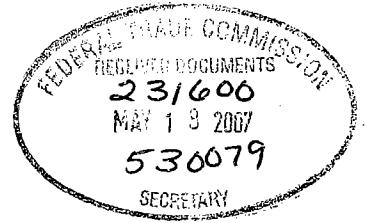


ORIGINAL

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

Public

**COMPLAINT COUNSEL'S MOTION *IN LIMINE* TO BAR LAY OPINION
TESTIMONY REGARDING SUPPOSED JUSTIFICATIONS FOR REALCOMP'S
RULES AND POLICIES**

Complaint Counsel respectfully submit this Motion *in limine* for an Order barring testimony, whether live or by deposition, by Robert Gleason, Douglas Hardy, and Doug Whitehouse, and any other Respondent witnesses without personal knowledge of the matters testified to, regarding any supposed justifications for Respondent Realcomp II Ltd.'s Website and Search Function Policies, for the reasons set forth in Complaint Counsel's accompanying Memorandum in support of its Motion.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sean Gates".

Sean Gates
Peggy Bayer Femenella
Joel Christie
Linda Holleran
Christopher Renner

Counsel Supporting the Complaint

Bureau of Competition
Federal Trade Commission
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Dated: May 18, 2007

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

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

Public

COMPLAINT COUNSEL'S MEMORANDUM IN SUPPORT OF ITS MOTION *IN LIMINE* REQUESTING AN ORDER PRECLUDING LAY OPINION TESTIMONY REGARDING SUPPOSED JUSTIFICATIONS FOR REALCOMP'S RULES AND POLICIES

Sean Gates
Peggy Bayer Femenella
Joel Christie
Linda Holleran
Christopher Renner

Counsel Supporting the Complaint

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Complaint Counsel respectfully submit this Memorandum of law in support of their Motion *in limine* for an Order precluding the introduction by Respondent Realcomp II Ltd. (“Realcomp”) of deposition or trial testimony by certain lay witnesses relating to any supposed justifications for Realcomp’s Website and Search Function Policies (together, the “Policies”) without an adequate foundation in that witness’ personal knowledge.

I. INTRODUCTION AND BACKGROUND

The Complaint in this matter alleges that Realcomp’s Policies amount to a combination or conspiracy of competing real estate brokers to unreasonably restrain competition. One aspect of this case is the reasons or justifications for the Policies. On this issue, Realcomp’s Final Proposed Witness List and its deposition designations reveal that Realcomp will seek to elicit from three of its fact witnesses – Robert Gleason, Douglas Hardy and Douglas Whitehouse – “opinion” testimony regarding hypothetical problems that the Policies supposedly address. For instance, Realcomp intends to offer Messrs. Hardy and Whitehouse to “offer testimony concerning exclusive agents and the problems they pose not only for ERTS agents but also the public” and to “explain how the proposed relief would set up a system” that would result in supposed future problems, including “undercutting” the business activity of Realcomp members. (Realcomp’s Final Proposed Witness List at 3.)

The witnesses’ sworn deposition testimony, however, shows that none have personal knowledge of any of these supposed problems. In fact, these witnesses admit that they do not know the actual reasons why Realcomp implemented the Policies; they simply want to offer their “opinions” – based on a mish-mash of inadmissible hearsay and conjecture – regarding alleged problems and justifications for the rules. Beyond being purely speculative, the opinions of these

witnesses are also mere post-hoc rationales for the Polices, devoid of any evidentiary value.

Accordingly, Complaint Counsel seek an Order precluding such testimony at the hearing of this matter or by deposition.¹

II. ARGUMENT

A. Legal Standard

The Scheduling Order entered by the Court on December 4, 2006, specifically provides for the application of Rules 602 and 701 of the Federal Rules of Evidence to this proceeding. (Scheduling Order ¶¶ 20-21.) Rule 602 of the Federal Rules of Evidence states that a lay “witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.” Lay witnesses may only testify to opinions or inferences “which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.” Fed. R. Evid. 701. The proponent of lay opinion testimony has the burden of establishing that the testimony meets these foundational requirements. *United States v. Garcia*, 291 F.3d 127, 140 (2d Cir. 2002).

Admissible lay opinion testimony must be based on direct, personal knowledge of a relevant factual matter. *In re Air Crash at Charlotte*, 982 F. Supp. 1086, 1091 (D.S.C. 1997). Unlike expert witnesses, lay witnesses may not answer hypothetical questions or assume facts not in evidence in their testimony. *Teen-Ed, Inc., v. Kimball Int’l, Inc.*, 620 F.2d 399, 403-404 (3d Cir. 1980); *Hartzell Mfg. v. American Chem. Technologies*, 899 F. Supp. 405, 409 (D. Minn.

¹ The deposition testimony cited herein is attached to the Declaration of Peggy Bayer Femenella.

1995) (“[a] lay witness’s opinion testimony must be based upon his or her personal perceptions and, unavoidably, those perceptions must be of a type that are admissible in evidence”). Lay opinion testimony may not be based on inadmissible hearsay. *K.W. Plastics v. U.S. Can Co.*, 131 F. Supp. 2d 1265, 1273 (M.D. Al. 2001).

B. The Witnesses Lack Personal Knowledge of any of Realcomp’s Justifications for the Policies.

To testify to Realcomp’s reasons for the Policies, including the problems the Policies were meant to address, Realcomp’s witnesses must be able to testify from actual personal knowledge of what Realcomp did and why. In *Hart v. O’Brien*, 127 F.3d 424, 438 (5th Cir. 1997), for instance, a police officer’s opinion about the motivation of other officers during an arrest was inadmissible when the officer did not participate in the investigation or arrest, and did not base his opinions on personal observations made at or near the time of the arrest. Similarly, in *Kaczmarek v. Allied Chem. Corp.*, 836 F.2d 1055, 1060-61 (7th Cir. 1987), it was held to be reversible error to allow a safety director hired in 1984 to testify as to safety procedures used in 1979 because his knowledge was based on hearsay gleaned from his subordinates.

None of the three Realcomp witnesses meet this requirement. Messrs. Hardy and Whitehouse weren’t even on the Realcomp Board of Governors (“Board”) when the Policies were implemented. As Mr. Whitehouse testified:

- Q. Now, you weren’t on the Board of Governors when Realcomp implemented these two rules, were you?
- A. No, I was not.
- ...
- Q. Did the Realcomp Board of Governors consult you at all regarding passing these rules?
- A. No.
- Q. So you don't have any firsthand knowledge of why it was that the Realcomp

Board of Governors passed these rules?

A. No, I don't have any information on why they made the decision. I have my own opinion but --

Q. You have your opinion but you don't know exactly why they did?

A. No, I do not.

Whitehouse Dep. at 105:6-106:5; *see also id.* at 104:11-105:5, 106:6-106:20. Mr. Hardy's testimony is similar. Hardy Dep. at 99:17-101:15, 117:12-118:6, 121:14-122:15. Because these two were not on the Board at the time, and have no firsthand knowledge of the Board's motivations in implementing the Policies, they lack any personal knowledge to testify to why Realcomp did what it did.

Mr. Gleason was on the Board but has no recollection of why the Policies were passed:

Q. Do you remember any of the reasons why any of these motions were passed?

A. No, I don't.

Q. Do you remember at the time any discussions about either of these motions?

A. No, I don't.

Q. So you can't tell me today why it was these motions were passed?

A. No.

Q. You can't tell me today what are the reasons that the board of governors had at the time for passing these motions?

A. No.

Q. Do you remember any problems that were -- Realcomp was facing back in 2001 because of limited service and MLS entry only listings?

A. No, I really don't.

Gleason Dep. at 22:20-23:11; *see also id.* at 20:8-21:18.

This lack of personal knowledge is fatal. Just as the police officer in *Hart* and the safety director in *Kaczmarek* could not testify regarding the reasons others acted when they did not base their testimony on personal knowledge, neither can Messrs. Gleason, Hardy, or Whitehouse testify regarding the reasons for the Realcomp Policies.

C. The Witnesses Have No Personal Knowledge of Any Alleged Problems Supporting the Policies.

Not only do these three witnesses lack any personal knowledge of the reasons why Realcomp adopted the Policies, they also admittedly lack any personal knowledge of the supposed problems upon which their opinions are based. Courts have consistently rejected the opinion testimony of lay witnesses based on factual premises outside the witnesses' personal knowledge. For example, in *United States v. Hoffner*, 777 F.2d 1423, 1426 (10th Cir. 1985), the court affirmed the exclusion of lay opinion testimony offered to show the defendant's motivation in certain transactions when the witnesses had not perceived the transactions in question. *See also Hart*, 127 F.3d at 438 (same); *Swajian v. General Motors Corp.*, 916 F.2d 31, 36 (1st Cir. 1990) (admission of lay opinion predicated on unperceived event held reversible error).

Complaint Counsel request an Order precluding this testimony.

Messrs. Gleason, Hardy and Whitehouse have no personal knowledge of any problems the Polices were meant to solve. Mr. Whitehouse's testimony is typical:

- Q.: Okay. So going back in your experience, you know, prior to 2000 even, tell me all the problems that you can tell me from firsthand knowledge.
A.: From firsthand, experiencing a problem myself?
Q.: Yes.
A.: I can't. I can only tell you secondhand.
Q.: So you only have secondhand knowledge of any problems that the publication of exclusive agency listings on to Internet sites causes?
A.: Correct. I have not experienced that myself in my sale.

Whitehouse Dep. at 111:1-111:11.

Mr. Hardy has no personal knowledge of problems justifying the Policies:

- Q. Now, you can't tell me whether or not at the time it was adopted Realcomp was – had some kind of problems because of different types of listings other than exclusive right-to-sell going to public Internet sites, can you?

A. I just don't know.

Hardy Dep. at 100:17-100:22. Indeed, Mr. Hardy, who has not been an active, full-time broker for over ten years, has not even had the opportunity to observe at firsthand any such supposed problems. Hardy Dep. at 129:13-130:3. *See also* Gleason Dep. at 23:8- 23:11; 25:3-25:8; 48:12-48:24; 120:22-121:20.

D. The Witnesses' Opinion Testimony is Based on Hearsay and Conjecture.

Realcomp's witnesses don't know why the Board implemented the Policies and don't know from firsthand knowledge of any problems the Policies were meant to solve. What Messrs. Gleason, Hardy, and Whitehouse *do* have, however, are "opinions" about the Policies, opinions that are necessarily based, in the absence of any personal knowledge of why Realcomp did what it did, on hearsay and speculation about facts not in evidence. Mr. Whitehouse, for instance, bases his opinions not on any personal knowledge of problems faced by Realcomp members, but entirely on stories that have been related to him by agents *in other areas* through such means as "e-mail, chat groups, [and] chat rooms." Whitehouse Dep. at 111:12-112:6.

Messrs. Gleason and Hardy, both current Board members, base their opinions on conversations they had at Board meetings *after* the Commission's investigation began:

Q. Okay. So prior to 2006, and prior to the FTC's investigation into Realcomp, do you remember any discussions with the Realcomp board of governors about those rules?

A. No.

Q. Since the investigation, did you then become familiar with the rules that are at issue?

A. Yes.

Q. Okay. And is it at that time that you found out what the reasons were for the board of governors to pass the rules?

A. Yes.

Q. So prior to that time you didn't know why the rules were there?

- A. No.
- Q. And from whom did you learn the reasons for the rules?
- A. Oh, I don't know specifically. We talked about it at the board of governors meeting. I don't remember who it was. I mean it was general conversation amongst a lot of us.

Gleason Dep. at 24:8-25:2; Hardy Dep. at 102:6-102:21, 103:10-103:18.

The testimony of Messrs. Hardy and Whitehouse is not merely based on hearsay, but on rumors – the statements of unidentified declarants – that is hearsay completely devoid of any indicia of reliability. Mr. Whitehouse cannot remember the names of the people who allegedly have had problems with limited services listings, he cannot remember how many such conversations he has had, and he has no documents substantiating either these hearsay statements or his memory of them. Whitehouse Dep. at 111:25-113:11. Mr. Hardy also relies upon hearsay statements attributed to unnamed subordinates in offering his opinions. Hardy Dep. at 129:13-130:3.

Courts routinely bar this sort of hearsay-based lay opinion testimony. In *TLT-Babcock, Inc. v. Emerson Elec. Co.*, 33 F.3d 397, 400 (4th Cir. 1994), for example, the court affirmed the exclusion of a manager's opinion testimony as to the cause of failure of fan shafts in a highway tunnel when the manager performed his job, and premised his testimony, "upon the reports he received from staff" who were his "eyes and ears in the field," for lack of personal knowledge. *See also Kaczmarek*, 836 F.2d at 1060-61 (explaining that a manager "cannot offer the contents of a hearsay statement [obtained from his subordinates] as *his* personal knowledge") (emphasis in original). Rule 701 bars this type of testimony because there is no way to test through cross-examination whether the opinions of Messrs. Hardy and Whitehouse are "rationally based" on the perceptions of the hearsay declarants, *see Mitroff v. Xomox Corp.*, 797 F.2d 271, 276 (6th Cir.

1986), or whether their opinions are based on statements containing multiple levels of hearsay. *See Meder v. Everest & Jennings, Inc.*, 637 F.2d 1182, 1188 (8th Cir. 1981).

Moreover, because Messrs. Hardy and Whitehouse are unable to provide the names of the hearsay declarants whose statements their opinions are based upon, there is no way for Realcomp to carry its burden of establishing that these statements qualify for some exception to the hearsay rule. Because “it is virtually impossible to determine the trustworthiness of a statement where the [hearsay] declarant is unidentified[,]” *National Communs. Ass’n v. AT&T*, 92 Civ. 1375, 1998 U.S. Dist. LEXIS 3198, at *35 n.7 (S.D.N.Y. March 16, 1998), courts routinely exclude such statements. *See, e.g., Zaken v. Boerer*, 964 F.2d 1319, 1323-24 (2d Cir. 1992) (statement regarding the alleged reason for the plaintiff’s termination excluded because it was not attributed to a specific individual); *see also Carden v. Westinghouse Elec. Corp.*, 850 F.2d 996, 1003 (3d Cir. 1988) (because their proponent can rarely carry the “heavy burden” of establishing “their evidentiary and trustworthiness requirements,” hearsay “declarations of unidentified persons are rarely admitted”). Complaint Counsel will also be unduly prejudiced by the admission of testimony based on the hearsay statements of unidentified declarants, because there will be no way to impeach the credibility or test the bias, if any, of such declarants. *See Miller v. Keating*, 754 F.2d 507, 510 (3d Cir. 1985).

The hearsay relied on by Messrs. Gleason and Hardy – conversations had at Board meetings held after the Commission’s investigation began – further strengthens the conclusion that this testimony must be excluded. Courts that have considered similar opinion testimony – statements made in anticipation of litigation by interested parties – have routinely rejected such testimony. In *Certain Underwriters at Lloyd’s, London v. Sinkovich*, 232 F.3d 200, 204-205

(4th Cir. 2000), for example, it was held to be reversible error to admit into evidence statements in a report compiled by a third party retained to offer opinions in connection with the litigation because such statements lack any indicia of reliability or trustworthiness.

E. Fact Witnesses May Not Provide Expert Testimony.

The opinion testimony of Gleason, Hardy and Whitehouse - based entirely on inadmissible evidence - would circumvent both the reliability requirements of Rule 702 and the disclosure requirements pertaining to expert testimony. The purpose of Rule 701(c) is to “eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing.” FED. R. EVID. 701, advisory committee’s note to 2000 amendment. “Unlike a lay witness under Rule 701, an expert can answer hypothetical questions and offer opinions not based on first-hand knowledge because his opinions presumably ‘will have a reliable basis in the knowledge and experience of his discipline.’” *Certain Underwriters at Lloyd’s*, 232 F.3d at 203 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993)); *see also Asplundh Mfg. Div. v. Benton Harbor Eng’g*, 57 F.3d 1190, 1202 (3d Cir. 1995) (*Daubert* requires “trial judges to carefully exercise a screening function with respect to Rule 701 opinion testimony when the lay opinion offered closely resembles expert testimony”).

III. CONCLUSION

For the foregoing reasons, Complaint Counsel respectfully request that Your Honor grant its Motion *in limine* and enter an Order precluding Messrs. Gleason, Hardy, Whitehouse, and any other of Realcomp’s witnesses without personal knowledge of the matters testified to, from testifying at the hearing in this matter or by deposition on any supposed justifications for

Realcomp's Policies.

Respectfully submitted,



Christopher Renner
Complaint Counsel

Dated: May 18, 2007

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

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

Public

DECLARATION OF PEGGY BAYER FEMENELLA

I, Peggy Bayer Femenella, make the following statement:

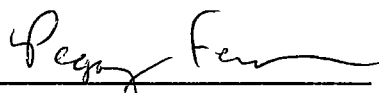
1. I am an Attorney in the Bureau of Competition of the Federal Trade Commission. I serve as Complaint Counsel in this matter.
2. Pursuant to Paragraph 5 of the Scheduling Order, I conferred with Steve Lasher, counsel for Realcomp on May 17, 2007, in an effort in good faith to resolve the issues raised by this Motion, and we have been unable to reach an agreement.
3. 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 Motion in Limine and Memorandum in Support of Motion in Limine Requesting an Order Barring Lay Opinion Testimony Regarding Supposed Justifications For Realcomp's Rules and Policies.
4. The materials submitted to the Court in the Appendix to the Memorandum in Support of Complaint Counsel's Motion in Limine Requesting an Order Barring Lay Opinion Testimony Regarding Supposed Justifications For Realcomp's Rules and Policies are true and correct copies of the following:

Tab Number	Document Title	Document Date
Tab 1	Realcomp's Final Proposed Witness List	05/15/07
Tab 2	Deposition Transcript of Robert Gleason	02/23/07

Tab Number	Document Title	Document Date
Tab 3	Deposition Transcript excerpts of Douglas Hardy	02/21/07
Tab 4	Deposition Transcript excerpts of Douglas Whitehouse	02/22/07

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

Executed on May 18, 2007.


Peggy Bayer Femenella

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

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

Public

[PROPOSED] ORDER

On May 18, 2007, Complaint Counsel moved *in limine* to limit the trial and deposition testimony of Robert Gleason, Douglas Hardy, Douglas Whitehouse, and any other Respondent witnesses without personal knowledge of the matters testified to, regarding any supposed justifications for Respondent Realcomp II Ltd.'s ("Realcomp") Website and Search Function Policies.

Accordingly, upon due consideration of the parties' submissions, it is hereby

ORDERED that Robert Gleason, Douglas Hardy, Douglas Whitehouse, and any other Respondent witnesses without personal knowledge of the matters testified to, are precluded from testifying, whether live or by deposition, regarding any supposed justifications for Realcomp's Website and Search Function Policies.

ORDERED:

Date:

Stephen J. McGuire
Chief Administrative Law Judge

CERTIFICATE OF SERVICE

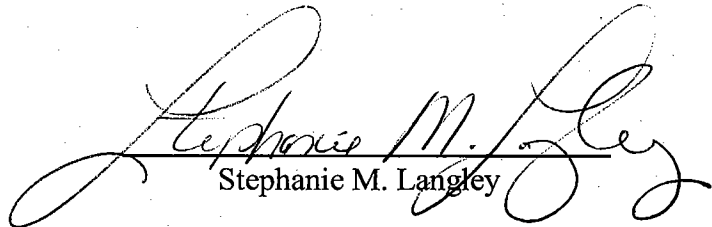
This is to certify that on May 18, 2007, I caused a copy of the attached Complaint Counsel's Motion in Limine to Bar Lay Opinion Testimony Regarding Supposed Justifications for Realcomp's Rules and Policies, the Memorandum in Support of its Motion *In Limine*, a Declaration of Peggy Bayer Femenella and Exhibits 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


Stephanie M. Langley

**UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION**

In the Matter of)	Docket No. 9320
REALCOMP II LTD.,)	Chief Administrative Law Judge
Respondent.)	Stephen J. McGuire

RESPONDENT REALCOMP II, LTD.'S FINAL PROPOSED WITNESS LIST

Respondent Realcomp II Ltd. ("Realcomp"), through its attorneys, Foster, Swift, Collins & Smith, P.C., hereby submits Realcomp's Final Proposed Witness List of witnesses it may call during its case in chief:

RESPONDENT WITNESSES

1. **Karen Kage
c/o Realcomp**

It is anticipated that Ms. Kage will provide an overview of Realcomp, explaining its purpose and function and the need for cooperation and compensation. Ms. Kage is also expected to offer an overview of real estate practices, the Southeastern Michigan real estate market, the rationale for the rules at issue, their efficiency justifications and the harm that would be caused by Complainant's Counsel's proposed relief. Ms. Kage is also expected to explain Realcomp's Rules at issue in this case, in particular the Search Function Rule and the Website Policy Rules. Ms. Kage is also expected to testify about means available for non-exclusive right to sell (ERTS) agents, hereafter referred to as Exclusive Agents (EA), ability to compete in Southeastern Michigan and alternatives available to them, including other internet websites; other MLSs and local boards; and use of internet data exchange (IDX). Ms. Kage is expected to offer testimony concerning the relationship of EAs and ERTS agents with respect to days on market and listing price to selling price comparisons showing that EA listings are not being harmed by Realcomp's rules. Ms. Kage is further expected to offer testimony concerning data and information that have been produced and made available in this case. Ms. Kage is also expected to offer testimony concerning the housing market and economy in Southeastern Michigan. Ms. Kage is expected to explain Realcomp's data sharing arrangements with other Multiple

Listing Services (MLS) and local boards, including the Ann Arbor Board. Ms. Kage may also offer testimony concerning matters upon which she has previously been deposed and concerning all documents and exhibits that Realcomp has produced in this case.

2. **Kelly Sweeney**
Weir Manuel, REALTORS®
298 S. Old Woodward Avenue
Birmingham, MI 48009

Mr. Sweeney is expected to offer testimony concerning the importance of the Realcomp Rules at issue as they relate to the underpinnings of the MLS of cooperation and compensation. It is expected that Mr. Sweeney will explain the concern with forwarding EA listings and treating them in the manner sought by Complainant's Counsel as that would be requiring Realcomp members to pay for and promote a means and method that will undercut their own business activity and be inconsistent with cooperation and compensation. Mr. Sweeney is expected to explain how Complainant's Counsel's proposed relief will set up a system by which prospective purchasers, through promotion and advertisements paid for by Realcomp members, would essentially be placed in a position of dealing directly with homeowners who, for purposes of transaction, would be akin to a for sale by owner, negotiating and handling the sale of their residential property directly with prospective purchasers with no commission to be paid to any cooperating broker. Mr. Sweeney is also expected to offer testimony concerning the residential real estate market in Michigan and how that compares to other markets. Mr. Sweeney is also expected to offer testimony concerning exclusive agents and the problems they pose not only for exclusive right to sell agents but also the public. Mr. Sweeney is also expected to offer testimony about IDX feeds and the broker's own position if they are forwarded EA listings by Realcomp as well as the ability of EAs to forward their own listings, use alternate websites and compete in Southeastern Michigan. Mr. Sweeney is also expected to offer testimony concerning MiRealSource and its availability to EAs. Mr. Sweeney is also expected to offer testimony about MiRealSource. Mr. Sweeney is also expected to offer testimony consistent with the deposition testimony taken in this case and all exhibits from his deposition.

3. **Douglas C. Whitehouse**
Hannett-Wilson-Whitehouse, LLC
880 S. Old Woodward, Suite 200
Birmingham, MI 48009

Mr. Whitehouse is expected to offer testimony concerning the importance of the Realcomp Rules at issue as they relate to the underpinnings of the MLS of cooperation and compensation. It is expected that Mr. Whitehouse will explain the

concern with forwarding EA listings and treating them in the manner sought by Complainant's Counsel as that would be requiring Realcomp members to pay for and promote the means and method that will undercut their own business activity and be inconsistent with cooperation and compensation. Mr. Whitehouse is expected to explain how the proposed relief would set up a system where prospective purchasers, through promotion and advertisements paid by Realcomp members, would be placed in a position of dealing directly with homeowners who, for purposes of transaction at issue would be akin to being in the position of a for sale by owner, negotiating and handling the sale of their residential property directly with prospective purchasers with no commission to be paid to any cooperating broker. Mr. Whitehouse is also expected to offer testimony concerning the residential real estate market in Southeastern Michigan and how that compares to other markets. Mr. Whitehouse is also expected to offer testimony concerning exclusive agents and the problems they pose not only for ERTS agents but also the public. Mr. Whitehouse is also expected to offer testimony about IDX feeds and the broker's own position if they are forwarded EA listings by Realcomp as well as the ability of EAs to forward their own listings, use alternate websites and compete in Southeastern Michigan. Mr. Whitehouse is also expected to offer testimony concerning MiRealSource and its availability to EAs. Mr. Whitehouse is also expected to offer testimony concerning the efficiencies of Realcomp's search default function. Mr. Whitehouse is also expected to offer testimony consistent with the deposition testimony taken in this case and all exhibits from his deposition.

4. **Douglas H. Hardy**
Century 21 Today-Farmington Hills
28544 Orchard Lake
Farmington Hills, MI 48334

Mr. Hardy is expected to offer testimony concerning the importance of the Realcomp Rules at issue as they relate to the underpinnings of the MLS of cooperation and compensation. It is expected that Mr. Hardy will explain the concern with forwarding EA listing and treating them in the manner sought by Complainant's Counsel as that would be requiring Realcomp members to pay for and promote the means and method that will undercut their own business activity and be inconsistent with cooperation and compensation. Mr. Hardy is expected to explain how the proposed relief will set up a system by which prospective purchasers, through promotion and advertisements paid for by Realcomp members, would akin to be dealing directly with homeowners, who for purposes of transaction at issue, would be akin to a for sale by owner, negotiating and handling the sale of their residential property directly with prospective purchasers with no commission to be paid to any cooperating broker. Mr. Hardy is also expected to offer testimony concerning the residential real estate market in Southeastern Michigan and how that compares to other markets. Mr. Hardy is also expected to offer testimony concerning exclusive agents and the problems they pose not only for ERTS agents but also the public. Mr.

Hardy is also expected to offer testimony about IDX feeds and the broker's own position if they were to be forwarded EA listings by Realcomp as well as the ability of EAs to forward their own listings, use alternate websites and compete in Southeastern Michigan. Mr. Hardy is also expected to offer testimony concerning MiRealSource and its availability to EAs. Mr. Hardy is also expected to offer testimony about the residential real estate market and economy in Southeastern Michigan. Mr. Hardy is also expected to offer testimony consistent with the deposition testimony taken in this case and all exhibits from his deposition.

5. **David M. Eisenstadt, Ph.D. (Expert Witness)**
Principal
Microeconomic Consulting and Research Associates, Inc.
1155 Connecticut Avenue, N.W.
Suite 900
Washington, D.C. 20036
202-467-2500

Dr. Eisenstadt is an economist who has been retained by Realcomp to serve as an expert economist in this case. Dr. Eisenstadt is expected to offer testimony consistent with the opinions and matters set forth in his expert report. Dr. Eisenstadt is also expected to offer testimony in response to the report of FTC's expert, Darrell Williams, Ph.D. and the data and studies relied upon by Dr. Williams in that report which were received by Dr. Eisenstadt after his report was prepared. Those additional opinions and matters will be disclosed after Dr. Eisenstadt has had the opportunity to review the additional material provided to him by Complainant's Counsel as recently as May 3, 2007. Dr. Eisenstadt is expected to offer testimony concerning his analysis of data from 10 MLSs and in rebuttal to paragraphs 86-90, Appendices C-E, and Exhibit 26 of Dr. Williams' Expert Report of April 3, 2007 and the matters set forth in Dr. Eisenstadt's Supplemental Expert Report, which is to be submitted on or before May 31, 2007. Dr. Eisenstadt is also expected to offer testimony consistent with his depositions in this case and all documents and materials he has relied upon in support of his expert report.

6. **Robert Taylor, Jr.**
Weir Manuel, REALTORS®
298 S. Old Woodward
Birmingham, MI 48009

It is expected that Mr. Taylor's testimony will be presented by deposition. It is expected that Mr. Taylor's deposition testimony will be about the search default function and the ease by which a person can set that to search for all listings and that he, himself, does that. Mr. Taylor may also offer testimony concerning the arbitration process concerning the issue of procuring cause and the limitations of that process as not being applicable when no commission is being paid.

7. Walt Baczkowski

It is expected that Mr. Baczkowski's testimony will be presented by deposition. It is expected that Mr. Baczkowski's testimony will be that the search default rule of Realcomp does not necessarily make it more difficult for persons using this to view all listings or listings of EAs. Mr. Baczkowski's deposition testimony is also expected to be that broker's own websites can have EA listings on it and all a broker has to do is put a feed from that source to their site and that this is easy to do.

8. Marty Nowak

It is expected that Mr. Nowak's testimony will be presented by deposition. That testimony is expected to be that avoiding Realcomp's search default is very simple. It is also expected that Mr. Nowak's testimony will be that public websites at issue are owned by the brokers and they should not have to market what they will not be paid for. Mr. Nowak is expected to explain that EAs are actually seeking to put for sale by owners on websites.

9. Dale Smith

It is expected that Mr. Smith's testimony will be presented by deposition. That testimony is expected to concern Mr. Smith's description of Southeastern Michigan residential real estate market as being unique due to its economy and that this, in turn, has made the market very competitive. Mr. Smith's testimony is also expected to concern Michigan brokers negotiating everything with respect to services and listings.

10. Dreu Adams

It is expected that Mr. Adams' testimony will be presented by deposition. The expected testimony concerns Mr. Adams' acknowledgment that it is very difficult to do business in Southeastern Michigan for all real estate agents as they are generally down 20%, with everyone struggling. Mr. Adams is also expected to explain how Realcomp's rules at issue in this case have actually benefitted consumers with respect to his own business as he is providing additional services at a lower price.

11. Virginia Bratt

It is expected that Ms. Bratt's testimony will be offered by deposition. That testimony is expected to concern her description of MiRealSource; that agents, including EA agents, can compete in Southeastern Michigan by only belonging to MiRealSource; MiRealSource's former rules and the change in their rules as a result of its entry into a consent judgment; the reason or at least part of the reason that MiRealSource entered into that consent judgment was its concern with avoiding the

expense of litigating this matter; the \$50 per listing charge MiRealSource has for guest listing fees; charges MiRealSource has for persons who wish to become a member; MiRealSource's growth throughout Southeastern Michigan and areas of expansion; problems with including EA listings and real examples of where realtors were not compensated where EA listings were transmitted; the residential real estate market in Southeastern Michigan; realtors using MiRealSource alone and not Realcomp to do business in Southeastern Michigan; alternatives to Realcomp for realtors in Southeastern Michigan; and regarding MiRealSource's broker data sharing and how that is the same thing as the IDX.

12. Dave Elya

It is expected that Mr. Elya's testimony will be offered by deposition. That testimony will concern his having listings in Realcomp and MiRealSource by choice.

13. Robert Goldberg/National Association of Realtor ("NAR")

It is expected that Mr. Goldberg's testimony will be by deposition. That testimony is expected to concern the considerable competition faced by Realtor.com, including from Google, in residential real estate and search engine optimization. Mr. Goldberg's testimony is also expected to concern the proliferation of websites available for residential real estate; options available to EAs and the declining share of Realtor.com of the market. Mr. Goldberg's testimony is also expected to concern rankings of websites effectiveness; results of a survey of members showing that 85% of their members say that less than 10% of their sales are driven by Realtor.com and that he does not know of any statistics that backup a claim that Realtor.com facilitates an actual transaction. Mr. Goldberg is expected to explain that Realtor.com does not have a corner of the market and that it does not have unique benefits. He is expected to explain that competition to Realtor.com has dramatically increased and that Realtor.com's utilization is trending downward. Mr. Goldberg is expected to offer testimony showing that it is fairly simple for persons even on an individual basis to put listings on the website and to maintain their own website and that search engine optimization permits the smaller broker to compete with larger brokers on the web.

14. Robert D. Gleason
SKBK Sothebys International Real Estate
348 E. Maple
Birmingham, MI 48009

Mr. Gleason is expected to offer testimony by deposition. That testimony is expected to describe the concern with Realcomp members paying to promote and sell EA listings in the manner sought by Complainant's Counsel. Mr. Gleason is also expected to explain how making EA listings available on the public websites as

advocated for by Complainant's Counsel, ultimately leads to things such as the addresses for those listings being available and promotes these properties for sale without compensation to a cooperating broker. He will explain that these listings, paid for by realtors, would go directly to the public so that the seller can deal directly with the purchaser, thereby fostering sales with no assurance of compensation to Realcomp members who are being asked to pay for this promotion.

15. Dan Mulvihill

It is expected that the testimony of Mr. Mulvihill will be presented by deposition. Mr. Mulvihill's testimony will be about the Internet not having much of an effect on actual sales.

16. Gerald Burke

It is expected that the testimony of Mr. Burke will be presented by deposition. Mr. Burke's testimony will concern Realcomp's search default rule, the rationale for its adoption, that the majority of people want this and the ease of viewing the remaining listings.

17. Gary Moody

Realcomp anticipates that, unless called as a witness by the FTC, Mr. Moody's testimony will be presented by deposition. That deposition will concern Mr. Moody's EA business in Southeastern Michigan; its success and growth; website optimization and alternative means available for promoting listings on the internet.

18. Albert Hepp

Realcomp anticipates that, unless called as a witness by the FTC, Mr. Hepp's testimony will be presented by deposition. That deposition will concern Mr. Hepp and his Company's ability to do business in Southeastern Michigan and its growth, as an exclusive agent, since 2004.

19. Jeff Kermath

Realcomp anticipates that, unless called as a witness by the FTC, Mr. Kermath's testimony will be presented by deposition. That deposition is expected to concern Mr. Kermath's acknowledgment that his exclusive agency business in Southeastern Michigan has grown and his representation to the public that he and his company have achieved great success with exclusive agent but better with exclusive right to sell and the availability of certain websites.

20. Craig Mincy

Realcomp anticipates that, unless called as a witness by the FTC, Mr. Mincy's testimony will be presented by deposition. Mr. Mincy's testimony is expected to be that his listings, both exclusive agent and ERTS, have increased by 30% from 2005 to 2006. Mr. Mincy's testimony is also expected to be that there is no difference in the time that listings stay on the market, whether they be exclusive agent or ERTS. Mr. Mincy's testimony is also expected to be that 80% of the residential real estate properties sell as a result of the MLS and 10% as a result of being in Realtor.com. Mr. Mincy's testimony will also concern the availability of other websites.

21. Cliff Neirsbach/NAR

Mr. Neirsbach's testimony is expected to be introduced by deposition. Mr. Neirsbach is expected to explain NAR's Rules relating to the IDX and allowing individual brokers to make decisions of limitations of who they would send IDX feeds. Brokers can do this on an objective basis, including the type of agency and thereby excluding EA listings. Mr. Neirsbach is also expected to offer testimony that NAR made changes in its rules so as to avoid litigation expense. Mr. Neirsbach is also expected to offer testimony about there being competition in the real estate field and that he knows of nothing in Michigan, including Southeastern Michigan, to suggest otherwise. Mr. Neirsbach is also expected to offer testimony that the MLS allows smaller brokers to compete with larger brokers and that is good for consumers.

**22. Robert Greenspan
c/o Move, Inc.**

Mr. Greenspan's testimony is expected to be offered by deposition. That deposition is expected to be that Realtor.com no longer has a competitive advantage as content is everywhere today. Mr. Greenspan's testimony will also concern RX137 and his agreement with the statements contained therein. Mr. Greenspan's testimony will also concern the rules and operating agreement concerning placing listings on Realtor.com and individual brokers being able to do that under the operating agreement.

**23. Phil Dawley
c/o Movie, Inc.**

Mr. Dawley's testimony is expected to be offered by deposition. That testimony will concern his description of CX601 showing that Realtor.com feeds from a number of MLSs or other local board in or around Southeastern Michigan and that these are, in addition to Realcomp, are: MiRealSource, Ann Arbor Board of Realtors, Flint Board of Realtors and Shiawassee. Mr. Dawley's testimony will also concern individual brokers submitting their listings directly to Realtor.com. Mr. Dawley is also

expected to offer testimony about Realtor.com experiencing increased competition from large search engines such as Yahoo and Google and smaller startups such as Trulia and Zillo.

**24. Wayne Aronson
c/o YourIgloo**

Mr. Aronson's testimony is expected to be offered by deposition in the event that he is not called as a witness by the Complainant's Counsel or his transcript is used by Complainant's Counsel. That testimony is expected to concern Mr. Aronson's ranking of the effectiveness of various means of internet sites for residential real estate listings; the availability of Downriver MLS and MiRealSource to place EA listings into Realtor.com and his company's continuing to do business, notwithstanding his denial of the same, as a result of his referring listings to EAs in Michigan such as Gary Moody and Shannon Scott.

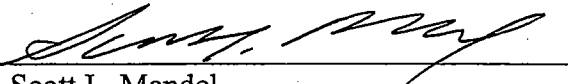
25. Anita Groggins

Ms. Groggins' testimony is expected to be by deposition. It is expected that in the event that Complainant's Counsel calls Ms. Groggins as a witness or seeks to introduce portions of her testimony, Realcomp will seek to introduce Ms. Groggins' testimony about how she can easily negotiate Realcomp's search function default to search for all listings and that persons familiar with computers and the Internet can easily negotiate that as it just requires a couple of clicks on "search all" or check in the box for additional listings.

Foster, Swift, Collins & Smith, P.C.
Attorneys for Respondent

Dated: May 15, 2007

By:



Scott L. Mandel
Steven H. Lasher

CERTIFICATE OF SERVICE

This is to certify that on May 15, 2007, I caused a copy of the attached Respondent's Final Proposed Witness List to be served upon the following persons by Electronic Transmission and overnight delivery:

Sean P. Gates, Esq.
601 New Jersey Ave., N.W.
Rm. NJ-6219
Washington, DC 20001

And two courtesy copies of same hand delivered to:

Hon. Stephen J. McGuire
Chief Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, DC 20580



Lorri A. Rosier

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FEDERAL TRADE COMMISSION

MATTER NO. D09320

TITLE REALCOMP, II, LTD.

PLACE FOSTER SWIFT COLLINS & SMITH, P.C.
32300 NORTHWESTERN HIGHWAY, SUITE 2300
FARMINGTON HILLS, MICHIGAN

DATE FEBRUARY 23, 2007

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TESTIMONY OF ROBERT GLEASON

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1 without board of governors' approval; right?

2 A. Correct.

3 Q. Now looking at CX 91, if you turn to the third page
4 you'll see at the top there's an item entitled
5 MLS/User Committee.

6 Do you see that?

7 A. Yes.

8 Q. Okay. And you see there was a motion made, seconded
9 and carried to approve a recommendation for the
10 MLS/User Committee to add three new feature options
11 under compensation arrangements for all property
12 types.

13 Do you see that?

14 A. Yes, I do.

15 Q. And that motion added to the feature options exclusive
16 agency listings, limited service listings and MLS
17 entry only listings; is that right?

18 A. Yes.

19 Q. And it reads below that: It was further agreed that
20 listings falling within these categories will not be
21 included in the data that is sent to the real estate
22 Internet advertisers.

23 Do you see that?

24 A. Yes, I do.

25 Q. Can you tell me from your memory what were the reasons

1 discussed at this meeting regarding the agreement that
2 these listings would not be sent to the real estate
3 Internet advertisers?

4 A. I can't remember. I'm not even sure I was at -- was I
5 at the meeting?

6 Q. Well, if you look at the second page, it lists you as
7 present I believe.

8 A. Yes, I was present. I don't remember.

9 Q. So you don't remember any of the discussion about this
10 particular motion at this particular meeting?

11 A. I really don't, no.

12 Q. Okay. Do you remember at the time any discussions
13 about reasons why these types of listings would not go
14 out to real estate Internet advertisers?

15 A. No, I don't.

16 Q. So you can't tell me why it was that the board of
17 governors passed this particular motion?

18 A. No, I can't.

19 Q. I'll give you what's been marked as CX 92. CX 92
20 appears to be a minutes for the board of governors
21 meeting for Realcomp II dated September 28th, 2001.

22 Do you see on the first page it lists you
23 as present at this meeting as an alternate governor?

24 A. Yes, I do.

25 Q. Do you remember this meeting at all?

1 A. No, I don't.

2 Q. If you look at the second page, you see there's an
3 item that says Update on Limited Service and MLS Entry
4 Only Listings.

5 Do you see that?

6 A. Yes, I do.

7 Q. Okay. And then under that title there's a motion that
8 was made, seconded and carried to establish separate
9 search requirements on RealcompOnline in order to
10 include MLS only and/or limited service listings in
11 the basic search.

12 Do you see that?

13 A. Yes, I do.

14 Q. And then another motion was made, seconded and carried
15 to exclude MLS only and limited service listings from
16 all data extracts to the Internet real estate Web
17 sites publishing Realcomp data.

18 Do you see that?

19 A. Yes, I do.

20 Q. Do you remember any of the reasons why any of these
21 motions were passed?

22 A. No, I don't.

23 Q. Do you remember at the time any discussions about
24 either of these motions?

25 A. No, I don't.

- 1 Q. So you can't tell me today why it was these motions
2 were passed?
- 3 A. No.
- 4 Q. You can't tell me today what are the reasons that the
5 board of governors had at the time for passing these
6 motions?
- 7 A. No.
- 8 Q. Do you remember any problems that were -- Realcomp was
9 facing back in 2001 because of limited service and MLS
10 entry only listings?
- 11 A. No, I really don't.
- 12 Q. Mr. Gleason, you're aware that the Federal Trade
13 Commission's suit against Realcomp involves one set of
14 rules which exclude anything other than exclusive
15 right-to-sell listings on the push from Realcomp of
16 its listings out to Internet sites such as REALTOR.com
17 and onto the IDX feed; right?
- 18 A. Yes.
- 19 Q. And you've been on the board of governors now as a
20 primary governor since 2004; right?
- 21 A. Yes.
- 22 Q. Can you tell me of any discussions during that time
23 that you've had with the board of governors regarding
24 the reasons for those rules?
- 25 A. We've discussed it at the last several meetings. In

1 other words, our particular situation of why we're
2 here.

3 Q. Okay. So the last several meetings, is that in 2006?

4 A. Well, this year.

5 Q. Okay. It was 2006 and 2007?

6 A. Yeah. I can't remember how far back in 2006, but it
7 started in 2006.

8 Q. Okay. So prior to 2006, and prior to the FTC's
9 investigation into Realcomp, do you remember any
10 discussions with the Realcomp board of governors about
11 those rules?

12 A. No.

13 Q. Since the investigation, did you then become familiar
14 with the rules that are at issue?

15 A. Yes.

16 Q. Okay. And is it at that time that you found out what
17 the reasons were for the board of governors to pass
18 the rules?

19 A. Yes.

20 Q. So prior to that time you didn't know why the rules
21 were there?

22 A. No.

23 Q. And from whom did you learn the reasons for the rules?

24 A. Oh, I don't know specifically. We talked about it at
25 the board of governors meeting. I don't remember who

1 it was. I mean it was general conversation amongst a
2 lot of us.

3 Q. And was there anybody from the -- in those
4 conversations that said well, back in 2001 we were
5 having this big problem with limited service and MLS
6 entry only listings and that's what we were trying to
7 address?

8 A. No.

9 Q. Okay. So what were the reasons then discussed within
10 the board of governors for the rules that prevent
11 anything other than exclusive right-to-sell listings
12 to go to Internet Web sites?

13 A. The reasons were that we have a business model that
14 works, that it's a way to make sure that we can
15 guarantee compensation to cooperating brokers.

16 The question being why does the model work,
17 is that basically what the question is?

18 Q. No, I'm trying to understand the reasons why Realcomp
19 has these rules. What are the justifications for the
20 rules?

21 MR. MANDEL: I'm sorry, Sean, let's make
22 sure. Do you want him to tell you those or is your
23 question what was discussed by the board of governors?
24 Two different issues.

25 BY MR. GATES:

- 1 A. Yes.
- 2 Q. Okay. Tell me about it. Give me the details. When
3 did it happen, who was involved?
- 4 A. Where a buyer went around an exclusive agency
5 contract?
- 6 Q. Yes.
- 7 A. Is that what your question is?
- 8 Q. The seller is listing under an EA contract.
- 9 A. No, the seller is not listing under an EA contract. I
10 apologize, this was a new construction that was
11 listed.
- 12 Q. So I want any examples of a listing under an EA
13 contract in which there was a procuring cause dispute
14 because the buyer went around the agent.
- 15 A. Okay. The buyer went around the agent under exclusive
16 agency contract? Not that I know of, no.
- 17 Q. But you say this is the problem with putting these
18 things out on the Internet; right?
- 19 A. Well, I'm saying it could be.
- 20 Q. It could be, but you can't tell me of any examples
21 were this actually happened?
- 22 A. Under an EA contract?
- 23 Q. Yes.
- 24 A. No.
- 25 Q. Okay. If you look back at CX 100, if you look at the

1 MR. MANDEL: I think he's asking as far as
2 what rules, Sean?

3 BY MR. GATES:

4 Q. The Web site policy rules that we've been discussing,

5 A. My understanding is that what we just talked about as
6 far as Realcomp's policy. Now you're asking me what
7 NAR's policy is?

8 Q. Yes.

9 A. My understanding I think is that they do include
10 exclusive agencies. That's why we're going against
11 NAR.

12 Q. Right, okay. I got you.

13 But do you know whether or not other MLSs
14 have in the past published EA listings onto public Web
15 sites?

16 A. Yes, they have.

17 Q. They have, okay. And how do you know that?

18 A. Because of the ones that caved in to you guys.

19 Q. Well, they previously did not, but now do. I'm asking
20 putting aside the ones --

21 A. Those are the ones I've read about.

22 Q. Okay. So other than the ones that have entered into
23 settlement agreements with the Federal Trade
24 Commission, were you aware that other MLSs published
25 EA listings to public Internet Web sites even before

- 1 the FTC got involved in this area?
- 2 A. I didn't know.
- 3 Q. Oh, you didn't know that? You don't know one way or
4 the other?
- 5 A. I don't know one way or the other.
- 6 Q. Okay. Do you know of any MLS that's experienced
7 problems because of publishing EAs onto public Web
8 sites?
- 9 A. No, I don't know one way or the other.
- 10 Q. Okay. So when you, Realcomp, decided to maintain your
11 stance on your Web site policies, you didn't look at
12 whether -- what other MLSs across the country were
13 doing?
- 14 A. I did not personally, no.
- 15 Q. Do you know whether or not the board of governors did?
- 16 A. Yes, they did, some of them.
- 17 Q. Some of them did, and what did they report to you?
- 18 A. As far as what their policies were?
- 19 Q. Correct.
- 20 A. I can't remember. I really don't know what they
21 reported to us or to the people at that meeting.
22 There's a lot of talk about, in other words, the MLSs.
23 As far as that particular item is concerned, I don't
24 know.
- 25 Q. Do you know of any other MLS that has a default search

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MATTER NO. D09320

TITLE REALCOMP, II, LTD.

PLACE FOSTER SWIFT COLLINS & SMITH, P.C.
32300 NORTHWESTERN HIGHWAY, SUITE 2300
FARMINGTON HILLS, MICHIGAN

DATE FEBRUARY 21, 2007

PAGES 1 THROUGH 142

TESTIMONY OF DOUGLAS HARDY

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(301)870-8025**

- 1 Q. Okay.
- 2 A. It's just their first letters abbreviated.
- 3 Q. So it's NOCBOR?
- 4 A. Yes, sir.
- 5 Q. Is that N-O-C-B-O-R?
- 6 A. Yes, sir.
- 7 Q. Do you have any positions at NOCBOR?
- 8 A. No, sir, just other than being on their Board of
- 9 Governors.
- 10 Q. Have you had any positions at NOCBOR prior to 2007?
- 11 A. No, sir.
- 12 Q. What other boards are you a member of, if any?
- 13 A. I think no other boards.
- 14 Q. Does your company or your offices have to be members
- 15 of the different boards?
- 16 A. Yes.
- 17 Q. And for Century 21 Today which boards is it a member
- 18 of?
- 19 A. It's my belief we're a member of the Western Wayne
- 20 Association of Realtors, North Oakland County Board of
- 21 Realtors, the M-C-A-R, which is the Michigan
- 22 Consolidated Association of Realtors. I think that's
- 23 it.
- 24 Q. Which MLSs is Century 21 Today a member of?
- 25 A. Realcomp.

- 1 A. That's my impression. That's my understanding,
2 absolutely.
- 3 Q. So it wouldn't be a good use of money to join MI Real
4 Source because you already have access to those 95
5 percent of those listings.
- 6 A. It would -- it's a cost savings for the agents.
- 7 Q. What about other MLSs outside of the Realcomp area, in
8 other counties?
- 9 A. No, sir.
- 10 Q. And is there a reason why your offices haven't joined
11 some of those other MLSs?
- 12 A. I don't think I have any interaction with areas
13 selling houses outside of our areas.
- 14 Q. Okay. And why don't you tell me which areas your
15 Century 21 Today covers.
- 16 A. Oakland and Wayne County, and some Macomb County.
- 17 Q. So within Oakland and Wayne County can you give me a
18 ballpark figure of the percentage of listings that
19 Century 21 has today -- Century 21 has in those
20 counties versus its total number of listings?
- 21 A. I don't know the numbers. It would be a high number.
22 I just don't know. I just didn't bring any of that
23 stuff.
- 24 Q. No, that's fine.
- 25 A. I can look it up.

1 Q. What about Sotheby's, your Sotheby's franchise, you
2 have a hundred agents there, what geographic areas do
3 they list houses in?

4 A. Most all Oakland County.

5 Q. And you said that the Sotheby's office is also a
6 member of MI Real Source?

7 A. Yes, sir.

8 Q. Can you tell me why that is?

9 A. When we bought them in May 1st, in May of 2006, they
10 were a member of MI Real Source and I didn't want -- I
11 don't want to change things too fast, so I just left
12 it in place.

13 Q. Would it be a cost savings to you to terminate the
14 Sotheby's office's membership in MI Real Source?

15 A. Not to the company, no.

16 Q. That --

17 A. To the agents it would be a cost savings.

18 Q. The agents are the ones who pay the dues to MI Real
19 Source?

20 A. Yes, sir.

21 Q. And for Century 21 Today you made a decision not to
22 join MI Real Source, are you planning to do that as
23 well at Sotheby's, to terminate the MI Real Source
24 membership?

25 A. Yes, sir.

1 Realtor.com and the IDX websites, do you market homes
2 on any other websites?

3 A. There's so many places our listings go, I don't know
4 if I could actually give you a comprehensive list.
5 Those for sure are the significant sites.

6 Q. Let me give you what's been marked previously as CX
7 77, and just tell me whether you, if you know, whether
8 or not you market -- Century 21 Today markets any of
9 its homes, its listings on any of those websites.

10 A. I do not know. I think the only way they would get
11 there if it was part of IDX, but --

12 Q. Do you recognize any of these websites?

13 A. FSBO Monster is a pretty interesting website, but
14 there's not one I recognize that I've actually spent
15 more than this time on this page with except zillow at
16 the bottom.

17 Q. Thank you. You can put that down. Mr. Hardy, you
18 know that Realcomp has a rule that it allows only
19 exclusive right-to-sell listings to go to public
20 Internet sites from the Realcomp MLS, right?

21 A. Yes.

22 Q. And you know that Realcomp has a rule that says only
23 exclusive right-to-sell listings go to the IDX sites,
24 right?

25 A. Yes.

1 Q. From the Realcomp MLS, right?

2 Now, were you -- you were not at the
3 meeting, the Realcomp Board of Governors meeting at
4 which that policy was first decided, right?

5 A. It's my understanding that it was done before I was on
6 the board.

7 Q. Okay. So it was done before you were on the board and
8 so you weren't at the meeting where it was actually
9 voted on, right?

10 A. No, sir. If it was before my term on the board, I
11 wasn't there, and I think it was before my term on the
12 board.

13 Q. Mr. Hardy, you can't tell me then based on firsthand
14 knowledge at least why it was the board adopted those
15 rules, right?

16 A. No, sir.

17 Q. Now, you can't tell me whether or not at the time it
18 was adopted Realcomp was -- had some kind of problems
19 because of different types of listings other than
20 exclusive right-to-sell going to public Internet
21 sites, can you?

22 A. I just don't know.

23 Q. Now, do you know -- have you been told what the reason
24 is for the rule?

25 A. No, sir.

1 Q. So you don't know from your discussions from any of
2 the other Board of Governors or anyone else why it is
3 that rule was put in place?

4 A. No, sir.

5 Q. Do you have an understanding of, from any source, what
6 the purpose of the rule is?

7 A. You mean in today's terms or at the time it was
8 adopted?

9 Q. No. Okay. So let's do that. At the time it was
10 adopted, from any source can you tell me what the
11 purpose of the rule is?

12 A. No, sir.

13 Q. So you don't have any understanding, any secondhand
14 knowledge of why the rule was originally adopted?

15 A. No, sir.

16 Q. Now, you have, though, discussed or have an
17 understanding of what the purpose of the rule is now
18 in today's terms, is that right?

19 A. Yes.

20 Q. From where did you get that understanding?

21 A. It's really just because of this whole adventure
22 investigating the rule a little bit more and reading
23 the rule and seeing how it comes to terms in today's
24 market is really why, what I got my knowledge of it
25 from.

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CX43-0102

1 Q. Okay. So if I understand, when you say this
2 adventure, you're talking about the Federal Trade
3 Commissions case, investigation and case against
4 Realcomp?

5 A. Yes.

6 Q. So prior to that time, prior to the FTC investigation
7 and case against Realcomp, you didn't have any
8 understanding whatsoever what the purpose of the rule
9 was?

10 A. I didn't really have any knowledge of the rule either.

11 Q. So when was it that you first knew about the rule?

12 A. I think I first became aware of the rule when I was --
13 understood we were being investigated and this was one
14 of the issues.

15 Q. So at that time you investigated the rule?

16 A. Investigating in the sense that I asked what is the
17 rule.

18 Q. And who did you ask?

19 A. I think at one of our board meetings we all might have
20 been appraised by our counsel of what the
21 investigation was about.

22 Q. And did that occur in 2006?

23 A. You know? I don't -- I don't know when it was.

24 I can't look at you. Sorry.

25 Q. Well --

1 A. It was like contemporaneous with the events of your
2 investigation of Realcomp. I truly don't recall.

3 Q. You don't recall what year that was?

4 A. Don't tell my wife I can't remember our anniversary
5 date. That's really restricted of anything. You
6 know? I don't -- whenever it happened, you know, it's
7 kind of been an evolving process. So whenever the
8 investigation came about, I think, you know, Steve
9 made us aware of it.

10 Q. And then when you say you investigated or found out
11 about the rule, other than asking, well, other than
12 conversations with Mr. Lasher, how did you find out
13 about the rule and its purpose?

14 A. Uhm, I have never found out the purpose of the rule.
15 I only asked what the rule was, and so I was told most
16 likely by Karen Kage at a board meeting, you know,
17 just read the rule, and that's what -- how I learned
18 about the rule.

19 Q. So you don't know what the purpose of the rule is then
20 from the standpoint of the Realcomp Board of
21 Governors?

22 A. Not at the time it was adopted, no.

23 Q. Do you understand what the purpose of the rule is now?

24 A. I understand the rule now, I think, and my
25 understanding of the rule is that if we were to allow

1 Q. That's your understanding of the purpose of the rule,
2 right?

3 A. It's just my understanding of the rule. I don't
4 know -- I can't speak to where it came from or the
5 real goal behind it; but in my investigating, you
6 know, my summary is I don't think it's in the best
7 interest of the Realcomp to put two parties together
8 with -- without a guaranty of compensation.

9 Q. You understand that --

10 A. I didn't write on this one.

11 Q. Good job.

12 You understand that the Federal Trade
13 Commission is also challenging what we call the search
14 function policy?

15 A. Yes, sir.

16 Q. Okay. So search function policy so we're all on the
17 same page is that under the default search in the
18 Realcomp Online, only exclusive right-to-sell and
19 unknown listings come up, right?

20 A. Correct.

21 Q. So under the default search at least exclusive agency,
22 limited service, and MLS entry only listings do not
23 come into the search, right?

24 A. Correct.

25 Q. And you weren't there and don't know why the Realcomp

1 Board of Governors adopted that rule originally,
2 right?

3 A. No, but I'll ramble ultimately at some time about it.

4 Q. Okay. But you weren't there, you don't know why it
5 was adopted at first?

6 A. No, sir.

7 Q. Let me give you a document already marked as CX 166.

8 CX 166 --

9 A. Apparently I'm on the board of this one.

10 Q. Is the minutes of a meeting from August 22nd, 2003 of
11 the Board of Governors?

12 A. Correct.

13 Q. Okay. And you were listed as present. You were a
14 member of the Board of Governors at this time and
15 present at this meeting?

16 A. Correct. This is my third full year, so probably
17 sometime in 2003 I appeared on the board.

18 Q. So probably mid-2003 or something like that?

19 A. Something like that.

20 Q. If you look at page three.

21 A. Yes, sir.

22 Q. Okay. And you see down the middle it says, a motion
23 was made, seconded and carried to cease further
24 promotion of the partnership between MI Home Hunt and
25 Realcomp, do you see where I am?

1 were to elect those.

2 Q. Okay. Now, let's back up for a second. Each listing
3 within the Realcomp MLS is identified by listing type,
4 correct?

5 A. Correct.

6 Q. When you pull up a detailed listing, the listing type
7 is right there at the top, right?

8 A. I believe so.

9 Q. So that when you look at the listing type that's right
10 there at the top of a detailed listing, that informs
11 the agent of the relationship or the agreement between
12 the home seller and the listing agent, right?

13 A. Correct.

14 Q. So you said that the reason for the default search is
15 so that agents would know whether or not they're
16 dealing with a home seller or an agent, right?

17 A. I mean, I'm assuming that's the reason.

18 Q. You're assuming that's the reason. Okay. So you
19 don't know why it was adopted?

20 A. I don't know why it was adopted. I don't recall any
21 of the discussion, and I can only speak of current
22 practice in the industry.

23 Q. So let's go back to the -- currently, have you had any
24 discussion with the Board of Governors, putting aside
25 anything with counsel, about the reasons for the

1 search function policy?

2 A. No.

3 Q. So you can't tell me why it is that Realcomp has a
4 search function policy, other than your deduction for
5 reasons?

6 A. Yeah, and having a number of agents deal with it in
7 practice, that it's actually a hindrance to the
8 consumer to have your home listed where an agent's
9 going to directly call you.

10 Q. So let's back up for a second to make sure we're clear
11 on the record.

12 You can't tell me the purposes of the
13 search function policy, at least from the Realcomp
14 Board of Governors' viewpoint?

15 A. No, sir.

16 Q. And what you can tell me, though, and you were saying
17 is that you had some of your agents have had
18 experiences dealing with sellers who are under these
19 types of listing agreements, right?

20 A. Yes, sir.

21 Q. You said it's not in the interest of the consumers,
22 which consumer?

23 A. I actually believe the seller.

24 Q. So is it your testimony then the purpose of the search
25 function policy is to protect the sellers?

1 change those rules, right? And they could do that in
2 the next meeting if they wanted to, correct?

3 A. Sure.

4 Q. So for right now it's your viewpoint that you're not
5 going to make that type of motion, not going to change
6 those rules, right?

7 A. I've had the issue prior to this process has never
8 even really come up and been discussed much. I mean,
9 you know, I have a number of agents I represent
10 personally as a broker and a number of that I talk to
11 in the industry and I have never had it come to me as
12 a concern.

13 Q. Let's back up in your personal experience. You said
14 you've talked about these different problems that
15 agents run into when they're dealing with limited
16 service listings, but you haven't personally been the
17 selling agent or the cooperative broker in any of
18 those transactions, right?

19 A. I think my selling days predated this business model.

20 Q. So just so we're clear on the record, you weren't the
21 cooperating broker in any of the transactions that
22 you're talking about where there were problems, right?

23 A. No, sir, but I do hear from 400 agents, 300 Century
24 and a hundred Sotheby's about each of their troubled
25 transactions because that's what I do. I go to every

1 office every day, talk to my agents, how their
2 business is going and often I'll hear about issues
3 with deals. Every day.

4 Q. And is it your testimony that those issues occur every
5 single time there's an EA listing?

6 A. No, I don't think so. I think the issues are more I
7 get frustrated concerns from agents on dealing with
8 certain types of listings and it's far more common on
9 some listings than others.

10 Q. And you have problems though with exclusive
11 right-to-sell listings, right?

12 A. Absolutely.

13 Q. And there's problems with certain other agents who are
14 listing agents, right?

15 A. Yes, sir.

16 Q. Regardless of business model?

17 A. Yes, sir.

18 Q. And regardless of listing type?

19 A. Yes.

20 Q. But as it stands now, you as a Realcomp governor are
21 saying I'm not going to change this policy, right?

22 A. You guys want to come up with a deal today in this
23 room?

24 Q. You can do it without a deal.

25 A. I have had nobody -- none of our members have come to

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FEDERAL TRADE COMMISSION

MATTER NO. D09320

TITLE REALCOMP, II, LTD.

PLACE FOSTER SWIFT COLLINS & SMITH, P.C.
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FARMINGTON HILLS, MICHIGAN

DATE FEBRUARY 22, 2007

PAGES 1 THROUGH 154

TESTIMONY OF DOUGLAS WHITEHOUSE

CONTAINS RESTRICTED AND CONFIDENTIAL PORTIONS

**FOR THE RECORD, INC.
10760 DEMARR ROAD
WHITE PLAINS, MD 20695
(301)870-8025**

- 1 A. It was a regional real estate company in the southeast
2 Michigan area.
- 3 Q. Does Chamberlain Realtors still exist?
- 4 A. Actually, they've been sold and it was originally
5 Chamberlain and then it was Chamberlain, Prudential,
6 Prudential, Chamberlain, Steel and now it is
7 Prudential Cranbrook Realtors.
- 8 Q. And Hannet, Wilson & Whitehouse, how many agents do
9 you have?
- 10 A. Probably about 45.
- 11 Q. And how many offices?
- 12 A. One.
- 13 Q. And where's the office?
- 14 A. In Birmingham, Michigan.
- 15 Q. What MLSs is Hannet, Wilson & Whitehouse a member of?
- 16 A. Realcomp and MI Real Source.
- 17 Q. What's the geographic region in which Hannet, Wilson &
18 Whitehouse does its business, how would you describe
19 that?
- 20 A. The best way to describe it is southeast Michigan.
- 21 Q. What counties do you cover?
- 22 A. Primarily I would say the majority of our business is
23 in Oakland, Macomb and Wayne. We go into other areas,
24 I mean, but not hugely significant.
- 25 Q. When did you join MI Real Source?

1 analysis?

2 A. Yeah.

3 Q. Okay. Thank you.

4 MARKED BY THE REPORTER:

5 DEPOSITION EXHIBIT NUMBER CX 327

6 12:50 p.m.

7 BY MR. GATES:

8 Q. CX 327 is a letter from Karen Kage to you dated
9 September 18th, 2006, right?

10 A. Yes, it is.

11 Q. And in the middle of the page it talks about
12 Realcomp's MLS rules and regulations that are subject
13 to the Federal Trade Commission's litigation, right?

14 A. Yep.

15 Q. And it talks about the first bullet point is exclusive
16 agency, limited service, MLS entry only listings will
17 not be distributed to any real estate Internet
18 advertising sites, right?

19 A. Correct.

20 Q. So that's one of the rules that you understand is part
21 of the Federal Trade Commission's suit, right?

22 A. Correct.

23 Q. Second one is that listing information downloaded or
24 otherwise displayed pursuant to IDX shall be limited
25 to properties listed on an exclusive right-to-sell

1 basis.

2 A. Correct.

3 Q. So those two rules have to do with the distribution of
4 listings on to the Internet, right?

5 A. Correct.

6 Q. Now, you weren't on the Board of Governors when
7 Realcomp implemented these two rules, were you?

8 A. No, I was not.

9 Q. Do you know when they implemented these two rules?

10 A. No.

11 Q. When did you first become aware of the two rules?

12 A. I couldn't give you a date. I really --

13 Q. Did you know about them before you got the letter from
14 Karen Kage?

15 A. I would say so.

16 Q. How long before that?

17 A. I honestly don't know.

18 Q. Did you know about them in 2005?

19 A. I would say so but I don't remember a date.

20 Q. Did the Realcomp Board of Governors consult you at all
21 regarding passing these rules?

22 A. No.

23 Q. So you don't have any firsthand knowledge of why it
24 was that the Realcomp Board of Governors passed these
25 rules?

