (in ordinary markets, such as the one here, "[r]estrictions on the ability to advertise prices normally make it more difficult for consumers to find a lower price and for [rivals] to compete on the basis of price") (citations omitted) (first alteration original); *Morales v. Trans World Airlines*, 504 U.S. 374, 388 (1992) ("it is clear as an economic matter that \* \* \* restrictions on fare advertising have the forbidden significant effect upon fares"); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977) ("Advertising \* \* \* serves to inform the public of the availability, nature, and prices of products and services, and thus performs an indispensable role in the allocation of resources in a free enterprise system"); *Polygram v. FTC*, 416 F.3d at 37 ("agreements restraining autonomy in pricing and advertising 'impede the ordinary give and take of the market place'") (quoting *Indiana Federation*, 476 U.S. at 459); *Denny's Marina*, 8 F.3d at 1221 (exclusion of discounting rival from popular trade shows constitutes horizontal price-fixing).

Our examination of the nature of the restriction leads us to find that the Realcomp Policies create significant competitive hazards. By their nature, the Realcomp Policies tend to impose a significant impediment to access to limited service listings by contributing brokers seeking homes on behalf of buyers on the MLS, and by buyers directly seeking homes through public websites. Realcomp's Website Policy and related requirements prevented the dissemination of limited service listings by Realcomp on its Approved Websites, whose benefits Realcomp regularly emphasized. These measures have the further inherent

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purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or, as here, the purchase of higher priced services, than would occur in its absence." *Compare* IDF 220, 349, 447 ("The majority of home buyers and sellers want to be able to search for homes on the Internet before they buy or sell." But Realcomp's "Website Policy \* \* \* prevent[s] Exclusive Agency, Limited Service and MLS Entry Only listings from being sent" to the "four categories of websites [that home buyers visited] much more than any others[.]").

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tendency to reduce the “price pressure” that limited service brokerage has exerted on the full-service brokerage commission structure. By favoring ERTS listings, the Realcomp Policies bolster those contracts’ imposition of a requirement that sellers must pay for a cooperating broker whether one is used or not. D. Williams Tr. 1189-90. Realcomp’s minimum service requirements then add to and increase the price floor of ERTS listings by setting a minimum level of brokerage services that the listing broker must offer under ERTS listings. CX 498-A-044-45. Realcomp’s Search Function Policy and related requirements prevented default access to limited service listings on its MLS.

The Realcomp Policies are, in essence, an agreement among horizontal competitors to restrict the availability of information that consumers can use to evaluate the prices and other features of competing providers’ offerings, the effect of which is to make such information more difficult and costly to obtain. Such practices have been found to be particularly problematic where, as here, the incumbent providers are restricting such dissemination of information so as to impede the marketplace participation by relatively new entrants offering low-cost or discounted products or services. *See, e.g., Realty Multi-List, supra* (preventing MLS participation by real estate brokers who did not maintain full-service office open during customary business hours);<sup>21</sup> *Denny’s Marina, supra* (excluding discounter from popular trade shows). Realcomp’s Policies restrict (albeit not destroying entirely) the ability of low-cost, limited service brokerages to get their listings included on heavily used public websites, thereby making it more difficult and costly for them to participate fully in the marketplace. As a result, these policies tend to alleviate downward pricing pressure on traditional brokers’ commission-based pricing model. We accordingly conclude, under the first step of our *Polygram* analytical framework, that the Realcomp

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<sup>21</sup> As we discuss in Section V.D.1., below, *Realty Multi-List* relied on both the nature of the restraints at issue and the market power of the MLS, under what the Court of Appeals termed a “facial reasonableness” standard. As the *Polygram* “inherently suspect” framework we apply here eschews the requirement of market power, we cite that decision here only inasmuch as it discusses the nature of restraints that aim at punishing the discounting behavior of rivals in the real estate brokerage services market.

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Policies are inherently suspect and, thus, presumptively unreasonable.

## 2. Realcomp's Proffered Justifications

Next, the *Polygram* framework requires our consideration of whether Realcomp can overcome this presumption of unreasonableness by showing that the practice has “some countervailing procompetitive virtue -- such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services.” *Indiana Federation*, 476 U.S. at 459; *see also Chicago Professional Sports, L.P.*, 961 F.2d 667, 674 (7th Cir. 1992) (justification must provide “some explanation connecting the practice to consumers’ benefits”). If such justifications are both “cognizable” and “plausible,” then Respondents may be able to justify their practice and further examination would be warranted.<sup>22</sup> Otherwise, “the case is at an end and the practices are condemned.” *Polygram*, 136 F.T.C. at 345.

Realcomp argues that the Policies are justified because they eliminate two inefficiencies that arise from EA listings: (1) “free-riding” from home owners who opt to list their homes using EA listings and who then compete with cooperating brokers to find buyers for their home; and (2) a “bidding disadvantage” faced by buyers who use cooperating brokers when bidding against an unrepresented buyer for a home listed under an EA agreement. We reject both of those arguments.

As an initial matter, we note that both the “free riding” and “bidding disadvantage” arguments appear to be post-hoc

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<sup>22</sup> We also acknowledged in *Polygram* that a defendant can avoid liability by showing “why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question.” 136 F.T.C. at 345; *cf. California Dental*, 526 U.S. at 773 (noting that the professional context of the advertising restrictions there may ameliorate their presumptively anticompetitive nature, “‘normally’ found in the commercial world”). There is no record evidence here, however, that the market for real estate brokerage services in Southeast Michigan exhibited any such ameliorative characteristics, and Realcomp has not made any arguments to us along those lines.

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rationalizations rather than actual reasons for the policies' adoption.<sup>23</sup> Even apart from this consideration, we find both proffered defenses without merit.

**a. Free Riding**

For free riding to occur, there must be a product or service that is consumed by an individual or entity who does not pay for that product or service. For example, if certain retailers invest in showrooms staffed with knowledgeable personnel to provide information to consumers and thus promote the sale of a brand of merchandise, other retailers who sell the same brand but refrain from such investments may get a "free ride" on those investments if consumers can get the information from the retailers that make the investment and then buy the product at a lower price from the retailers who do not. The policy concern is that free-riding can diminish the incentives to make such investments at all. *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 222-23 (D.C. Cir. 1986) (Bork, J.). In principle, measures to control free-riding are widely recognized as cognizable justifications under the antitrust laws. See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984); *Business Electronics, Inc. v. Sharp Electronics, Inc.*, 485 U.S. 717, 731 (1988).

In this case, Realcomp argued (and the ALJ agreed) that the Website Policy is designed to prevent EA home sellers from free-riding by advertising their MLS listing on Realcomp's Approved Websites, but then selling their homes without the assistance of a cooperating broker who is a member of Realcomp, thus avoiding payment of a commission to the Realcomp member. The ALJ concluded that, without the website restrictions, home sellers with EA agreements "would free ride on the Realcomp members who invest and participate in the MLS through the payment of dues

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<sup>23</sup> The Board Resolutions adopting the Policies did not mention such "free-riding" or "bidding disadvantage" problems. CX 100, CX 32-005-06, CX 8-007. Realcomp offered those justifications long after the Board approved the Policies and after the FTC issued the Complaint in this matter. IDF 618-619. None of the Realcomp Governors knows why the Board adopted the Website Policy and Search Function Policy. CX 37 (Bowers Dep.), at 26, 28, 32; CX 43 (Hardy Dep.), at 100, 102-03, 117-118, 122; CX 40 (Elya Dep.), at 64-65, 70, 83; CX 38 (Gleason Dep.), at 20-25, 58.

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and who otherwise undertake to support the cooperative endeavor of the MLS.” ID 121.

This conclusion is erroneous, for the simple reason that there was no “free ride” at all here.<sup>24</sup> A simple way to see this is to ask what investments, and by whom, were being free-ridden upon. Was Realcomp, the provider of the MLS service, being free-ridden upon? Clearly not, because Realcomp charges membership fees for its services. The EA home seller makes use of the MLS only by virtue of retaining the services of a listing broker who is a Realcomp member. JX 1-04, 07 (Joint Stipulations of Fact Nos. 19, 55). Sellers who use EA listings pay fees to their listing brokers, and their listing brokers (like any other listing broker in the Realcomp MLS) pay dues and fees to Realcomp. Realcomp charges identical dues and fees to all of its members, regardless whether they offer their clients EA or ERTS listings. JX 1-05 (Joint Stipulations of Fact No. 36). Thus, the seller of an EA listed property does not have “free” access to Realcomp’s services. Rather, both EA sellers and ERTS sellers must make payments to listing brokers who, in turn, pay Realcomp for participation in the association.<sup>25</sup> Accordingly, the contention that EA sellers are “free riders” is erroneous. *Cf. Chicago Professional Sports L.P. v. Nat’l Basketball Ass’n*, 961 F.2d 667, 675 (7th Cir. 1992) (“What gives this the name *free-riding* is the lack of charge. \* \* \* When payment is possible, free-riding is not a problem because the ‘ride’ is not free. Here lies the flaw in the [defendant’s] story. It may (and does) charge members for value delivered”); *Toys “R” Us v. FTC*, 221 F.3d 928, 938 (7th Cir. 2000) (“the manufacturers were paying for the services TRU furnished, \* \* \* and thus these services were not susceptible to free riding”).

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<sup>24</sup> “A free ride occurs when one party to an arrangement reaps benefits for which another party pays, \* \* \* [and] the party that provides capital and services [does so] without receiving compensation.” *Rothery*, 792 F.2d at 212-13.

<sup>25</sup> Indeed, EA brokers pay the same amount of Realcomp dues as full-service brokers, but they do not receive the same level of services as Realcomp offers its other members. CX 415 (Nowak Dep.), at 43. For example, EA broker member dues help pay for Realcomp’s MoveInMichigan.com website, though EA broker Realcomp members do not get to have their listings included on it. *Id.* at 55. It could be said that full-service Realcomp members “free ride” on the dues paid by limited service Realcomp members.

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The lack of free-riding on Realcomp's services is and should be the end of the matter, because the only efficiency-enhancing joint activity advanced here was the creation and operation of the MLS, and the justifiability of any restriction must be tested by whether the restriction was reasonably necessary to achieve that end. See Federal Trade Commission and U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors*, § 3.36(b) (April 2000). The ALJ, however, seemed to think that cooperating brokers were somehow being free-ridden upon, suggesting that Realcomp's restrictive policies are necessary to ensure "the incentives of [cooperating] brokers to show and promote EA properties to their buyer-clients." ID 121. Realcomp made no attempt to meet its burden of showing that such a reduction of incentives took place, and indeed the theory is implausible on its face. Under both ERTS and EA listings, when a cooperating broker brings in the buyer, that cooperating broker is entitled to the same level of compensation, IDF 200, 201, 204, creating ample incentive to show and promote EA properties. Moreover, Realcomp's Policies tolerate the practice of allowing an ERTS seller to retain the entire six-percent commission when the buyer is obtained without the services of a cooperating broker.<sup>26</sup> Because the ERTS listing broker presumably would prefer to have the full six-percent commission rather than split the six percent half and half with a cooperating broker, the listing broker has an incentive to complete the transaction without a cooperating broker if possible. For the ALJ's theory to work, therefore, a cooperating broker would have to have more to fear from an EA seller -- an amateur -- seeking to find a buyer without a cooperating broker than from a listing broker -- a seasoned professional -- given exactly the same three-percent incentive to do so. The record contains no such evidence.

If Realcomp gets the same fees from EA listings and ERTS listings, and cooperating brokers get the same three-percent commission from EA listings and ERTS listings, who actually loses from EA listings? Two categories of people come to mind: the listing broker who signs an EA contract for less compensation

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<sup>26</sup> Realcomp's rules do not require that a Realcomp cooperating broker be involved in any transaction facilitated through the Realcomp MLS or through Realcomp's feed of listings to the public websites. D. Williams Tr. 1224-25; JX 1-05 (Stipulations of Fact Nos. 29-32).



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than an ERTS contract would have provided, and the listing broker who insists upon an ERTS contract and loses a listing as a result. But neither broker is providing a service that is being free-ridden upon. The listing broker who signs an EA contract is providing brokerage services for which he is being compensated in exactly the manner for which he bargained. And he bargained for it because he knows that improved technology -- the Internet -- causes many buyers to come forward on their own, obviating the need for some of the services for which either he or a cooperating broker used to get paid three percent. And the listing broker who insists upon an ERTS contract and loses a listing as a result provides no services at all, and by definition cannot be free-ridden upon. In other words, these two categories of listing brokers are not losing money through free-riding; they are losing money through competition.

The courts are quite familiar with -- and have consistently rejected -- efforts to dress up as a “free-riding justification” what is in fact an effort to protect a less-demanded, higher-priced product from competition by a lower-priced product that consumers may prefer more strongly. *See NCAA*, 468 U.S. at 116-17; *see also Premier Elec. Construction Co. v. Nat’l Elec. Contractors Ass’n, Inc.*, 814 F.2d 358, 370 (7th Cir. 1987) (“A group of firms trying to extract a supra-competitive price therefore hardly can turn around and try to squelch lower prices -- as the [defendants] may have done -- by branding the lower prices ‘free riding’!”).<sup>27</sup> Realcomp’s purported “free-riding” justification is no more complicated than that.

We find that the underlying rationale for the Website Policy is to not to ensure the continued efforts of cooperating brokers, but

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<sup>27</sup> When a powerful group of competitors imposes restrictions that “increase its rivals’ costs of doing business, the better to eliminate a source of competition,” the members of the group may benefit both by “enabl[ing] the members to capture more of the market” and by “rais[ing] the market price to its own advantage” and to the disadvantage of consumers. *Premier Elec. Construction*, 814 F.2d at 368 (citing T. Krattenmaker & S. Salop, *Anticompetitive Exclusion: Raising Rivals’ Costs to Achieve Power Over Price*, 96 Yale L.J. 209 (1986)).

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to reduce “price pressure” on commissions.<sup>28</sup> Accordingly, Realcomp’s purported “free-riding” justification is entirely without merit.<sup>29</sup>

**b. The Bidding Disadvantage**

Realcomp also claims that its Policies are justified because they eliminate a “bidding disadvantage” faced by a buyer represented by a cooperating broker when bidding against an unrepresented buyer for a home sold under an EA listing. This argument is not a cognizable justification under the antitrust laws, and we accordingly reject it.

Insofar as buyers bid against each other for a home, they compete with each other. The antitrust laws protect that competition, and the fact that one competitor (*i.e.* one with no cooperating broker) may have a cost advantage over another does not make the competition unfair. To the contrary, it is regarded as an efficiency to which the low cost competitor is entitled. *C.B. Trucking, Inc. v. Waste Mgmt., Inc.*, 137 F.3d 41, 45 (1st Cir. 1998); *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1080 (1st Cir. 1993). An EA seller has a preference for a buyer not bound to a cooperating broker, because the same nominal sale price will yield a higher net price. An ERTS seller does not share that preference, because he must pay the full six-percent commission, whether or not there is a cooperating broker. Thus, by eliminating the bidding disadvantage for a buyer represented by a cooperating broker, Realcomp’s Policies serve to prop up a commission structure that raises the cost of selling a home. The net effect of the Policies is to diminish the possibility of brokerage commissions falling substantially below the *de facto*

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<sup>28</sup> The fact that Realcomp established the challenged Policies between 2002 and 2006, when the market share for limited service brokerages was increasing more than fivefold, also supports an inference that the Policies were anticompetitive, not procompetitive, in purpose. IDF 90-91. The inference we draw is reinforced by Realcomp’s continued enforcement of its Website Policy, even though that Policy conflicts with NAR’s by-laws and thereby violates Realcomp’s own by-laws. IDF 418-423.

<sup>29</sup> We thus reject the ALJ’s purported “findings of fact” – more accurately characterized as inferences drawn from the evidence – regarding Realcomp’s free-riding argument. IDF 601-619.

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price floor created by the structure of the cooperative payment system that governs ERTS brokerage contracts. CX 498-A-046.<sup>30</sup>

As with Realcomp's free-riding argument, eliminating the so-called "bidding disadvantage" does not allow Realcomp or its members to "increase output, or improve product quality, service or innovation." *Polygram*, 136 F.T.C. at 346. In *Cantor*, the court rejected the defendant's justification for its policy -- restricting dissemination of information through yard signs -- because, rather than promoting competition, the practice made it easier for less diligent brokers to attract buyers and earn a commission. *Cantor v. Multiple Listing Serv. Of Dutchess County, Inc.*, 568 F. Supp. 424, 430-31 (C.D.N.Y. 1983). For the same reason, we reject Realcomp's bidding disadvantage justification.

Rather than saving the Policies from condemnation, Realcomp's argument reinforces the conclusion that they have an anti-competitive effect. The Policies do not enhance competition. They serve to prevent the cost of selling a home from dropping below the prevailing six-percent commission rate, and they hinder the exchange of information which Realcomp's creation was supposed to facilitate.<sup>31</sup> The Policies may protect brokers'

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<sup>30</sup> For example, one discount limited service broker, Craig Mincy of MichiganListing.com, advertises the potential savings of EA listings versus full-service listings through an example of the sale of a \$300,000 home. Mincy, Tr. 374 (illustrated by DX 4). Under a traditional full-service ERTS listing at 6% commission, a seller would pay a commission of \$18,000, even if there is no cooperating broker involved in the transaction. Mincy, Tr. 375-376 (illustrated by DX 4). In contrast, under the MichiganListing.com EA listing, the EZ-Listing, the seller would only pay \$495 if there is no cooperating broker involved, a savings of \$17,505. In the event a cooperating broker is involved, a seller using the EZ-Listing would pay \$9,495 (the \$495 fee to MichiganListing.com and a three percent, or \$9,000, commission to the cooperating broker), for a savings of \$8,505. Mincy, Tr. 376-377. Mr. Mincy puts this example on his website to "show the general public they don't necessarily have to pay six percent to sell their home." Mincy, Tr. 377-378.

<sup>31</sup> See *Professional Engineers*, 435 U.S. at 693 ("the anticompetitive purpose and effect of \* \* \* agreement" to withhold price information is "confirm[ed]" by expectation that it would "tend to maintain the price level"); *Indiana Federation*, 476 U.S. at 461-62 ("A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely

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commissions and the established commission-based business model, but they impede competition. “[T]he antitrust laws \* \* \* were enacted for ‘the protection of *competition*, not *competitors*.’” *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). Realcomp’s “bidding disadvantage” argument must, therefore, fail.<sup>32</sup>

Accordingly, under *Polygram*’s “inherently suspect” framework, we conclude that the Realcomp Policies are unreasonable and in violation of both Section 1 of the Sherman Act and Section 5 of the FTC Act.

We next consider whether a more elaborate rule of reason analysis, encompassing considerations of market power and effects, provides an alternative basis (*i.e.* regardless of whether Realcomp’s policies are inherently suspect) for our conclusion that those policies are anticompetitive.

**D. Analysis of the Realcomp Policies Under A Rule of Reason Encompassing Consideration of Market Power and Anticompetitive Effects**

As we noted above, under the circumstances of this case, we need not rely solely on the nature of the challenged restraints in order to determine whether Realcomp’s Policies violate the antitrust laws. In this section, we evaluate those policies under a more fulsome rule of reason analysis -- and reach the same conclusion. Under this framework, a plaintiff must show that the challenged restraints have resulted in, or are likely to result in, anticompetitive effects, in the form of higher prices, reduced output, degraded quality of products or services, retarded

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enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned”); *Detroit Auto Dealers*, 111 F.T.C. at 495 (competitors’ agreement to limit showroom hours “raises the opportunity cost to consumers” of obtaining comparative information “and thereby reduces pressure on dealers to provide the prices, services, and features consumers desire”).

<sup>32</sup> Accordingly, we reject the ALJ’s purported “findings of fact” -- more accurately characterized as conclusions or inferences drawn from the evidence -- regarding Realcomp’s “bidding disadvantage” argument. IDF 629-632.

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innovation, or other manifestations of harm to consumer welfare. Should the plaintiff carry its burden of showing actual or likely anticompetitive effects, the respondent -- in order to avoid condemnation -- must come forward with legitimate countervailing justifications.

As we indicated in Section V.B., *supra*, a plaintiff can carry out its affirmative case in either of two ways. It may make an indirect showing based on a demonstration of defendant's market power, which when combined with the anticompetitive nature of the restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects. Or, plaintiff can provide direct evidence of "actual, sustained adverse effects on competition" in the relevant markets, which would be "legally sufficient to support a finding that the challenged restraint was unreasonable" -- whether or not plaintiff has made any showing regarding market power. *Indiana Federation*, 476 U.S. at 461. See *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff has "two independent means by which to satisfy the adverse-effect requirement" -- direct proof of "actual adverse effect on competition" or "indirectly by establishing \* \* \* sufficient market power to cause an adverse effect on competition"); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects"); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993) (same).

The ALJ found that Realcomp possessed substantial market power in the relevant markets, and Realcomp does not contest this finding.<sup>33</sup> In the ordinary case, the market definition/market power measurement exercise provides the most complex, resource-intensive element of what is called the "full rule of reason" analysis that courts and commentators describe as the most elaborate variant of the Section 1 analytical continuum. In

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<sup>33</sup> Even if the ALJ's reading of the courts of appeals decisions in *Worldwide Basketball*, *Continental Airlines*, and *Brookins*, to require complaint counsel here to delineate a relevant market and measure the respondent's market power, were correct (*see supra*, note 16), his finding of substantial market power satisfies those decisions as well.

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this matter, the often contentious and sometimes problematic issue of the respondent's market significance is resolved conclusively. The ALJ's uncontested finding that Realcomp has substantial market power eliminates the urgency to decide which variant of the rule of reason governs our assessment of whether Realcomp violated Section 5 of the FTC Act. This finding of market power, coupled with our earlier determination that the tendency of the challenged policies was to suppress competition, provide "indirect" evidence that those policies have or likely will have anticompetitive effects.

We also find that there is sufficient direct proof of actual detrimental effects on competition resulting from Realcomp's restrictive policies. Complaint counsel's economic expert witness, Dr. Darrell Williams, conducted a time-series analysis comparing the share of EA listings in the Realcomp MLS before and after the implementation of the challenged policies, and found significantly fewer discount listings after the policies at issue were implemented. Dr. Williams also conducted a benchmark study comparing the share of EA listings in a number of multiple listing services in geographic areas with and without listing restrictions similar to Realcomp's, and found significantly fewer discount listings in areas where the MLS imposed website restrictions similar to Realcomp's. Lastly, Dr. Williams's regression analysis, controlling for several variables, provides clear demonstration of the correlation between restrictive website policies such as Realcomp's and the minimization of EA listings.

Thus, under this fuller rule of reason analysis, we find ample support in the record for a conclusion that Realcomp's policies are anticompetitive and – unless Realcomp can establish a legitimate countervailing justification for them – unreasonable restraints of trade, in violation of Section 1 of the Sherman Act and Section 5 of the FTC Act.

**1. Indirect Evidence of Anticompetitive Effects: The Significance of Realcomp's Market Power in the Rule of Reason Analysis**

The ALJ ultimately interpreted the conduct at issue differently than we do. Yet his Opinion reflects an evident awareness that

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Realcomp's conduct posed noteworthy competitive hazards. Judge McGuire wrote:

With respect to the Website Policy, and the requirement that in order to be considered an ERTS listing, an agent must provide minimum brokerage services, the nature of the restraint is such that it is likely to be anticompetitive. Such conclusion, though not intuitively obvious, necessarily requires an expanded inquiry into whether competition was, in actuality, unreasonably restrained.

ID 97. Examining, as we have, the context in which Realcomp developed the challenged Policies and accounting for their apparent purpose, we agree that the nature of the Policies is such that they were likely to be anticompetitive. A fuller inquiry into the behavior in question reinforces that assessment.

As we discussed above, a crucial element of assessing indirect evidence of anticompetitive effects -- the fuller inquiry to which the ALJ refers -- is the examination of Realcomp's position in the relevant market. The ALJ found that Realcomp possessed substantial market power in two relevant markets in Southeastern Michigan: the market for residential real estate brokerage services and the market for multiple listing services, which is a vital input into the brokerage services market. Realcomp does not dispute these findings in this appeal.

Complaint counsel argues that the finding of market power, coupled with a determination that the nature of the challenged policies was to suppress competition, support an inference of actual or likely adverse competitive effects. We agree, and both case law and the commentary support that proposition. *See, e.g., Law v. NCAA*, 134 F.3d at 1019; *Tops Markets*, 142 F.3d at 96; *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *Brown Univ.*, 5 F.3d at 669; *see also* American Bar Association, Section of Antitrust Law, 1 ANTITRUST LAW DEVELOPMENTS, at 65 (6th ed. 2007); American Bar Association, Section of Antitrust Law, MONOGRAPH NO. 23, THE RULE OF REASON, at 161-63 (1999). The ALJ's contrary conclusion, ID 97, constitutes an error of law.

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The importance of market power as a tool for assessing the likely competitive effect of a concerted practice is also demonstrated in cases involving the real estate sector. A prominent example is *United States v. Realty Multi-List, Inc.*, *supra*, where the court applied a “facial unreasonableness” standard, which “allows the courts to reach and void on its face any significantly restrictive rule of a combination or trade association with significant market power, which lacks competitive justification or whose reach clearly exceeds the combination’s legitimate needs.” 629 F.2d at 1370. There was no evidence of an actual “pricing effect” in *Realty Multi-List*. Nonetheless, the Court of Appeals found “facially unreasonable” the rules of the defendant MLS, which, among other things, denied to non-members information in the MLS database and other members’ listings information. *Id.* at 1357, 1370. The court found that the rules harmed broker competition between non-members and members and also harmed real estate buyers and sellers. *Id.* at 1371-72. As the court explained, as a result of those rules, “the public is denied the incentive to competition \* \* \*.” *Id.* at 1371.

Other courts as well have held unlawful policies or practices of a combination of real estate brokers having market power that deny access to an MLS or to other information respecting services that consumers desire. *Thompson v. Metropolitan MultiList, Inc.*, 934 F.2d 1566 (11th Cir 1991), for example, held that an organization of real estate brokers controlling an MLS, whose rules excluded certain competitors’ access to the MLS, violated the Rule of Reason. *Marin County Board of Realtors v. Palsson*, 549 P.2d 833 (Cal. 1976) held the same thing. And, in *Cantor*, the court held that an organization of real estate brokers controlling an MLS, whose rules prohibited certain competitors from using yard signs that were not MLS-branded yard signs, also violated the Rule of Reason. 568 F. Supp. at 430-31. As the court observed in *Realty Multi-List*, “there exists the potential for significant competitive harms when the group, having assumed significant power in the market, also assumes the power to exclude other competitors from its pooled resources.” 629 F.2d at 1370. See also *United States v. VISA U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) (joint venture rules prohibiting members from competing “with the others in a manner which the consortium considers harmful to its combined interests” was anticompetitive



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behavior). Realcomp's Policies similarly restrict competition by denying consumers a service they desire: access to EA listings with full public website exposure through the Realcomp MLS.

In light of Realcomp's acknowledged market power, and the facially restrictive nature of the policies at issue, no more is required, under the rule of reason, to support our conclusion that the Policies are unreasonable because they will predictably result in harm to competition.<sup>34</sup> The record evidence provides additional support for that conclusion, however, by detailing the mechanisms by which the Policies affect the workings of the market. Those Policies: (1) significantly restricted access by consumers to limited service brokerage listings on public websites; (2) effectively limited the reach of listings disseminated on the MLS itself, at least until the Search Policy was changed, and thereby (3) caused a reduction in the "pricing pressure" on the six-percent commissions typically charged by full-service brokers. These adverse effects on competition were established by the ALJ's findings respecting the importance of the Internet in general and the Approved Websites in particular to home buyers and sellers who want access to listings on public websites, *e.g.*, IDF 218-219; by the ALJ's findings that Realcomp's Policies severely restricted consumers' access to limited service listings on public websites, *e.g.*, IDF 349-350; by the testimony from limited service brokers about how Realcomp's Policies place them at a severe competitive disadvantage versus other geographic areas where the local MLS has no similar restrictions, *e.g.*, D. Moody Tr. 531-533; CX 526 (Groggins Dep.), at 29-31; CX 422

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<sup>34</sup> Thus, even if we accepted the ALJ's findings in total, we would still reverse his decision. Because the ALJ found that Realcomp had market power, ID 97, and that the Website Policy restricting the distribution of discount listing to public web sites was "likely to be anticompetitive," *id.*, those findings establish a *prima facie* case of illegality, *see, e.g., United States v. Brown Univ.*, 5 F.3d at 668-69, which Realcomp has failed to rebut. As discussed above, the justifications Realcomp offers are neither cognizable nor plausible. *See supra* Section V.C.2. Moreover, in light of these findings, the ALJ erred in requiring further proof regarding actual anticompetitive harm as an additional element of proof. *See also Indiana Federation*, 476 U.S. at 460 (quoting *Areeda, supra*, ¶1511, at 429); *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel v. Christian Hospital*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewiston Hospital*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v. National Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000).

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(Aronson Dep.), at 74-76; G. Moody Tr. 821-823, 825-826; Kermath Tr. 741; and by the ALJ's findings that limited service listings exerted "price pressure" on the full-service brokerage commission structure, IDF 99-101.

The ALJ found that the Search Function Policy did not harm competition because users of the Realcomp MLS could override the default settings. The ALJ found that, until April 2007, by virtue of Realcomp's Search Function Policy and its Minimum Service Requirement, the default setting for Realcomp's MLS was such that all searches were automatically configured to include only full-service listings so that members wishing to view limited services listings needed to specifically select those listings or to select the button labeled "select all listings." IDF 361, 363, 374. The relevant question, however, is not whether Realcomp's Policies *completely* excluded discount brokers from advertising their listings on the MLS, but whether they tended to stifle competition. The Policies did so.<sup>35</sup> Realcomp data and broker testimony show that many brokers did not override the default search parameters.<sup>36</sup> On this point we rely upon the record evidence showing what brokers actually do.

For example, Realcomp data show that cooperating brokers viewed and emailed EA listings far less frequently than ERTS listings. CX 498-A-036. Realcomp kept statistics for each listing within the Realcomp MLS showing the number of times a Realcomp MLS user viewed the detailed report for that listing.

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<sup>35</sup> While we do not necessarily reject the ALJ's very limited factual findings regarding the impact of the Search Function policy (IDF 361-371, 455-462), we note that he inexplicably omitted the extensive record evidence cited and summarized in the following paragraphs regarding the exclusionary impact of this Policy. For the reasons set forth in the text, we disagree with and disavow the conclusion he expressed in the section heading accompanying those "findings of fact" ("Discount Brokers Are Not Excluded by the Search Function Policy"). ID 58.

<sup>36</sup> This is hardly surprising. Realcomp's restrictive practice was aimed at discount *listing* brokers. While cooperating brokers could override the default search criteria, there was nothing that discount listing brokers could do to ensure that the cooperating brokers did so. Thus, the default setting was equally effective in punishing discount brokers whether it relied on the cooperating brokers' inertia, or on some other, more technologically advanced, weapon of exclusion.

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CX 228-06. Dr. Williams determined, based on Realcomp's data, that between January 2004 and October 2006, ERTS listings were viewed, on average, 5.1 times per day, whereas EA listings were viewed only 3.2 times per day. CX 498-A-036; CX 517; CX 518. Realcomp also calculated that Realcomp MLS users viewed residential and condominium ERTS listings on average a total of 201 times per month, whereas they viewed EA residential and condominium listings an average of 94 times per month. CX 228-06-07.

Realcomp also kept statistics for each listing within the Realcomp MLS showing the number of times Realcomp MLS users sent out a listing via email, either as an individual listing or part of a group of listings. CX 228-06. Based on Realcomp data, Dr. Williams ascertained that in 2006, ERTS listings were sent via email from the Realcomp MLS an average of 6.9 times per day-on-market, whereas EA listings were sent via email an average of only 1.9 times per day-on-market. CX 498-A-036-037; CX 519; CX 520. Furthermore, Realcomp calculated that Realcomp MLS users emailed residential and condominium ERTS listings on average a total of 286 times per month, whereas residential and condominium EA listings were emailed on average a total of one time per month -- less than 0.4 percent as often. CX 228-06-07.

Furthermore, brokers testified that they received complaints from consumers who had been told by brokers that their EA listed homes were difficult to find in the MLS. RRPf 931, 933-35, 964, 986, 1042, 1048. Testimony from EA brokers reinforces this evidence. In her experience as a broker, Denise Moody of Greater Michigan Realty observed that her customers' limited service listings are viewed far less often by other Realcomp members and emailed to potential buyers less frequently than her customers' ERTS listings. D. Moody Tr. 531-533. Limited Service brokers also testified that they heard from other agents looking on the MLS that they could not find their customers' listings, and that this was because of Realcomp's Search Function Policy. CX 526-29-31 (Groggins Dep.). Limited Service brokers also received complaints from customers whom other agents told that their

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listings were not on the Realcomp MLS. *See, e.g.*, CX 422-62-63, -74-76 (Aronson Dep.); RX 67-06; RX 73-01.<sup>37</sup>

Craig Mincy, the owner of MichiganListing.com (*see supra*, note 30) testified that, when he was a full-service broker, he was not aware that Realcomp's default search screen excluded EA listings, and that he only became aware of it later when, as he began offering limited service listings, a customer informed him that the customer's listing was not on Realtor.com. Mincy Tr. 390-92.<sup>38</sup> Mr. Mincy believes that he missed properties when doing searches on behalf of buyers, in part due to Realcomp's Search Function Policy. *Id.* at 393, 400. Mr. Mincy also testified that he receives half a dozen calls per week from Realcomp brokers who, because of Realcomp's Search Function Policy, did not find his MichiganListing.com EA properties listed on the Realcomp MLS. *Id.* at 401-402. He testified that he has had no similar calls from Realcomp brokers regarding his ERTS listings or his listings in other MLSs. He only receives these calls regarding his limited service listings in Realcomp. *Id.* at 405-406.<sup>39</sup>

This evidence supports our finding that the Realcomp Search Function Policy was a significant factor accounting for the results we have described. One of complaint counsel's industry experts testified that he has "never heard of this kind of decline by agents

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<sup>37</sup> Greater Michigan Realty gets calls "weekly" from customers with listings in Realcomp who indicated they have been contacted by another Realtor who claims that the customer's listing can't be found or "didn't show up" on the MLS system. In the Realcomp area, this type of customer complaint is "one of the most significant challenges" that Greater Michigan Realty faces. G. Moody Tr. 821-823, 825-826; CX 443-002. AmeriSell Realty's broker-owner Jeff Kermath testified that he receives complaints from clients in the Realcomp service area "several times per week" that other Realtors "can't find the listing" on the MLS. Kermath Tr. 741.

<sup>38</sup> The only way Realcomp members find out about the Search Function Policy is through one training class at the very beginning of their membership. CX 36 (Kage IHT), at 94.

<sup>39</sup> Realcomp's Board of Governors received a request to change the default setting because brokers did not realize that default searches only resulted in ERTS listings. CX 35 (Kage Dep.), at 133-38; CX 250-02-03. One Realcomp Governor voted to change the default because he wanted the default to include all available listing types. CX 415 (Nowak Dep.), at 44-45.

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choosing saying [sic] I'm not going to look at that listing because it's Exclusive Agency \* \* \* and everything I've ever understood in my entire career is that cooperating brokers want to see every single home that's available on that MLS." Murray Tr. 194, 195-96. Realcomp's Search Function Policy places limited service listings at a disadvantage similar to being excluded from Realcomp altogether. RX 154-A-32; Murray Tr. 196-199.<sup>40</sup> This evidence bolsters our conclusion that the Search Function Policy, in tandem with the Minimum Service Requirement, likely had anticompetitive effects.

Turning to the Website Policy, although the MLS continues to be the most important tool for advertising real estate listings, the Internet has raised the importance of advertising on public Realtor websites. Unlike the Search Function Policy, which merely made it more difficult for EA listings to advertise effectively on the Realcomp MLS, the Website Policy barred discount brokers -- and continues to bar them -- from using Realcomp to advertise on public websites altogether.

Realcomp's Website Policy completely excludes limited service listings from Realcomp's highly promoted "MoveInMichigan.com" real estate company site, which Realcomp describes to consumers as "one of the most comprehensive Real Estate listing sites in all of Southeastern Michigan," CX 15, and from "ClickOnDetroit.com," the leading local website in southern Michigan. CX 222-009-010; IDF 234-235. Realcomp does not inform consumers that MoveInMichigan.com only includes ERTS listings (CX 150), so they are unaware that it is incomplete. Limited service brokers have no other way to place their listings on those websites, which are two of the top four public websites used by consumers in the relevant market. Kage Tr. 936-37, 989; CX 36 (Kage IHT), at 48-49 (brokers using these listings cannot post on MoveInMichigan.com or ClickOnDetroit.com because Realcomp has an exclusivity agreement for those websites); IDF 238, 387.

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<sup>40</sup> The Search Function Policy also affects other aspects of the Realcomp MLS, including Comparative Market Analyses. CX 251-253. The Realcomp training book regarding Comparative Market Analysis does not tell Realcomp members how to include all listing types in their analysis. *Id.* At least some Comparative Market Analysis reports generated by brokers through the Realcomp MLS default to ERTS listings. CX 253.

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Access to the majority of Realcomp's member IDX websites (another one of the top four public website sources for consumers' use in the relevant market) is also restricted severely. Even dual listing on other MLSs, such as MiRealSource, does not allow brokers to display EA listings on MoveInMichigan.com or most Realcomp member IDX websites. Murray Tr. 236-237; RX 154-A-065; CX 36-190; IDF 387.

The ALJ found that Realcomp's Website Policy and related requirements curbed access by consumers to limited service listings on all of Realcomp's Approved Websites, including Realtor.com. IDF 349-350. As for Realtor.com, NAR's own site and the fourth of the major sources of consumer websites in the relevant market, sellers who list with Realcomp still can get their listings on Realtor.com, notwithstanding Realcomp's restrictive policies, but only if limited service brokers "dual-listed" their listings on both the Realcomp MLS and another MLS that did not impose similar public website restrictions. IDF 436. This alternative imposes extra costs on the listing broker and added burden on any broker assisting such a customer (*i.e.* matching listing numbers that do not correspond to one another). IDF 437, 443-444.

Further, the dual listing alternative, which can provide some of the access that Realcomp's policies would otherwise restrict, is not costless, either in terms of time or money.<sup>41</sup> As we noted in

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<sup>41</sup> We reject the ALJ's finding that discount brokers must incur only "nominal" costs for dual-listing in Realcomp and another MLS in order to circumvent Realcomp's restrictive Website Policy. IDF 442-443. This finding is flatly inconsistent with the testimony of the witnesses that the ALJ cites in support of that proposition. *See, e.g.*, Mincy, Tr. at 417-419 (testifying that, over the course of a year, his company had to devote a total of about two full person-weeks maintaining "dual listings" in another MLS as well as Realcomp in order to circumvent Realcomp's restrictive Website Policy – time that took away from his ability to market services and expand his business, and that his listings still had less exposure than Realcomp ERTS listings due to being excluded from the IDX websites and updated less effectively); Sweeney, Tr. 1312, 1340 ("Q: And I would assume, then, your staff has to enter listings twice? A: Yes, that's actually a bigger cost is the administrative hassle of entering the listings in both systems. \* \* \* It's not just the double entry, \* \* \* it's the maintenance, every time there's a price change, you have to do it in two systems, any time there's any change whatsoever at least reported in the system, you have to do it twice. Yes, that is a burden. An administrative burden.").

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*Polygram*, restrictions on advertising likely harm consumers by raising their search costs and reducing sellers' incentives to lower prices. 136 F.T.C. at 354-55. Preventing discount listings from appearing on publicly available websites imposes costs on competitors who must seek out alternatives to Realcomp's IDX feeds and imposes costs on consumers, who must hunt through several sources of home listings in order to include EA listings in their home buying decisions.

The ALJ found that the Policies did not have an anticompetitive effect because they did not completely exclude discount brokers from the Realcomp MLS, but merely restricted access to some of its services. He attempted to distinguish this case from *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284 (1985), on that ground. ID 94. Like the ALJ's emphasis on the lack of price effects, his emphasis on the lack of exclusion from Realcomp and from its MLS was an error of law; for complete exclusion is not the standard of liability here.<sup>42</sup> In *Northwest Wholesale Stationers*, the Supreme Court stated that a combination of competitors with market power need not exclude other competitors from their association in order to restrain trade unreasonably under Section 1. 472 U.S. at 295, n.6 ("Northwest's activity is a concerted refusal to deal with Pacific on substantially equal terms. Such activity might justify *per se* condemnation if it placed a competing firm at a severe competitive disadvantage.").

Similarly, in *Palsson*, the California Supreme Court made it clear that the problem with the exclusionary rules there was not that the MLS rules excluded competitors, but that they operated to "narrow consumer choice" and "hampered" non-members from competing "effectively." 549 P.2d at 842-43. The same thing was true in *Thompson*, where the court held that the MLS rule

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<sup>42</sup> The ALJ's "findings of fact" that discount brokers are not *entirely* excluded from the Realcomp MLS, IDF 428-433, and that there are measures they can take to obtain listings on Realtor.com and other websites, IDF 434-454, are thus irrelevant, even if they may not be entirely inaccurate. Similarly, the fact that some discount brokers are managing to compete, IDF 463-472, is irrelevant and has no bearing on the exclusionary impact of Realcomp's restrictive practices (*i.e.*, how much *more* effectively competitive the market would be in the absence of those policies).

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limiting membership to members of a real estate board violated the Rule of Reason, not because the rule excluded some Realtors but because it operated both to injure consumers by preventing the excluded brokers' listings from being "distributed as widely as possible," and to injure competition among brokers. 934 F.2d at 1580. And the challenged rule in *Cantor* was held illegal under the Rule of Reason because it deprived discount brokers from using an effective means of advertising their services, which had the same two anticompetitive effects. See 568 F. Supp. at 430. Thus, as a matter of law, there is liability under the Rule of Reason cases insofar as Realcomp's Policies operated to narrow consumer choice or hinder the competitive process.<sup>43</sup>

The ALJ's own findings and the uncontroverted evidence described above establish both of those effects. More specifically, those findings establish that (1) because of its database of listings, the Realcomp MLS is the most effective tool for the sale of residential real estate in Southeastern Michigan; (2) brokers offering limited service and brokers offering traditional, full-service brokers' services compete with one another for new listings; (3) limited service brokers' services potentially cost less than the services of brokers offering only full-service listings (they not only unbundle the services offered but also unbundle the commission structure); (4) limited service brokers' listings consequently exert "price pressure" on full-service brokers' listings; (5) Realcomp's Website Policy, coupled with its Minimum Service Requirement, severely restricted consumers' access to limited service listings because, as a result of those policies, the listings were not available on the most popular websites; and (6) Realcomp's Search Function Policy, coupled with its Minimum Service Requirement, impeded even brokers from accessing limited service listings on the Realcomp MLS because of the default settings. See, e.g., IDF 76-77, 81, 88, 97,

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<sup>43</sup> Of course, the point of policies that punish discounters need not be to drive them out of business entirely; all that is necessary is to detect and punish deviations enough to bring a sufficient number of discounters back into the fold to sustain the price at supracompetitive levels. Cf. U.S. Dep't of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (rev'd April 8, 1997), § 2.1 ("Detection and punishment of deviations ensure that coordinating firms will find it more profitable to adhere to the terms of coordination than to pursue short-term profits from deviating, given the costs of reprisal.").



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100-101, 106-108, 114, 121, 210, 249, 349-50, 361, 363-64, 428, 430.

Each of these findings enjoys significant evidentiary support. For example, the impact on brokerage commissions of limited and full-service offerings is illustrated by the MichiganListing.com advertisement described above, *supra* note 30. The substantial “pricing pressure” exerted by limited service brokers on full-service brokers is supported, *inter alia*, by NAR’s description of that phenomenon. *See supra* (text accompanying note 9); CX 403-007. The impact of the Website Policy is demonstrated by the testimony of Realcomp’s witness, Mr. Sweeney, that brokers whose listings are not accessible in the Realcomp Approved Websites are at “a severe competitive disadvantage.” Sweeney Tr. 1344-47. The impact of the Search Function Policy is established by the statistics respecting the computer use of the Realcomp MLS to access limited service and full-service offerings. *See supra* (text accompanying notes 35-40). And the impact of all of the Policies combined is reflected in the testimony of limited-service brokers, who described the complaints they received from consumers who could not access Realcomp MLS limited-service offerings on the public websites. *See supra* (text accompanying notes 40-41); *see, e.g.*, CX 422-62-63, -74-76 (Aronson Dep.); CX 526-029-31; RX 67-06; RX 73-01. In the ALJ’s full Rule of Reason analysis, none of these findings, or the evidence supporting them, is mentioned. *See* ID 97-119.

This is not a case in which the Commission’s reversal of the ALJ is based on indifference to his findings of fact and conclusions of law. To the contrary, the result in this case is based almost exclusively on his findings<sup>44</sup> and our conviction that, based on those findings and examination of his conclusions, those conclusions were erroneous, as a matter of law.

Given the market structure and competitive dynamics of the residential real estate industry, we find that Realcomp’s Website Policy, the Search Function Policy, and the Minimum Service Requirement harmed competition and created a likelihood that valuable rivalry among real estate service providers would be suppressed. The Website Policy excluded discount listings from

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<sup>44</sup> *But see supra*, note 4.

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being advertised on websites available to the general public. The Search Function Policy significantly reduced the exposure of non-ERTS listings to brokers searching the MLS, while the Minimum Service Requirement limited the arrangements that discount brokers could make and still claim ERTS status. The latter requirement enhanced the discriminatory effects of the Website and Search Function policies. As a group these Policies improperly constrained competition between discount listings and full-service listings.

The ALJ concluded otherwise. He advanced several reasons to explain his view that, despite his recognition that the Website Policy was likely on its face to cause competitive harm, ID 97, the Policies did not injure competition. We believe that this reasoning slights the importance of Realcomp's market power in assessing the significance of its conduct. In our view, Realcomp's substantial market power, coupled with the clear tendencies of its restrictive policies to harm competition, establishes a basis for inferring actual or likely anticompetitive effects and, consistent with the case law, suffices to require Realcomp to provide reasonable justifications for the challenged restrictions, which, as we discuss above, it failed to do. We nonetheless also consider the other means by which a plaintiff may establish its prima facie case under the rule of reason – by direct evidence of anticompetitive effects.

## **2. Direct Evidence of Anticompetitive Effects**

We examine in this section the direct evidence of effects provided by complaint counsel, and we address the reasons advanced by the ALJ for his conclusion that complaint counsel's showing on the issue of competitive effects was wanting. Specifically, we examine the ALJ's findings that, first, the testimony of Realcomp's economic expert showed that the Realcomp policies did not adversely affect the market share of limited-service offerings or the sale prices or days-on-the-market of homes listed (IDF 482-600; ID 105-119); second, the challenged Policies did not prohibit limited-service brokers or agents from joining Realcomp (IDF 163-64, 185, 433; ID 94); third, the Policies did not exclude the listings of limited-service brokers from the Realcomp MLS itself (ID 95, 100-01); fourth, with specific reference to the Website Policy, access to the

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Approved Websites was not a major consideration in light of the accessibility of limited-service listings in Realcomp's MLS itself and possible listings by limited-service brokers and agents on Realtor.com and on other websites such as Google and Trulia (ID 101-102); and, fifth, the presence of four growing or successful EA brokers in the relevant market was "inconsistent with Complaint Counsel's theory that EA brokers have been competitively impaired," ID 98.

The ALJ concluded that the economic analyses performed by the FTC's expert were unpersuasive and had little probative value in showing that Realcomp's Policies adversely affected competition.<sup>45</sup> This conclusion appears to reflect an inadequate grounding on the ALJ's part in some of the technical matters for which adjudicators at an expert agency charged with handling competition matters should be expected to develop expertise.

For example, the ALJ accepted Dr. Eisenstadt's testimony that Dr. Williams's regressions were flawed because they failed to include several relevant variables, including zip code level data and MSA level data. But this critique is not supported by the underlying regression model or data. The relevant information was in fact captured with the county level explanatory variables (in other words, the additional variables, while relevant, are not independent). Indeed, county level data vary more than MSA or zip code level controls and, arguably, provide more detailed information. Therefore, adding the MSA level variables when county level data already have been factored in would decrease the number of degrees of freedom in the analysis, thus inflating the variance of the estimated parameters, without providing any more helpful information. Dr. Williams explored this relationship and correctly concluded that including both MSA and county level controls will introduce inefficiencies in the model, which "make[s] no economic sense," and would have resulted in inaccurate and meaningless results. CX 560-06.

There were other errors in the ALJ's decision as well, which we discuss below. In reviewing the record *de novo*, we find that

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<sup>45</sup> See ID 61-75 (IDF 482-600) (inferences or conclusions regarding the economic and econometric testimony mischaracterized as "findings of fact"); ID 105-119.

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the economic evidence provided by the FTC's economic expert and other record evidence support the proposition that Realcomp's Policies harmed competition.

Dr. Darrell Williams, the FTC's economic expert, conducted three analyses to determine how Realcomp's Policies affected competition: (1) a time-series analysis that compared the share of EA listings in the Realcomp MLS before the adoption of the Policies with the share of EA listings after their adoption; (2) a benchmark study that compared the share of EA listings in multiple listing services in geographic areas with and without listing restrictions similar to Realcomp's; and (3) a regression analysis to determine the correlation between restrictive listing policies and the share of EA listings.

Dr. Williams's time-series analysis showed that the monthly average share of EA listings in the Realcomp MLS fell from about 1.5 percent in May 2004 before the Policies were both in place and enforced, to about 0.75 percent in October 2006. IDF 487. With this drop, EA listings lost half of their toehold in the market. Noting that Realcomp's expert testified that the drop was at most one percentage point (IDF 482), the ALJ characterized the drop as "not significant." ID 61. In doing so, he confused the reduction in absolute percentage points with the relevant rate of change that showed non-traditional arrangements losing their toehold in the market.

The ALJ also discounted the results of the time-series analysis on the ground that the study did not account for other economic factors that might have caused the share of EA listings to fall. ID 103-04, 106. In anticipation of this criticism, Dr. Williams had performed two studies to compare Realcomp with MLSs in nine other Metropolitan Statistical Areas (MSAs). Six of these (the Control MSAs) had no restrictions throughout the period for which data was collected.<sup>46</sup> Of the other three (the Restriction MSAs), two had had policies, throughout the period for which data was collected, that prevented EA listings from being included

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<sup>46</sup> Charlotte, North Carolina; Dayton, Ohio; Denver, Colorado; Memphis, Tennessee; Toledo, Ohio; and Wichita, Kansas.

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in MLS feeds to public websites and the MLS's IDX;<sup>47</sup> the other (Boulder, Colorado) adopted such restrictions during the period under consideration. IDF 491-496.

Dr. Williams performed a statistical analysis comparing the share of EA listings in the Control MSAs with the Restriction MSAs (including Realcomp's MSA). IDF 512-513. The ALJ faulted Dr. Williams's selection of Control and Restriction MSAs. According to the ALJ, the selection of the Control MSAs was flawed by its inclusion of MSAs that were dissimilar from Detroit (the MSA which includes the relevant geographic market).

The ALJ determined that if Dr. Williams had correctly identified the economic and demographic factors that determine the share of EA contracts at the MSA level, then one would expect that the shares of EA listings in the Control MSAs would also be very similar. IDF 526. This conclusion is erroneous. Even if the seven variables used as criteria to select the control sample were perfect predictors of the percentage of EA listings, this would not imply that the percentages in each MSA would be equal or nearly equal to each other because the values of the seven explanatory variables are not equal. CX 560-05. Realcomp's expert, Dr. Eisenstadt, himself acknowledged that the values of the seven variables used as sample selection criteria vary across MLSs in the control sample, *see* RX 161-08, ¶13, so it's not clear why the ALJ would nonetheless expect the shares of EA listings in those Control MSAs to be "very similar." The fact that the Restriction MSAs all had very low shares of EA listings, despite different demographics, supports a conclusion that restrictive policies caused the reduction in EA shares. If these MSAs had few common characteristics other than restrictive multiple listing policies, yet all had low EA shares, it would be logical to conclude that the restrictive policies caused the lower shares.

Realcomp's expert, Dr. Eisenstadt, testified that a comparison of Detroit to Dayton (one of the Control MSAs) revealed the flaw in Dr. Williams's analysis. According to Dr. Eisenstadt, because Dayton and Detroit are demographically similar, any anticompetitive effect of the Policies should be readily evident from a comparison of those two markets. Dr. Eisenstadt testified

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<sup>47</sup> Williamsburg, Virginia and Green Bay/Appleton, Wisconsin.

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that the evidence did not bear this theory out: Dayton had a 1.24 percent share of EA listings, in comparison to Detroit's 1.01 percent share, a difference which the ALJ deemed insignificant. Comparing differences in absolute percentage points when the numbers are very low masks the magnitude of the difference. What is less than a quarter percentage point difference in absolute terms in this case in fact translates to a 19 percent difference between the two populations, a difference that we do not consider insignificant.

The ALJ also pointed to the statistics regarding the city of Boulder as further evidence that the Restrictions had no anticompetitive effect. The multiple listing service in Boulder operated both with and without restrictions during the time period studied by Dr. Williams. EA listings had a 2.03 percent share in the Boulder MLS in the period without restrictions and a 0.98 percent share in the period after restrictions were adopted. The ALJ once again characterized the decline in share as insignificant by comparing absolute percentage points, amounting to 1.05 percentage points. As we have discussed, when the numbers are very low, the rate of change in the EA share reveals the extent to which non-traditional arrangements have been losing their toehold in the market. In this case, EA listings in Boulder fell by 51 percent after the restrictions were adopted. Dr. Eisenstadt testified that there was a downward trend during the last three months of the pre-restriction period, and that if these last three months were used as a benchmark, the reduction in the share of EA listings would be even smaller than one percentage point (in absolute terms).<sup>48</sup> But a one percentage point drop in the share of EA listings in Boulder translates to a 49 percent decline in the market share of those listings; a half-percentage point drop equals a 25 percent decline in market share. We consider either of these declines to be competitively significant.

Finally, it is important to note the difficulty of proving, through evidence of this sort, a substantial loss of competition in cases involving new entrants who gain and then lose a toehold in

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<sup>48</sup> The actual size of the decline in these three months is unknown. During his testimony, Dr. Eisenstadt referred to an exhibit not admitted in evidence but did not state the actual size of the decline in his testimony. *See* Eisenstadt Tr. 1412-1414.

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a market. As demonstrated above, the magnitude of any effect is likely to be small in absolute market share terms, given the already small numbers to begin with. But, as the D.C. Circuit pointed out in *United States v. Microsoft*, the relevant question in dealing with emerging competition is not whether the new entrant would actually have developed into a viable substitute for the dominant product, but whether “the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant’s continued monopoly power \* \* \*.” 253 F.3d 34, 79 (D.C. Cir. 2001). The court in *Microsoft* concluded that “it would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will \* \* \*.” *Id.* The *Microsoft* court therefore did not require a showing of actual harm but only asked whether exclusionary acts designed to quash nascent competition, when undertaken by a firm with a large market share, were sufficient for a finding of a violation. Although the *Microsoft* court was analyzing a monopolization claim under Section 2 of the Sherman Act, we believe that the principle is equally applicable to this case.

In conclusion, we find unpersuasive the ALJ’s rejection of complaint counsel’s econometric evidence of anticompetitive effects. But even if we were to agree with the ALJ that the economic evidence was at best inconclusive, the inferences reasonably drawn from the other record evidence discussed in part V.D.1. above amply corroborates the conclusions of Dr. Williams that, by “inhibit[ing] the ability of nontraditional brokers to compete effectively,” thus “reduc[ing] the choices available to consumers of brokerage services,” and “protect[ing] the de facto price floor that supports the level of real estate brokerage commissions,” CX 498-A-07, Realcomp’s Policies have had a substantial restrictive effect on competition for real estate brokerage services in Southeastern Michigan.

Notwithstanding such conclusion, defendants generally may be able to defeat a finding of liability if their practices can be “justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive.” *Northwest Wholesale Stationers*, 472 U.S. at 294. The requisite beneficial effect ordinarily is one that stems from measures that

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increase output or improve product quality, service, or innovation. *Polygram*, 135 F.T.C. at 345-46.

As we discussed above in connection with our analysis under the *Polygram* “inherently suspect” analysis, however, Realcomp’s proffered justifications fail to satisfy those standards. We rejected Realcomp’s “free riding” claim as implausible on its face, and its “bidding disadvantage” argument as not cognizable under the antitrust laws. Accordingly, Realcomp has failed to overcome the anticompetitive effects of its Policies with any legitimate, procompetitive justifications.

**VI. Remedy**

Complaint counsel has proven that Realcomp violated Section 5 of the Federal Trade Commission Act by adopting anticompetitive policies that prohibited information on Exclusive Agency listings and other forms of nontraditional listings from being transmitted from its MLS to public real estate websites, and restricted their display in the Realcomp MLS’s search results. Realcomp’s Policies, adopted by a group of competing real estate brokers, are collective agreements that stifle competition from nontraditional listings.

The Commission has wide discretion in its choice of a remedy for violations of Section 5 of the FTC Act. *FTC v. Nat’l Lead Co.*, 352 U.S. 419, 428 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611 (1946). The Commission’s remedy must be reasonably related to the violation. *FTC v. Ruberoid Co.*, 343 U.S. 470, 473 (1952); *Jacob Siegel*, 327 U.S. at 613. Complaint counsel’s proposed remedy, which we adopt here (with minor changes to paragraphs I.A, I.K, I.L, I.N, I.P, I.Q, and II), requires Realcomp to cease and desist from adopting or enforcing any policy, rule, practice or agreement that interferes with the ability of its broker members to enter into EA listings or other forms of nontraditional listings. The Order is consistent with the relief accepted in settlement of recent similar cases, and will remedy Realcomp’s illegal conduct while at the same time allowing Realcomp to continue to provide the competitively enhancing services of its MLS and public data feeds.



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Paragraph I of the Order defines terms used within the Order. Paragraph II prohibits Realcomp from engaging in behavior that discriminates against nontraditional listings. Realcomp may not, under the Order, treat nontraditional listings in a discriminatory manner. Specifically, Realcomp may not, among other things, prevent its members from offering or accepting EA listings; prevent its members from cooperating with brokers that offer or accept EA listings; or prevent the publication of EA listings on its MLS or public websites to which Realcomp provides data. Realcomp may, however, adopt policies relating to matters that are reasonably ancillary to its legitimate objectives, such as the payment of dues and participation requirements.

Paragraph III of the order requires Realcomp to amend its rules and regulations to conform to the Order, within 30 days after the date the Order becomes final. Paragraph IV requires Realcomp, within 90 days after the date the Order becomes final, to inform its members of the amendments required under Paragraph III, and to provide each of its members with a copy of the Order. Paragraph IV also requires that the Order be placed on Realcomp's publicly accessible website and to remain accessible for five years from the date it becomes final.

Paragraph V requires Realcomp to notify the Commission of any proposed dissolution, acquisition, merger or consolidation of Realcomp, or of any other change that might affect its compliance obligations. Paragraph VI requires Realcomp to file written reports setting forth the manner and form in which it has complied with the Order.

Paragraph VII provides that the Order will remain in effect for a period of ten years.

**VII. Conclusion**

We hold that Realcomp violated Section 5 of the Federal Trade Commission Act and we reverse the Initial Decision. We enter the attached Order, which, among other things, prohibits Realcomp from restricting nontraditional listings from the full range of services which it offers. Realcomp is required to amend its rules and regulations within thirty days after the Order becomes final, to inform each Realcomp member of the changes

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to its rules and regulations, and to provide a copy of the Order to each Realcomp member. The Order incorporates the parties' Joint Stipulation Regarding Respondent's Search Function Policy, in which Realcomp agreed to repeal its Search Function Policy.

**FINAL ORDER**

The Commission has heard this matter on the appeal of Counsel Supporting the Complaint from the Initial Decision and on briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying Opinion of the Commission, the Commission has determined to reverse and vacate the Initial Decision and enter the following order. Accordingly,

**I.**

**IT IS HEREBY ORDERED** that for purposes of this Order, the following definitions shall apply:

- A. "Respondent" or "Realcomp" means Realcomp II Ltd., a corporation organized, existing and doing business under and by virtue of the laws of the State of Michigan, with its office and principal place of business at 28555 Orchard Lake Road, Suite 200, Farmington Hills, Michigan 48334. The term also means the Realcomp Owners, Board of Directors, its predecessors, successors, assigns, divisions and wholly or partially owned subsidiaries, committees, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the directors, officers, shareholders, participants, employees, consultants, agents, and representatives of the foregoing. The terms "subsidiary," "affiliate" and "joint venture" refer to any person in which there is partial or total ownership or control by Realcomp, and is specifically meant to

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include Realcomp MLS and/or each of the Realcomp Websites.

- B. “Owners” means the current and future Boards and Associations of Realtors that are the sole shareholders of Realcomp, which included the Dearborn Board of REALTORS, Detroit Association of REALTORS, Livingston Association of REALTORS, Metropolitan Consolidated Association of REALTORS, North Oakland County Board of REALTORS, Eastern Thumb Association of REALTORS and Western-Wayne Oakland County Association of REALTORS at the time of entry of this order.
- C. “Multiple Listing Service” or “MLS” means a cooperative venture by which real estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering cooperation and offering compensation in and facilitating real estate transactions.
- D. “Realcomp MLS” means the Realcomp MLS or any other MLS owned, operated or controlled, in whole or in part, directly or indirectly, by Realcomp, any of its Owners, predecessors, divisions and wholly or partially owned subsidiaries, affiliates, and all the directors, officers, employees, agents, and representatives of the foregoing.
- E. “Realcomp Member” means any person authorized by Realcomp to use or enjoy the benefits of the Realcomp MLS, including but not limited to Members and Subscribers as those terms are defined in the Realcomp Rules and Regulations.
- F. “IDX” means the internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website.

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- G. "IDX Website" means a Website that is capable of integrating the IDX listing information within the Website.
- H. "Moveinmichigan.com" means the Website owned and operated by Realcomp that allows the general public to search information concerning real estate listings from Realcomp.
- I. "Realtor.com" means the Website operated by the National Association of Realtors that allows the general public to search information concerning real estate listings downloaded from a variety of MLSs representing different geographic areas of the country, including but not limited to real estate listings from Realcomp.
- J. "Approved Website" means a Website to which Realcomp or Realcomp MLS provides information concerning listings for publication including, but not limited to, Realcomp Member IDX Websites, Moveinmichigan.com, and Realtor.com.
- K. "Exclusive Right to Sell Listing" means 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 broker, the owner or another broker, and any additional definition that Realcomp ascribes to the term "Exclusive Right to Sell Listing."
- L. "Exclusive Agency Listing" means a listing agreement that authorizes the listing broker, as an exclusive agent, to offer cooperation and compensation on a blanket unilateral basis, but also reserves to the seller a general right to sell the property on an unlimited or restrictive basis, and any additional definition that Realcomp ascribes to the term "Exclusive Agency Listing."

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- M. “Services of the MLS” means the benefits and services provided by the MLS to assist Realcomp Members in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents representing home sellers, Services of the MLS shall include, but are not limited to:
1. having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and
  2. having the property publicized through means available to the MLS including, but not limited to, information concerning the listing being made available on Moveinmichigan.com, Realtor.com and IDX Websites.
- N. “Full Service” means a listing broker will provide all of the following services: (1) Arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) Accept and present to the seller(s) offers to purchase procured by cooperating brokers; (3) Advise the seller(s) as to the merits of offers to purchase; (4) Assist the seller( s) in developing, communicating, or presenting counteroffers; and (5) Participate on behalf of the seller(s) in negotiations leading to the sale of the listed property.
- O. “Other Lawful Listing” means a listing agreement, other than an Exclusive Right to Sell Listing or Exclusive Agency Listing, which is in compliance with applicable state laws and regulations, including but not limited to, Limited Service listings and MLS Entry Only listings.
- P. “Limited Service Listing” means a listing agreement in which the listing broker will not provide one or more of the following services: (1) Arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) Accept and present to the

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seller(s) offers to purchase procured by cooperating brokers; (3) Advise the seller(s) as to the merits of offers to purchase; (4) Assist the seller(s) in developing, communicating, or presenting counteroffers; and (5) Participate on behalf of the seller(s) in negotiations leading to the sale of the listed property.

- Q. “MLS Entry Only Listing” means a listing agreement in which the listing broker will not provide any of the following services: (1) Arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) Accept and present to the seller(s) offers to purchase procured by cooperating brokers; (3) Advise the seller(s) as to the merits of offers to purchase; (4) Assist the seller(s) in developing, communicating, or presenting counteroffers; and (5) Participate on behalf of the seller(s) in negotiations leading to the sale of the listed property.

**II.**

**IT IS FURTHER ORDERED** that Respondent Realcomp, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a Multiple Listing Service or Approved Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement of Realcomp that denies, restricts or interferes with the ability of Realcomp Members to enter into Exclusive Agency Listings or Other Lawful Listing agreements with the sellers of properties, including, but not limited to, any policy, rule, practice or agreement that:

- A. prevents Realcomp Members from offering or accepting Exclusive Agency Listings or any Other Lawful Listings;
- B. prevents Realcomp Members from cooperating with listing brokers or agents that offer or accept Exclusive Agency Listings or any Other Lawful Listings;

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- C. prevents Realcomp Members, or the sellers of properties who have entered into lawful listing agreements with Realcomp Members, from publishing information concerning listings offered pursuant to Exclusive Agency Listings or any Other Lawful Listings on the Realcomp MLS and Approved Websites;
- D. denies or restricts the Services of the MLS to Exclusive Agency Listings or any Other Lawful Listings in any way that such Services of the MLS are not denied or restricted to Exclusive Right to Sell Listings;
- E. as pertaining to the searching, sorting, ordering, transmission, downloading, or displaying of information pertaining to such listings, treats Exclusive Agency Listings, or any Other Lawful Listings, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to any policy, rule, practice or agreement that:
  - 1. discriminates against Exclusive Agency Listings or Other Lawful Listings in the property search functions in the Realcomp MLS by defaulting to another listing type;
  - 2. defaults the searches in the Realcomp MLS to Exclusive Right to Sell/Full Service Listings and Unknown listings; or
  - 3. associates Exclusive Right to Sell Listings with Full Service, and/or that does not allow Exclusive Right to Sell/Limited Service Listings and Exclusive Right to Sell/MLS Entry Only Listings; or
- F. in any other respect, treats Exclusive Agency Listings, or any Other Lawful Listings, in a less advantageous manner than Exclusive Right to Sell Listings or any Other Lawful Listing.

*Provided, however,* that nothing herein shall prohibit the Respondent from adopting or enforcing any policy, rule, practice or agreement regarding subscription or participation requirements,

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payment of dues, administrative matters, or any other policy, rule, practice or agreement, that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

**III.**

**IT IS FURTHER ORDERED** that Respondent shall, no later than thirty (30) days after the date this Order becomes final, amend its rules and regulations to conform to the provisions of this Order.

**IV.**

**IT IS FURTHER ORDERED** that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) inform each Realcomp Member of the amendments to its rules and regulations to conform to the provisions of this Order; and (2) provide each Realcomp Member with a copy of this Order. Respondent shall transmit the rule change and Order by the means it uses to communicate with its members in the ordinary course of Realcomp's business, which shall include, but not be limited to: (A) sending one or more emails with one or more statements that there has been a change to the rule and an Order, along with a link to the amended rule and the Order, to each Realcomp Member whose email address is known to Realcomp; (B) mail to any Realcomp Member whose email address is unknown one or more statements that there has been a change to the rule and an Order, along with a link to the amended rule and the Order; and (C) placing on the publicly accessible Realcomp Website ([www.Realcomp.com](http://www.Realcomp.com)) a statement that there has been a change to the rule and an Order, along with a link to the amended rule and the Order. Respondent shall modify its Website as described above no later than five (5) business days after the date the Order becomes final, and shall display such modifications for no less than ninety (90) days from the date this Order becomes final. The Order shall remain accessible through common search terms and archives on the Website for five (5) years from the date it becomes final.



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**V.**

**IT IS FURTHER ORDERED** that Respondent shall notify the Commission at least thirty (30) days prior to:

- A. Any proposed dissolution of such Respondent;
- B. Any proposed acquisition, merger or consolidation of Respondent; or
- C. Any other change in the Respondent, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

**VI.**

**IT IS FURTHER ORDERED** that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

**VII.**

**IT IS FURTHER ORDERED** that this Order shall terminate on October 30, 2019.

By the Commission.