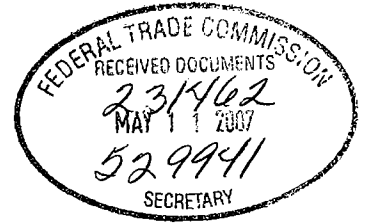


ORIGINAL

PUBLIC VERSION

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

COMPLAINT COUNSEL'S OPPOSITION
TO RESPONDENT REALCOMP II LTD.'S MOTION FOR DISMISSAL

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I. Introduction

This case is about competing real estate brokers in southeastern Michigan that entered into horizontal agreements to restrain trade by denying certain key benefits of their multiple listing service (“MLS”) to members offering discounted, limited services, thereby restricting price competition and reducing consumer choice. Respondent’s Motion for Dismissal (“Motion”) is premised on a legal theory – the essential facilities doctrine – that applies only to unilateral, single firm conduct, not concerted action.

Premised on an incorrect understanding of the antitrust laws, Respondent asserts that Complaint Counsel cannot prove that Realcomp has sufficient market power because the challenged conduct has not completely eliminated competition from limited service brokers. (Motion at 4, 9 (arguing that Complaint Counsel cannot show market power because the Realcomp MLS is not an “essential facility” and some limited service brokers have not been altogether excluded from the market).) As explained below, Complaint Counsel need not show that Realcomp eliminated all competition because the challenged conduct represents concerted action. Under the correct legal standard, the evidence is overwhelming that Realcomp possesses market power in the market for residential real estate brokerage services within southeastern Michigan, which specifically includes Oakland, Livingston, Wayne and Macomb counties.¹ Accordingly, Realcomp’s Motion should be denied.

II. Factual Background

A. Industry Background

An MLS is a database of information about properties that have been listed for sale by a real estate broker who is a member of that MLS and that can be viewed and searched by all other

¹ Plaintiff’s Motion does not dispute this market definition; this Opposition therefore does not detail the extensive evidence supporting this definition of the relevant market.

MLS members. (Niersbach Dep. at 130:14-22.) Realcomp operates an MLS in southeastern Michigan with over 14,500 real estate professionals as members – the largest in the entire state of Michigan. (Answer at ¶¶ 2, 3; Kage Dep. at 25:3-6.) Members of the public cannot view or otherwise obtain access to the Realcomp MLS unless they work with a broker who is a Realcomp member. (Answer at ¶ 12.)

A typical transaction involving the use of real estate brokers involves a “Listing Broker” and a “Cooperating Broker.” A Listing Broker is hired as the exclusive agent of the home owner to find an interested buyer, “lists” the property on the MLS, and may provide a variety of services to the seller, including marketing the home, negotiating offers on the property, and assisting sellers with the “closing” of the transaction. [REDACTED] Cooperating Brokers work with prospective buyers interested in purchasing a home, search the MLS on behalf of those buyers, and may provide a range of other services such as accompanying buyers during property visits and negotiating a contract with the seller. [REDACTED] Cooperating brokers may be compensated by the buyer, but they are most often compensated by the Listing Broker as payment for finding a buyer who purchases the home. (CX 100 at RC 1339, 1346-47; CX 373 at NARFTC 0002046.)

Listing Brokers use “listing agreements” to spell out the nature of their relationship with a seller, and typically include information about the length of their contract, the compensation to be paid to the Listing Broker, and any “offer of compensation” to be made to Cooperating Brokers who find a buyer for the home. [REDACTED] There are two types of listing agreements relevant to this case. Traditionally, the most common type of listing is an “Exclusive Right to Sell” (“ERTS”) listing, which requires the seller to pay the Listing Broker a commission if the house is sold during the term of the listing agreement, regardless of who actually finds the

buyer. (Answer at ¶ 8.) In practice, this means that the seller will have to pay the “offer of compensation” to the Listing Broker even if no Cooperating Broker is involved in the sale. Realcomp further defines ERTS listings as “full service” and requires brokers using ERTS listings to provide a set of five minimum services.²

The second type of listing agreement, an “Exclusive Agency” (“EA”) listing, requires the seller to pay the Listing Broker a commission if any broker finds the buyer, but it does not require payment if the seller finds the buyer. (Answer at ¶ 9.) Limited service brokers use EA listings to provide their services on a discounted and unbundled basis, thus allowing sellers to select which specific services they would like to purchase at a flat fee (*e.g.*, \$500 for listing the house on the MLS, \$100 for helping run an open house, \$200 for “closing” help, *etc.*). (D. Moody Dep. at 16:11 - 22:9.) In practice, these listings allow sellers to avoid paying the offer of compensation if the buyer is not represented by a Cooperating Broker. EA listings can therefore “represent an important intermediate alternative between the total reliance of the seller on brokers under the traditional Exclusive Right to Sell contract and total self-reliance in finding a buyer.” James L. Langenfeld & Louis Silvia, *Federal Trade Commission Horizontal Restraint Cases: An Economic Perspective*, 61 ANTITRUST L. J. 653, 663 (1993).

Realcomp further defines listing agreements based on the services provided by the Listing Broker. Under Realcomp Rules, a “Limited Service” (“LS”) listing is one in which the Listing Broker does not provide at least one of the five minimum services required of an ERTS listing, and a “MLS-Entry Only” (“MEO”) listing is one in which the broker enters the home on

² Specifically, these services are: (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 the offer to purchase; (4) Assist the seller(s) in developing, communicating, or presenting counteroffers; and (5) Participate on behalf of seller(s) in negotiations leading to the sale of listed property. (Realcomp Admissions, No. 4; CX 100 at RC 1341.)

the MLS but does not provide any of the five minimum services. (CX 100 at RC 1341.)

Limited service brokers typically use EA contracts that are considered to be either LS or MEO listings under Realcomp rules.

B. Challenged Conduct

Complaint Counsel challenges two Realcomp policies: the “Website Policy” and the “Search Function Policy.” As part of its MLS operations, Realcomp provides a free feed of listing information to an array of real estate websites, including Realtor.com and Realcomp’s own MLS public website, MoveinMichigan.com. (CX 222 at 8.) Realcomp also provides a feed of MLS listing information to its broker and agent member websites, such as Remax.com or Century21Today.com, through a mechanism known as Internet Data Exchange (“IDX”). (*Id.*) As a result of these feeds, buyers can search Realtor.com, MoveinMichigan.com, broker websites, and agent websites (collectively, the “Approved Websites”) for homes that they may be interested in purchasing in southeastern Michigan. Pursuant to its Website Policy, however, Realcomp excludes the listing types most commonly used by brokers offering discounted, limited services – EA, LS and MEO listings – from its feed of MLS listing information to the Approved Websites. (CX 3 at 2; CX 100 at RC 1341, 1361; Kage Dep. at 13:25-14:11.)

Pursuant to the Search Function Policy, Realcomp specifically created an automatic default in the MLS system to search *only* for ERTS listings (or unknown). [REDACTED]

III. Legal Standard for Summary Decision

Although entitled a Motion to Dismiss, Respondent’s Motion is actually a motion for summary judgment, as reflected by Respondent seeking relief under FTC Rule § 3.24 and citing evidence in support of its Motion. (Motion at 1, 8-10.) Under Commission Rule of Practice § 3.24(a)(2), 16 C.F.R. § 3.24(a)(2), Respondent bears the burden of showing that “there is no genuine issue as to any material fact and that the moving party is entitled to such decision as a

matter of law.” As the moving party, Respondent bears the initial burden of identifying evidence that demonstrates the absence of any genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *In re Kroger Corp.*, 98 F.T.C. 639, 726 (1981) (Commission applies its summary decision rule consistently with case law construing Fed. R. Civ. P. 56). As the non-moving party, Complaint Counsel are entitled to have the evidence viewed in the light most favorable to them and to have all factual inferences made in their favor. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

IV. Argument

Realcomp has market power in the market for residential real estate brokerage services in Wayne, Oakland, Livingston and Macomb counties. Respondent does not challenge this market definition, but rather argues that Complaint Counsel cannot establish market power because Realcomp is not an “essential facility.” (Motion at 4-8.) As explained below, the challenged conduct reflects agreements among horizontal competitors, and it therefore does not implicate the essential facilities doctrine. Under the appropriate legal framework, abundant evidence establishes Realcomp’s market power. At a minimum, however, summary judgment should be denied because there is a material issue of fact in dispute. *Wilk v. American Med. Ass’n*, 895 F.2d 352, 360 (7th Cir. 1990) (“whether market power exists in an appropriately defined market is a fact-bound question”); *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1580 (11th Cir. 1991) (denying summary judgment because there was a disputed material fact as to the existence of the MLS’s market power).

A. The Challenged Conduct Represents Concerted Action

Complaint Counsel challenges Realcomp’s Website Policy and Search Function Policy as a combination or conspiracy of competing brokers that unreasonably restrain trade. (Complaint at ¶¶ 24, 27.) Realcomp is organized for the purpose of serving the economic interests of its

members, who are real estate brokers that “compete with one another to provide residential real estate brokerage service to customers.” (Answer at ¶¶ 2,4.) [REDACTED]; Gleason Dep. at 9:13-10:14 (admitting that brokers on the Realcomp Board of Governors compete with each other); CX 211.) Realcomp’s Board of Governors adopted the Website Policy and Search Function Policy, [REDACTED]. (CX 100 at RC 1361; CX 3 at 2; [REDACTED]; Motion at 2-3.)

The challenged conduct therefore reflects concerted action among horizontal competitors, *i.e.*, competing real estate brokers. The case law on this issue is clear. When an association comprised of competing members takes an action on behalf of the group, such as when a board of directors or a committee adopts a rule or policy, that association’s activities are considered to be the concerted action of the competing members. *See Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007 (3d Cir. 1994) (contrasting situation where a single board member took individual action and did not act on behalf of the group). This is because the economic impact of the association’s conduct would be the same as conduct by individual competitors who had not created a formal organization. *See id.*; *see also Weiss v. York Hosp.*, 745 F.2d 786, 815-16 (3d Cir. 1984) (finding that hospital executive committee’s decision to not allow osteopaths staff privileges, based on the decisions of competing physicians, represented the concerted action of the hospital’s medical staff within the meaning of § 1); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476, 479-80 (4th Cir. 1980) (finding action of Blue Cross Blue Shield to deny direct payment to psychologists represented concerted action of its competing physician members under § 1).³

³ These opinions are supported by numerous Supreme Court decisions. *E.g.*, *NCAA v. Bd. of Regents*, 468 U.S. 85, 99 (1984) (restraint of trade by association of independent competitors considered to be result of agreement between member competitors); *United States v. Topco Assocs.*, 405 U.S. 596, 606-12 (1972) (buying cooperative’s market allocation activities violated § 1 of the Sherman Act because the members were actual or potential competitors); *United*

Indeed, numerous courts have specifically evaluated MLS rules and policies under Section 1 of the Sherman Act's prohibition against unreasonable agreements in restraint of trade. *See, e.g., United States v. Realty Multi-List*, 629 F.2d 1351, 1373 (5th Cir. 1980) (restrictive MLS membership rules violated § 1 under a truncated rule of reason analysis); *Thompson*, 934 F.2d at 1579-81 (policies of Board-owned MLS were subject to potential group boycott liability under § 1 of the Sherman Act); *Cantor v. Multiple Listing Serv. of Dutchess Cty., Inc.*, 568 F. Supp. 424, 431 (S.D.N.Y. 1983) (finding MLS bylaws that restricted lawn sign advertising to be an unreasonable restraint of trade under § 1 of the Sherman Act); *Austin Bd. of Realtors v. E-Realty, Inc.*, 2000 WL 34239114, at *4 (W.D. Tex. Mar. 30, 2000) (analyzing MLS conduct under § 1 of the Sherman Act). There simply does not exist a good-faith basis to dispute that Realcomp's Website Policy and Search Function Policy represent anything other than concerted action.

B. The Essential Facilities Doctrine Is Inapplicable to the Facts of this Case

The essential facilities doctrine refers to the circumstances in which a monopolist must share a resource with a competitor because that firm's exclusive control over the resource would otherwise allow it to extend monopoly power into another market. *See MCI Communs. Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132 (7th Cir. 1982) (providing example of electricity generation plant as being an "essential" facility because it would allow the plant to extend monopoly power to another stage of production, energy transmission). The essential facilities doctrine is an exception to the general proposition that single firms generally can decide with

States v. Sealy, 388 U.S. 350, 352-55 (1967) (consortium of mattress and bedding manufacturers violated § 1 because the member manufacturers were actual or potential competitors of each other). *See also In re Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 1988 FTC LEXIS 34, at *29 (1988) ("Respondent members have separate economic identities and thus engage in a combination when they act together on the Board.").

whom they will do business. *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004).

This doctrine simply does not apply to this case because the challenged conduct reflects agreements among horizontal competitors. *See* discussion *supra* at Part IV(A). It applies solely to single-firm monopolization or attempted monopolization claims. *See Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985) (analyzing claims under § 2 of the Sherman Act); *Trinko*, 540 U.S. at 405 (same); *Alaska Airlines, Inc. v. United Airlines, Inc.*, 948 F.2d 536, 542 (9th Cir. 1991) (same).⁴ Indeed, courts repeatedly have rejected arguments for a more expansive approach to the essential facilities doctrine if based on cases involving concerted action. *See, e.g., Trinko*, 540 U.S. at 410 (rejecting arguments based on cases “involv[ing] concerted action, which presents greater antitrust concerns”) (emphasis in original); *Alaska Airlines*, 948 F.2d at 541 (concluding that certain cases were of “limited value” in evaluating essential facilities claim because they “involved a combination in restraint of trade, not single firm conduct”) (emphasis in original).

The reason that the essential facilities doctrine does not apply to concerted action is simple: horizontal agreements among competitors raise more antitrust concerns and therefore receive a much higher level of antitrust scrutiny than does single firm conduct. *See, e.g., Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) (concerted activity judged “more sternly” than unilateral activity); *Alaska Airlines*, 948 F.2d at 542 (“Under the Sherman Act, combinations and individuals are treated quite differently.”). For example, in *Aspen Skiing*, the Supreme Court affirmed a lower court’s decision that, based on an extensive market analysis under the rule of reason, the defendant had unlawfully monopolized the relevant

⁴ Respondent’s suggestion that the essential facilities doctrine is no longer good law after *Trinko*, *see* Motion at 4-5, is an overly broad and inaccurate interpretation of the *Trinko* decision. 540 U.S. at 407, 409 (holding that “*Aspen Skiing* is at or near the outer boundary of § 2 liability”).

market by failing to cooperate in a joint venture with its competitor for an “all-Aspen” ski ticket. 472 U.S. at 604-05. The Court noted that, “similar conduct carried out by the concerted action of three independent rivals with a similar share of the market would constitute a *per se* violation of § 1 of the Sherman Act.” 472 U.S. at 608, n. 38 (citing *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985)).

The Supreme Court’s decision in *Associated Press v. United States* discusses the appropriate legal standards for cases involving concerted action in the context of a cooperative venture. 326 U.S. 1 (1945). In that case, the Associated Press (“AP”) served as a cooperative association for the “collection, assembly and distribution of news” that was collected from members, employees and third parties. In order to obtain news from the AP or its members, newspapers had to belong to the association; however, existing members had the power to effectively veto the membership application of any newspaper that competed in their geographic area. 326 U.S. at 10-11.

The Supreme Court upheld the lower court’s findings that the venture’s bylaws were an agreement in restraint of trade that “hindered and impeded the growth of competing newspapers.” *Id.* at 11-12 (“Inability to buy news from the largest news agency ... can have most serious effects on the publication of competitive newspapers”). The Court explained that the AP gave its members a competitive advantage over their rivals, and conversely, a newspaper would “more than likely” be at a competitive disadvantage without access to the AP news. *Id.* at 17-18. The Supreme Court then struck down the relevant bylaws, reasoning that the joint venture could not use the advantage achieved by its collective means to suppress competition. *Id.* at 18-19 (rejecting arguments that decision made the AP a “public utility”).

Significantly, the Supreme Court specifically rejected the argument that the restraint must eliminate all competition. *Id.* at 18 (“it is not necessary to show that the challenged

arrangement suppresses all competition between the parties”) (citations omitted). The Court reached its decision even though there was evidence that some newspapers had been able to compete without access to the AP news. *Id.* at 18. As explained by the Court, “the fact that an agreement to restrain trade does not inhibit competition in all objects of that trade cannot save it from the condemnation of the Sherman Act.” *Id.* at 17 (no requirement that AP news be “indispensable” to competitors).

Realcomp’s Website and Search Function Policies, which reflect the concerted action of competing real estate brokers, therefore receive a much higher antitrust scrutiny than exists under the essential facilities doctrine or other cases concerning unilateral refusals to deal. As made clear by the Supreme Court’s decision in *Associated Press*, Complaint Counsel are not required to show that the challenged conduct eliminates all competition from limited service brokers in order to establish an antitrust violation.⁵ 326 U.S. at 17-18. Because the premise of Respondent’s argument that Complaint Counsel cannot show market power is faulty, Respondent’s Motion should be denied.

To the extent that this Court interprets Respondent’s Motion as a general assertion that there are no genuine issues of material fact regarding market power, and that Realcomp is entitled to judgment as a matter of law, there is overwhelming evidence of Realcomp’s market power in the relevant market. Market power, therefore, is a question of fact to be determined at trial. *See Celotex*, 477 U.S. at 323; *Wilk*, 895 F.2d at 360.

⁵ Respondent’s arguments that limited service brokers have been able to compete “successfully” is a disputed fact. [REDACTED]; Mincy Dep. at 60:8-62:21, 63:20-64:17 (describing how the Search Function and Website Policies restrict the exposure of his listings and hurts his business); Hepp Dep. at 42:9-44:7 (same); Aronson Dep. at 28:7- 30:12 (same.)

C. Realcomp Has Market Power

The record contains ample evidence that by virtue of its power in the market for the provision of MLS services, Realcomp can hinder or exclude competitors in the market for real estate brokerage services within its service area. The record further shows that Realcomp has exercised its market power through the Search Function and Website Policies.

In cases challenging the membership criteria of an MLS as a concerted refusal to deal, courts have found market power based on evidence that the MLS has sufficient economic importance such that the broker's exclusion results in the denial of an opportunity to compete effectively on equal terms.⁶ *See, e.g., Realty Multi-List*, 629 F.2d at 1373 (specifically rejecting requirement that the MLS must be a monopoly in the relevant market); *Thompson*, 934 F.2d at 1580 (adopting *Realty Mutli-List* standard); *accord Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985) (holding that group boycott would be subject to *per se* treatment if the cooperative “possesses market power or exclusive access to an element essential to effective competition”). “At the least, when broker participation in the listing service is high, the service itself is economically successful and competition from other listing services is lacking,” the MLS should be found to have market power and any unjustified exclusionary rules should be deemed unreasonable. *See Realty Multi-List*, 629 F.2d at 1373-74.⁷

⁶ As a leading treatise points out, “product exclusion” – “when a venture disapproves a particular product, or decides not to permit the product to be produced within the venture” – can be as anticompetitive as “member exclusion.” XII HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2220b3 (2d ed. 2005). The conduct at issue here is similar to product exclusion.

⁷ *See also* Complaint at ¶¶ 18-20 (explaining that full exposure of listings on the Realcomp MLS and feed of listing information to the Approved Websites is “necessary for the provision of effective residential real estate brokerage services” because it significantly increases the opportunities of brokerage firms to enter into listing agreements and significantly reduces the costs of providing effective brokerage services. In other words, the “realization of these opportunities and efficiencies is important for brokers to compete effectively.” *Id.* at ¶ 19.

Consistent with this case law, the record evidence demonstrates that Realcomp has market power. Realcomp is the largest MLS in the state of Michigan, with over 2,300 participating real estate offices and over 14,000 members. (CX 224 at 1.) Realcomp's size allows members to "[m]ake more sales through co-op arrangements with nearly one-half of all REALTORS in Michigan." (*Id.*) Further, data from Realcomp and adjacent MLSs show that Realcomp's market shares are indicative of market power:

[REDACTED]

The significance of these market shares and Realcomp's membership numbers are enhanced due to the MLS's "network effects." The value of an MLS to brokers increases with the number of its brokers and listings because more listings increase the likelihood that brokers will be able to match a willing buyer with a willing seller. (Elya Dep. at 28:23-29:4; Brant Dep. at 37:13-38:23; Smith Dep. at 109:19-110:7.) [REDACTED]

The testimony and documents in the record confirm that membership in the local MLS is vital to a broker's ability to effectively compete on equal terms. For example, an executive of one of the Realcomp Shareholder Boards testified that it is "very difficult to sell" a home not listed in an MLS. (Smith Dep. at 87:18-88:11.) A member of Realcomp's Board of Governors admitted that not putting a listing on the MLS "would be like tying my hands behind my back." (Elya Dep. at 35:25-36:10.) One Realcomp member even advises consumers when selecting an agent that "[a]n absolute must is that the Realtor subscribes to the local computerized multiple listing service, MLS, so that your property's exposed to the maximum number of potential buyers." (CX 307; Whitehouse Dep. at 46:5-48:9.)

The evidence further shows that a Listing Broker whose properties are not posted or otherwise displayed in the Realcomp MLS – such as through the use of automatic default settings to exclude specific listings from searches of the MLS database – would be at a

significant competitive disadvantage. Limited service brokers have testified that they have been competitively disadvantaged by Realcomp's Search Function Policy. (Aronson Dep. at 28:7-30:12; Hepp Dep. at 42:9-44:7 (testifying that flat-fee brokerage experienced less growth within Realcomp's service area because of "negative word of mouth advertising," attributed to Realcomp's restrictions, including the "default search criteria"); Mincy Dep. at 60:8-62:21 (discussing loss of potential clients and other difficulties in obtaining listings when sellers learn about the Search Function Policy).) *See also Realty Multi-List*, 629 F.2d at 1370 (the harm to an excluded broker is the mirror image of the competitive advantages of the MLS).

Access to Realcomp's feed of MLS listing information to the Approved Websites is also a significant competitive advantage for brokers. The Internet, and the marketing of homes for sale on the Internet, has become an "essential tool" in the home buying process. (*Internet vs. Traditional Buyer*, at NARFTC 0003771-72; [REDACTED]. [REDACTED], and studies have shown that approximately 80% of home buyers use the Internet to learn about properties for sale. (CX 373 at NARFTC 0002032, 2041.) As a result of their Internet searches, buyers have reported that they drove by or viewed a home, walked through a home, found an agent, and requested more information about a property. (*Id.* at NARFTC 0002035.) Indeed, almost a quarter of all buyers in 2006 first found the home they ultimately purchased on the Internet. (*Id.* at NARFTC 0002036.)⁸

Marketing homes on the Internet has become a significant factor in a broker's ability to compete effectively: [REDACTED] That is, buyers use the Internet in conjunction with using a real estate broker. (CX 373 at NARFTC 0002039 (87% of buyers using the Internet also used an agent, compared to only 74% of buyers who did not use the Internet).) [REDACTED].

⁸ [REDACTED]

[REDACTED] Buyers who use the Internet as part of their home search – including those in southeastern Michigan – have repeatedly ranked four categories of websites as the ones they use the most: (1) MLS websites; (2) Realtor.com; (3) brokerage firm websites; and (4) real estate agent websites. (CX 373 at NARFTC 0002042; [REDACTED].)

The Approved Websites, which are fed listing information by Realcomp, encompass all four categories of websites most visited by buyers. [REDACTED] Consistent with the Internet usage studies, Realcomp itself touts the “market power of web marketing, MoveInMichigan.com, IDX [(i.e., broker and agent websites)], and REALTOR.com,” (CX 78), and one Realcomp member testified that it would be “business suicide” to not include a broker’s listings on an IDX feed. (Sweeney Dep. at 100:4 - 15.)

[REDACTED]

Further, the evidence clearly shows that Realcomp’s exercise of market power through the Website and Search Function Policies has restrained competition. [REDACTED]⁹

In sum, there is considerable evidence establishing Realcomp’s market power. Because, at a minimum, this question represents a disputed issue of fact, Realcomp’s Motion should be denied. *Celotex*, 477 U.S. at 323.

D. Realcomp’s Alternative Requests for Relief Should Be Denied

In the alternative, Realcomp requests a ruling that “specifies (1) every remaining alleged basis for relief; and (2) the controlling standard(s) for any grant of relief” because Realcomp allegedly “is without the ability to determine what showings are necessary to respond to the claims against it,” and that this Court, or Complaint Counsel, should “define the legal basis of the remaining claims,” and specify “the standard(s) governing any grant of relief based on any remaining allegations.” (Motion at 1, 9-10.)

⁹ [REDACTED]

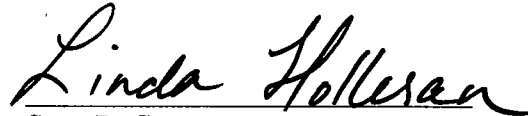
Realcomp's request for alternative relief should be denied because Realcomp has been fully apprised of the nature and details of its alleged violations of § 5 of the FTC Act, 15 U.S.C. § 45. Complaint Counsel filed a well-pled complaint with specific factual and legal allegations, which Realcomp answered without filing a Rule 3.11(c) motion for a more definite statement. Complaint Counsel also responded at length to numerous contention interrogatories propounded by Respondent, which were never challenged as being insufficient. Indeed, Respondent participated in the extensive discovery taken in this case without complaint.

Finally, Realcomp's due process argument is frivolous. Realcomp has not shown that it has been precluded from understanding the factual issues raised by the pleadings, or that it will somehow be deprived of an opportunity to present a defense. Indeed, the trial scheduled for June 19, 2007 is precisely the sort of hearing required by the Due Process Clause. *See Cleveland Bd. of Education v. Loudermill*, 470 U.S. 532, 542, 546 (1985); *see also Southwest Sunsites, Inc. v. FTC*, 785 F.2d 1431, 1435 (9th Cir. 1986).¹⁰ Accordingly, Realcomp's alternative request for relief should be denied.

¹⁰ Realcomp's citation to *Gonzales v. United States*, 348 U.S. 407, 414 n.5 (1955), is completely inapposite. In sharp contrast to the petitioner in *Gonzales*, who did not receive a statement of the arguments made by the Government to the panel hearing his appeal, Realcomp already has received a full statement of the allegations against it and the statutory provisions against which those allegations will be measured. *Bendix Corp. v. Federal Trade Commission*, 450 F.2d 534 (6th Cir. 1971), and *National Labor Relations Board v. Johnson*, 322 F.2d 216 (6th Cir. 1963), relate to what an agency can do *after* trial, not what an agency must do *before* trial. Section 5(n) of the FTC Act, which Realcomp also cites, applies to actions taken by the Commission *after* the initial trial, not before.

Date: May 11, 2007

Respectfully Submitted,

A handwritten signature in cursive script that reads "Linda Holleran". The signature is written in black ink and is positioned above a horizontal line.

Sean P. Gates

Joel Christie

Peggy Bayer Femenella

Linda M. Holleran

Christopher Renner

Counsel Supporting the Complaint

Federal Trade Commission
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**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

**In the Matter of
REALCOMP II LTD.,
a corporation.**

Docket No. 9320

**COMPLAINT COUNSEL'S
STATEMENT OF DISPUTED FACTS**

Respondent Realcomp II Ltd. (“Realcomp”) filed its Motion and Points of Authority for Dismissal (“Motion”) without a separate and concise statement of undisputed facts as required under § 3.24(a) of the Federal Trade Commissions Rules of Practice. *See* Motion at ¶ 1 (moving for “summary decision, pursuant to 16 C.F.R. § 3.24”). Complaint Counsel specifically objects to being compelled to file a statement of material disputed facts, pursuant to § 3.24(a)(2), without having the benefit of Realcomp’s statement of the allegedly undisputed facts that entitle it to judgment. Without admitting or conceding any of the factual allegations included in the Motion, Complaint Counsel specifically identifies the following disputed material facts:

<u>Disputed Fact</u>	<u>Evidence Showing Dispute</u>
Realcomp asserts: “Under the Web Site Policy, information concerning Exclusive Agency Listings is not transmitted by Realcomp to certain websites....” Motion at ¶ 5.	The evidence shows that the Web Site Policy also excludes Limited Service and MLS-Entry Only listings from Realcomp’s transmission of its members’ listings to certain websites. CX 3; CX 100; Kage Dep. at 13:25-14:11.

<u>Disputed Fact</u>	<u>Evidence Showing Dispute</u>
<p>Realcomp asserts that its “Web Site Policy prevents information from being transmitted to various public real estate websites, which Realcomp denies as untrue (Answer at ¶ 14) because the information can be, and is, transmitted to various public real estate websites by other means (including, Realtor.com).” Motion at ¶ 5.</p>	<p>The evidence shows that Realcomp’s Website Policy precludes brokers offering discounted, limited services through EA, LS, and MEO listings are effectively precluded from marketing those listings through a key array of real estate websites.</p> <p>Buyers who use the Internet as part of their home search – including those in southeastern Michigan – have repeatedly ranked four categories of websites as the ones they use the most: (1) MLS websites; (2) Realtor.com; (3) brokerage firm websites; and (4) real estate agent websites. [REDACTED]; CX 373 at NARFTC 0002042.</p> <p>[REDACTED]. Realcomp itself touts the “market power of web marketing, MoveinMichigan.com, IDX [(i.e., broker and agent websites)], and REALTOR.com,” CX 78, and one Realcomp member testified that it would be “business suicide” to not include a broker's listings on an IDX feed. Sweeney Dep. at 100:4 - 15.</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>[REDACTED]</p> <p>The Website Policy therefore limits the effectiveness of brokers using EA, LS and MEO listings. [REDACTED]; Hepp Dep. at 132:21-133:17; Mincy Dep. at 63:20- 64:17.</p>

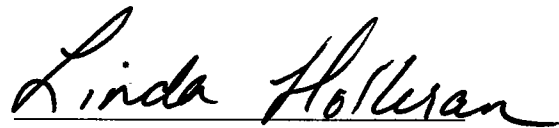
<u>Disputed Fact</u>	<u>Evidence Showing Dispute</u>
<p>Realcomp implies that its Website Policy and Search Function Policy do not represent concerted action. <i>See</i> Motion at ¶ 5.</p>	<p>The evidence shows that the Website Policy and the Search Function Policy were the result of concerted action.</p> <p>Realcomp’s members “compete with one another to provide residential real estate brokerage service to customers.” CX 32, Answer at ¶¶ 2,4.</p> <p>Realcomp is owned by [REDACTED]. Gleason Dep. at 9:13-10:14 (admitting that brokers on the Realcomp Board of Governors compete with each other); CX 211 (roster of Board of Governors).</p> <p>Realcomp’s Board of Governors adopted the Website Policy and Search Function Policy, [REDACTED]. CX 100 at RC 1361; CX 3 at 2 (Board adopting Website Policy); [REDACTED]; CX 32, Answer at ¶ 4.</p>
<p>Realcomp asserts the Search Function Policy only excludes Exclusive Agency listings. Motion at ¶ 6.</p>	<p>The evidence shows that Limited Service and MLS Entry Only listings are also excluded from the default search of the database. [REDACTED]</p>
<p>Realcomp asserts that “Exclusive Agency brokers continue to do business successfully in Southeast Michigan.” Motion at ¶ 14.</p>	<p>The evidence shows that the Website and Search Function Policies have negatively impacted the businesses of brokers offering flat-fee or unbundled services under Exclusive Agency, Limited Service, or MLS Entry Only Listings in the Realcomp Service Area. [REDACTED] D. Moody Dep. at 42:23-45:10; RX 26; Mincy Dep. at 63:20-64:17.</p> <p>[REDACTED]</p> <p>[REDACTED]</p>

<u>Disputed Fact</u>	<u>Evidence Showing Dispute</u>
<p>Realcomp asserts that “Exclusive Agency brokers are able to continue to do business selling residential real estate in Michigan, including the Realcomp Service Area.” Motion at ¶ 20.</p>	<p>Brokers offering flat-fee or unbundled brokerage services have exited southeast Michigan and/or the Realcomp Service Area, or have refrained from directly entering the market. Aronson Dep. at 28:7-30:12; Hepp Dep. at 131:11-132:20.</p> <p>[REDACTED]</p>
<p>Realcomp implies that the Search Function Policy does not limit the effectiveness of brokers using EA, LS and MEO listings because brokers can override the default. Motion at ¶ 6.</p>	<p>The evidence shows that the Search Function Policy has impacted the ability of brokers offering discounted, limited services because other brokers do not realize they need to override the default. Aronson Dep. at 28:7-30:12; Hepp Dep. at 42:9-44:7; Mincy Dep. at 60:8-62:21.</p> <p>[REDACTED]</p>
<p>Realcomp asserts that it does not have market power because it is not an “essential facility.” Motion at ¶ 23.</p>	<p>The evidence shows that Realcomp does have market power.</p> <p>Realcomp is the largest MLS in the state of Michigan, with over 2,300 participating real estate offices and over 14,000 members. CX 224 at 1. Realcomp’s size allows members to “[m]ake more sales through co-op arrangements with nearly one-half of all REALTORS in Michigan.” <i>Id.</i></p> <p>[REDACTED]</p> <p>The value of an MLS to brokers increases with the number of its brokers and listings because more listings increase the likelihood that brokers will be able to match a willing buyer with a willing seller. Elya Dep. at 28:23 - 29:4; Brant Dep. at 37:13 - 38:23; Smith Dep. at 109:19 - 110:7.</p> <p>[REDACTED]</p>

<u>Disputed Fact</u>	<u>Evidence Showing Dispute</u>
	<p data-bbox="818 262 1019 296">[REDACTED]</p> <p data-bbox="818 352 1406 894">The testimony and documents in the record confirm that membership in the local MLS is vital to a broker’s ability to effectively compete on equal terms. Smith Dep. at 87:18 - 88:11 (it is “very difficult to sell” a home not listed in an MLS); Elya Dep. at 35:25 - 36:10 (Realcomp Governor admitting that not putting a listing on the MLS “would be like tying my hands behind my back”); CX 307 (“An absolute must is that the Realtor subscribes to the local computerized multiple listing service, MLS, so that your property’s exposed to the maximum number of potential buyers.”); Whitehouse Dep. at 46:5 - 48:9 (describing CX 307).</p> <p data-bbox="812 951 1398 1570">Listing Brokers whose properties are not posted or otherwise displayed in the Realcomp MLS – such as through the use of automatic default settings to exclude specific listings from searches of the MLS database – would be at a significant competitive disadvantage. Aronson Dep. at 28:7 - 30:12; Hepp Dep. at 42:9 - 44:7 (testifying that flat-fee brokerage experienced less growth within Realcomp’s service area because of “negative word of mouth advertising,” attributed to Realcomp’s restrictions, including the “default search criteria”); Mincy Dep. at 60:8 - 62:21 (discussing loss of potential clients and other difficulties in obtaining listings when sellers learn about the Search Function Policy).</p>

Date: May 11, 2007

Respectfully Submitted,

A handwritten signature in black ink that reads "Linda Holleran". The signature is written in a cursive style and is positioned above a horizontal line.

Sean P. Gates

Joel Christie

Peggy Bayer Femenella

Linda M. Holleran

Christopher Renner

Counsel Supporting the Complaint

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

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

DECLARATION OF LINDA M. HOLLERAN

I, Linda Holleran, make the following statement:

1. I am an Attorney in the Bureau of Competition of the Federal Trade Commission. I serve as Complaint Counsel in this matter.
2. Pursuant to Pursuant to Rule 3.24(a)(2) and 3.24(a)(3) of the Commission's Rules of Practice, 16 C.F.R. §§3.24(a)(2) and 3.24(a)(3), I submit this declaration solely to bring before the Court documents and deposition transcripts relevant to Complaint Counsel's Opposition to Respondents' Motion for Dismissal.
3. The materials submitted to the Court in the Appendix to Complaint Counsel's Statement of Disputed Facts are true and correct copies of the following:

CX Number	Document Title	Document Date
CX 3	Minutes from the Board of Governors Meeting, September 28, 2001	09/28/01
CX 9	REDACTED	
CX 22	REDACTED	
CX 23	REDACTED	
CX 24	REDACTED	
CX 25	REDACTED	

CX Number	Document Title	Document Date
CX 32	Realcomp's Answer to the Complaint	11/20/06
CX 59	REDACTED	
CX 78	The Critical Role of the Realtor in the Real Estate Transaction	06/12/06
CX 100	Realcomp II Ltd., Rules & Regulations, Revised October, 2006 (RC1337 - RC1363)	10/06
CX 211	REDACTED	
CX 222	Statement of Real Property Information Services As Provided by Realcomp II Ltd.	01/07
CX 224	Chart: Realcomp II Ltd... The Realtor's MLS, All of these things bring "More Listings and More Sales: to Realcomp Subscribers	04/21/06
CX 307	Doug and Kathy Whitehouse: Select Your Realtor, What to Look for in a Realtor	
CX 369	2004 National Association of Realtors Profile of Real Estate Firms (NARFTC0002255 - NARFTC0002307)	2004
CX 370	2004 National Association of Realtors Profile of Real Estate Firms and Industry Overview (NARFTC0002308 - NARFTC0002372)	2004
CX 373	2006 National Association of Realtors Profile of Home Buyers and Sellers (NARFTC0001997 - NARFTC2092)	2006
CX 617	REDACTED	
CX 621	REDACTED	
Tab 1	Internet vs. Traditional Buyer (NARFTC0003767 - NARFTC0003785)	
Tab 2	REDACTED	
Tab 3	REDACTED	
Tab 4	REDACTED	
Tab 5	Deposition Transcript excerpts of Clifford Niersbach	03/09/07
Tab 6	Deposition Transcript excerpts of Wayne Aronson	02/16/07
Tab 7	Deposition Transcript excerpts of Denise Moody	02/09/07
Tab 8	Deposition Transcript excerpts of Karen Kage	02/20/07

CX Number	Document Title	Document Date
Tab 9	REDACTED	
Tab 10	Deposition Transcript excerpts of Robert Gleason	02/23/07
Tab 11	Deposition Transcript excerpts of Craig Mincy	02/28/07
Tab 12	Deposition Transcript excerpts of Albert Hepp	02/14/07
Tab 13	Deposition Transcript excerpts of David Elya	01/22/07
Tab 14	Deposition Transcript excerpts of Michelle Brant	01/17/07
Tab 15	Deposition Transcript excerpts of Dale Smith	01/16/07
Tab 16	Deposition Transcript excerpts of Douglas Whitehouse	02/22/07
Tab 17	Deposition Transcript excerpts of Kelly Sweeney	03/01/07
Tab 18	Deposition Transcript excerpts of David Eisenstadt	05/01/07

I declare under penalty of perjury that the foregoing is true and correct. (28 U.S.C. § 1746).

Executed on May 11, 2007.


Linda M. Holleran

PUBLIC

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

**In the Matter of
REALCOMP II LTD.,
a corporation.**

Docket No. 9320

APPENDIX TO COMPLAINT COUNSEL'S STATEMENT OF DISPUTED FACTS

CERTIFICATE OF SERVICE

This is to certify that on May 11, 2007, I caused public versions of a copy of Complaint Counsel's Opposition to Respondent Realcomp II Ltd.'s Motion for Dismissal, a Declaration of Linda M. Holleran, Complaint Counsel's Statement of Disputed Facts and the Appendix to Complaint Counsel's Statement of Disputed Facts, to be served upon the following persons:

by hand delivery to:

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

and by electronic transmission and overnight courier to:

Scott Mandel, Esq.
Foster, Swift, Collins & Smith P.C.
313 South Washington Square
Lansing, MI 48933-2193


Caroline Buddenhagen

1. The meeting was called to order by President, Kevin Gerkin at 9:00 a.m.

Present: Kevin Gerkin, President
Gerry Burke, Vice-President
Marian Hill, Treasurer
Darralyn Bowers, Governor
Bowen Broock, Governor
Mark Kleinknecht, Governor
Dan Mulvihill, Governor
Marty Nowak, Governor
John Prohownik, Governor
Gus Seeger, Governor
Robert Gleason, Alternate Governor
Alissa Nead, Alternate Governor
Tom Rademacher, Alternate Governor

Absent: Carl Williams, Secretary
Robert Sakuta, Governor
Ginny Gaedcke, Alternate Governor
E'Toile Libbett, Alternate Governor

Also Present: Steve Lasher, Realcomp II Ltd. Legal Counsel
Karen Kage, Realcomp II Ltd. Staff
Ken Franklin, Realcomp II Ltd. Staff

2. Approval of Agenda

Item 6B, Proposed Bylaw Change, was added to the agenda.

A **MOTION** was made, **SECONDED** and **CARRIED** to accept the agenda as amended for the September 28, 2001 meeting.

3. Approval of Minutes

A **MOTION** was made, **SECONDED** and **CARRIED** to approve the minutes from the August 24, 2001 meeting as presented.

4. Officer Reports

A. President

No report given.

B. Vice President

Included under New Business.

A MOTION was made, **SECONDED** and **CARRIED** to postpone a decision on this item until the October Meeting. *Note: Fidelity has agreed to a ninety day notice for an extension in place of six months as previously required.*

5. Unfinished Business

A. Update on Realcomp/Realmatrix Merger Task Force

Realcomp President and Merger Task Force Member, Kevin Gerkin, provided the Board with an update on the merger talks. The meeting scheduled for September 20 was cancelled by Realmatrix. President Gerkin also informed the Board that Realcomp provided a proposal to Realmatrix which will be discussed at the next meeting.

B. Update on Limited Service and MLS Entry Only Listings

The Board reviewed a memorandum from Legal Counsel regarding [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

A MOTION was made, **SECONDED** and **CARRIED** to establish separate search requirements on RealcompOnline™ in order to include MLS only and /or limited service listings in a basic search.

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.

7. New Business

A. Recommendation re: Realcomp/Realmatrix Merger Task Force Members

A MOTION was made, **SECONDED** and **CARRIED** to recommend that the Realcomp Shareholders extend the terms of the representatives on the Realcomp/Realmatrix Merger Task Force into 2002 should the merger process not be completed this year.

B. Proposed Bylaw Change

A MOTION was made, **SECONDED** and **CARRIED**, by 2/3 of the Board as required, to recommend that the Shareholders adopt the following change to the Realcomp II Ltd. Bylaws:

A Governor may be removed by an affirmative vote of sixty-six and two-thirds (66 2/3%) percent of the Governors in the event that a Governor has breached his or her duty of confidentiality. For this purpose, a breach of confidentiality shall include the disclosure by a Governor of discussions, voting or negotiations conducted at meetings of the Board of Governors unless such discussions, voting or negotiations are determined by the Board of Governors to be appropriate for public disclosure.

C. Treasurer's Report

1. A **MOTION** was made, **SECONDED** and **CARRIED** to receive the Income and Balance Sheets for August 31, 2001 subject to final review or audit.
2. The Statement of General Checking and Corporate Reserve Funds report was received.
3. A **MOTION** was made, **SECONDED** and **CARRIED** to change the Financial Policies to require approval of the 2002 annual budget from on or before October 31 to on or before November 30, 2001.

D. MLS/User Committee

The MLS/User Committee, at their September 10, 2001 Meeting, recommended that the Board of Governors pass through the cost of providing photos for MLS listings to those subscribers who opt for this service. The Board agreed not to take any action until such time that the ability to upload photos directly into RealcompOnline™ is available.

The Board also reviewed a **MOTION** from the Committee that defeated the recommendation to remove the expiration dates from all listings on RealcompOnline™.

A **MOTION** was made, **SECONDED** and **CARRIED** to remove the expiration dates from all listings on RealcompOnline™.

E. Management Team Report

Staff informed the Board that the first Realcomp trade show called "Tools of the Trade" is scheduled for November 15 at the Novi Expo Center. Stephen Canale and Tom Ervin are scheduled as guest speakers. In addition, approximately twenty vendors will be on hand to show what's new in hardware, software and on the Internet.

The agreement with RealTime Wireless has now been signed. This service will offer real time MLS access from any web enabled phone, Palm Pilots, Blackberry pagers, and other pocket PC's and will debut at the trade show in November.

Staff also informed the Board of the newly released Web Site, RealcompREALTORS®.com. This site will allow for searching for an office or agent that participates in Realcomp. Concerns were raised regarding having the necessary permission to use the word "REALTOR®" in the address. *Note: NAR Legal Counsel has approved using this address for the site.*

Discussion occurred regarding extending the contract with Fidelity for Compass. The current agreement expires on April 28, 2002. Fidelity is asking for a six month notice for an extension.

If a Governor is removed by the Board of Governors pursuant to subparagraphs d., e., or g. above, such Governor shall not be reappointed to the Board of Governors by the Shareholder originally selecting that Governor or appointed to any Realcomp Committees.

8. Upcoming Meetings

The next regular Board of Governor Meeting will be held on Friday, October 26, 2001.

9. Adjournment.

There being no further business, the meeting was adjourned at 12:05 p.m.

11/16/16 11:11 AM

REDACTED

11/16/16 11:11 AM

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES

_____))
))
In the Matter of))
))
REALCOMP II LTD.,))
))
Respondent.))
_____))

Docket No. 9320
Chief Administrative Law Judge
Stephen J. McGuire

REALCOMP II LTD.'S ANSWER TO COMPLAINT

Respondent Realcomp II Ltd., through its attorneys, Foster, Swift, Collins & Smith, P.C., pursuant to the Federal Trade Commission Rules of Practice ("FTC Rules"), 16 C.F.R. § 3.12, in answer to Petitioner's Complaint, states as follows:

NATURE OF THE CASE

This paragraph is a characterization of the Complaint to which no responsive pleading is required. To the extent that an answer is required, Respondent refers to its answer to the specific allegations of the Complaint as set forth below. Respondent denies as untrue that the policies at issue lack any pro-competitive justification. Respondent denies that the alleged Rules constitute an anti-competitive concerted refusal to deal. Respondent denies that the alleged Rules violate the anti-trust laws.

RESPONDENT AND ITS MEMBERS

PARAGRAPH 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.

ANSWER 1. In response to Paragraph 1 of the Complaint, Respondent admits the allegations set forth in the first two sentences of that paragraph. Respondent denies that its members are limited to real estate brokers doing business in Southeastern Michigan for the reason that its members include REALTORS® doing business outside of Southeastern Michigan.

PARAGRAPH 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.

ANSWER 2. In response to Paragraph 2 of the Complaint, Respondent admits the allegations contained in the first sentence. In response to the second sentence, Respondent states that operation of the Realcomp Multiple Listing Service is the primary function of Respondent as opposed to being one of the primary functions. In response to the remaining allegations contained in this paragraph, Respondent admits the same with the further response that the information on listings on a multiple listing service (MLS) is also used for appraisals.

PARAGRAPH 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.

ANSWER 3. In response to Paragraph 3 of the Complaint, Respondent admits that it is affiliated with the National Association of Realtors ("NAR"). Respondent denies that this thereby requires Realcomp to abide by the NAR Rules for the reason that Respondent's own governing documents speak to that requirement. In response to the remaining allegations contained in this paragraph, Respondent admits the same with the exception that Respondent does not have sufficient knowledge or information to form a belief as to the truth or falsity of the allegation that all of its members are active in the real estate profession.

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

ANSWER 4. In response to Paragraph 4 of the Complaint, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in the first sentence of that paragraph. Respondent admits the allegation contained in the second sentence to that paragraph.

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

ANSWER 5. In response to Paragraph 5 of the Complaint, Respondent admits the same.

JURISDICTION

PARAGRAPH 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.

ANSWER 6. In response to Paragraph 6 of the Complaint, Respondent admits the same.

THE CHALLENGED CONDUCT

PARAGRAPH 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.

ANSWER 7. In response to Paragraph 7 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 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.

ANSWER 8. In response to Paragraph 8 of the Complaint, Respondent admits the allegations contained therein.

PARAGRAPH 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.

ANSWER 9. In response to paragraph 9 of the Complaint, Respondent admits the allegations contained therein.

PARAGRAPH 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.

ANSWER 10. In response to paragraph 10 of the Complaint, Respondent states that the term "unbundled real estate services" is not defined and is not a term commonly used in the industry and; therefore, Respondent states it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph; therefore, Respondent neither admits nor denies the same.

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

ANSWER 11. In response to paragraph 11 of the Complaint, Respondent states it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained therein; therefore, neither admits nor denies the same.

PARAGRAPH 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.

ANSWER 12. In response to paragraph 12 of the Complaint, Respondent admits the allegations contained in first three sentences of that paragraph. In response to the fourth and final sentence of paragraph 12, Respondent denies the same in the form and matter alleged for the reason that the commission is paid by the listing broker as opposed to by the seller and this is not under the rules and procedures established by the MLS.

PARAGRAPH 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").

ANSWER 13. In response to paragraph 13 of the Complaint, Respondent admits the allegations contained therein.

PARAGRAPH 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.

ANSWER 14. In response to paragraph 14 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 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.

ANSWER 15. In response to paragraph 15 of the Complaint, Respondent denies that "Realtor.com" is a NAR-operated website and denies the allegations contained therein as they pertain to Realcomp-member websites. Respondent admits the remainder of the allegations contained in this paragraph.

PARAGRAPH 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.

ANSWER 16. In response to Paragraph 16 of the Complaint, Respondent admits the same. In further answer to this paragraph, Respondent states that the default described in this paragraph defaults not only to exclusive right to sell listings but also to unknown.

REALCOMP HAS MARKET POWER

PARAGRAPH 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.

ANSWER 17. In response to Paragraph 17 of the Complaint, Respondent states that the allegations contained therein are conclusions of law, not allegations of fact, and; therefore, neither admit nor deny the same.

PARAGRAPH 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.

ANSWER 18. In response to Paragraph 18 of the Complaint, Respondent admits the allegations contained in the first sentence of that paragraph with the exception of the allegation that this represents a relevant input market for the reason that this is a conclusion of law, not an allegation of fact and Respondent is without sufficient knowledge to form a belief as to whether this is a "key input." Respondent states that it is without sufficient knowledge or information to form a belief as

to the truth or falsity of the allegations contained in this paragraph; therefore, neither admits nor denies the same.

PARAGRAPH 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.

ANSWER 19. In response to Paragraph 19 of the Complaint, Respondent denies as untrue the allegations contained in the first sentence of that paragraph. In response to the remaining allegations contained in that paragraph, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph; therefore, neither admits nor denies the same.

PARAGRAPH 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.

ANSWER 20. In response to Paragraph 20 of the Complaint, Respondent denies as untrue the allegations contained in the first sentence of that paragraph. In response to the allegations contained in the remaining allegations contained in that paragraph, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of the allegations contained in this paragraph; therefore, neither admits nor denies the same.

PARAGRAPH 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.

ANSWER 21. In response to Paragraph 21 of the Complaint, Respondent states that it is without sufficient knowledge or information to form a belief as to the truth or falsity of these allegations and; therefore, neither admits nor denies the same.

PARAGRAPH 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.

ANSWER 22. In response to Paragraph 22 of the Complaint, Respondent states that the allegations contained therein are conclusions of law, not allegations of law and; therefore, neither admits nor denies the same.

THE REALCOMP POLICIES HAVE NO EFFICIENCY BENEFIT

PARAGRAPH 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.

ANSWER 23. In response to Paragraph 23 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

VIOLATION

PARAGRAPH 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.

ANSWER 24. In response to Paragraph 24 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 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.

ANSWER 25. In response to Paragraph 25 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 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 trade that have no cognizable and plausible efficiency justifications.

ANSWER 26. In response to Paragraph 26 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 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.

ANSWER 27. In response to Paragraph 27 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

PARAGRAPH 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.

ANSWER 28. In response to Paragraph 28 of the Complaint, Respondent denies the allegations contained therein for the reason same are untrue.

WHEREFORE, Respondent states that the Commission is not entitled to the relief requested.

RESPONDENT REALCOMP II LTD.'S AFFIRMATIVE DEFENSES

Respondent Realcomp II, Ltd., through its attorneys, Foster, Swift, Collins & Smith, P.C., hereby submits the following Affirmative Defenses, reserving the right to raise additional defenses if and when they are deemed appropriate as the case progresses.

1. The Complaint, in whole or in part, fails to state a claim upon which relief can be granted.

2. The Complaint fails to comply with the requirements of Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), because the issuance of the Complaint and the relief sought are not in the public interest.

3. The challenged conduct at issue in the Complaint has significant pro-competitive efficiencies that outweigh any alleged anti-competitive effects.

4. Respondent lacks market power as a significant amount of sales in the described market are from persons or entities other than Respondent and there is competition in that market.

WHEREFORE, Respondent prays that a Judgment dismissing the Complaint with prejudice and awarding costs and such other relief as deemed just and proper.

Date: November 20, 2006

Respectfully Submitted,

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

By:



Steven H. Lasher (P28785)

Scott L. Mandel (P33453)

Kirsten M. McNelly (P56979)

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