

ORIGINAL

PUBLIC

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION



\_\_\_\_\_  
In the Matter of )  
REALCOMP II LTD. )  
\_\_\_\_\_ )

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

**REPLY BRIEF OF RESPONDENT**

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August 17, 2007

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**I.**  
**INTRODUCTION:**  
**This Case Is Not About Competition Between "Traditional" Brokers**  
**and "Discount" Brokers**

This case presents a straightforward question: Can Respondent Realcomp establish different rules for different "products" (i.e., types of real estate listings) when its members have differing preferences for the different products? That is all this case is about.

Nonetheless, the premise and pervasive theme of Complaint Counsel's opening brief is that the Realcomp Policies<sup>1</sup> impair competition between "traditional" and "non-traditional" (i.e., "discount" or "limited service") brokers. Complaint Counsel paints a picture in which "traditional" brokers conspired to raise their rival discount brokers' costs by disfavoring the listings of discount brokers on the MLS. This picture, however, fails to accurately portray the record, obscuring the nature of the Realcomp Policies and the difficulty that Complaint Counsel faces in constructing a causal link between those Policies and the alleged injury to competition.

The Realcomp Policies concern the marketing of Exclusive Agency ("EA") listings. They apply to EA listings offered by "traditional" brokers and to EA listings offered by "discount" brokers. Realcomp has never drawn distinctions in the enforcement of the Web Site Policy or the Search Function Policy based on the identity or business model of the listing broker, and Complaint Counsel has not maintained otherwise.

The picture Complaint Counsel seeks to draw is obliterated by the facts:

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<sup>1</sup> References to the "Realcomp Policies" mean, collectively, the Web Site Policy and Search Function Policy as defined by stipulation in this case.

- "Discount" brokers in Southeast Michigan offer discounted (flat fee) Exclusive Right to Sell ("ERTS") listings (in addition to EA listings). (RPF ¶ 114).<sup>2</sup> These ERTS listings appear as ERTS listings on the Realcomp MLS. (RPF ¶ 114).
- In the Realcomp service area, discount brokers use ERTS listing contracts with great frequency, and on average at twice the rate of EA contracts. This ratio is about four times higher than in nearby Washtenaw County. (RCCPF ¶ 190).<sup>3</sup>
- "Traditional" brokers in Southeast Michigan offer EA Listings In addition to ERTS listings). These EA listings appear as EA listings on the Realcomp MLS. (RCCPF ¶ 190).
- On the Realcomp MLS, "traditional" brokers account for a significant proportion (as much as 60%) of the EA listings. (RCCPF ¶ 190).

And so, Complaint Counsel's picture ignores the fact that listing type does not really define the metes and bounds of competition between brokers with different business models. Likewise, Complaint Counsel is just wrong in arguing that putative reductions in the prevalence of EA listings are the same thing as reductions in the market share of discount brokers, a proposition for which no evidence exists in this record. (*See* Section II.C.5, *infra.*) The prevalence of flat-fee ERTS contracts and other business innovations by discount brokers is wholly consistent with Complaint Counsel's praise of "unbundled" brokerage services and wholly inconsistent with Complaint Counsel's theory of consumer harm. (*See* Section II.C.2, *infra.*) Indeed, the picture that finally emerges in this case is one of prosperity and growth for the discount brokers who testified on behalf of Complaint Counsel, even in a period of poor prospects for the Southeast Michigan real estate market. (*See* Section II.B.4, *infra.*)

Complaint Counsel has not met its burden, and this case should be dismissed.

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<sup>2</sup> Citations to "RPF" refer to Respondent Realcomp II, Ltd.'s Proposed Findings of Fact and Conclusions of Law (July 31, 2007)

<sup>3</sup> Citations to "RCCPF" refer to Respondent Realcomp II, Ltd.'s Reply to Complaint Counsel's Proposed Findings of Fact (August 17, 2007)

## II.

### ARGUMENT IN REPLY TO COMPLAINT COUNSEL'S OPENING BRIEF

#### A. The Evidence Does Not Support Complaint Counsel's Assertions That The Realcomp Policies Have Impaired Competition Between "Traditional" and "Discount" Brokers

##### 1. **No Anticompetitive Motives May be Attributed to the Adoption of the Realcomp Policies**

In its opening brief, Complaint Counsel attempts to draw adverse inferences regarding the motives underlying the adoption of the Realcomp Policies from the history of those Policies. Complaint Counsel's Post-Trial Brief at 23-25. However, it bears noting that there is nothing whatsoever in the evidence cited by Complaint Counsel that directly states any such motive, and all of such evidence in fact can be understood to be entirely consistent with the evidence in this case regarding the free-riding problem attendant to publication of EA listings.<sup>4</sup>

As the Executive Director of Realcomp, Karen Kage, testified, Realcomp's Web Site Policy was adopted by its Board out of concern that homeowners using EA listings have an incentive to sell their homes without the assistance of a cooperating broker and avoid paying a commission; while Realtors®, in turn, were paying for the sites. (RPF ¶ 137). The Board felt that it was not in the best interests of its members, the Realtors®, to provide free advertising for home sellers who were negotiating their own deals. (RPF ¶ 137). Realcomp's Search Function Policy was designed to make its MLS easier for Realcomp users and improve efficiency. (RPF ¶ 138). Because 98% to 99% of listings on the Realcomp MLS were for ERTS, the default was set by the Search Function Policy to reflect the majority of listings. (RPF ¶ 138(a)). The Search

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<sup>4</sup> Ironically, Complaint Counsel has no problem inferring laudatory motives to the policies of other MLSs that did not differentiate between EA and ERTS listings during the relevant time (other MLSs have "no problem" sending EA listings to public websites). Complaint Counsel's Post-Trial Brief at 26. Of course, this ignores the active and well-publicized activity of the FTC during that time to investigate and challenge MLSs (such as Realcomp and its competitor, MiRealSource) which had differentiating policies, which may have influenced the decisions of other MLSs not to enact or continue differentiating policies.

Function Policy made it so that there was one less "click" of the mouse for the majority of users searching only for ERTS listings. (RPF ¶ 138(b)).

The efficiency-enhancing objectives of the Realcomp Policies are to minimize free riding by EA home sellers on cooperating brokers, to provide an incentive for cooperating brokers to show EA properties, and to attenuate the bidding disadvantage that home buyers who prefer to be represented by a broker have in attempting to acquire EA-listed properties. (RPF ¶ 139).

## **2. The Realcomp Policies Have Not Eliminated Consumer Choice**

Complaint Counsel argues that the Realcomp Policies restricted the choices available to home sellers. Complaint Counsel's Post-Trial Brief at 26-27. But the evidence shows that consumers in the Realcomp Service Area indeed have many choices when it comes to brokerage services. The Southeastern Michigan real estate market is very competitive, (RPF ¶ 84), and is known nationally as being unique and extremely competitive. (RPF ¶ 85).

Complaint Counsel is incorrect to suggest that a buyer and seller cannot avoid paying a percentage commission to the listing agent under an Exclusive Right to Sell contract or that consumers in the Realcomp Service Area are required to purchase full service listings. Rather, flat fee ERTS listings are available in the Realcomp Service Area. (RCCPF ¶ 1242).

A flat fee ERTS listing requires an additional payment of as little as \$200 to the listing broker over and above the price of an EA listing purchased from the same discount broker. ((RPF ¶ 114; RCCPF ¶¶ 613, 1146, 1200, 1228). For example, Jeff Kermath, who owns AmeriSell, is a non-traditional (discount) broker who testified at trial for Complaint Counsel. Mr. Kermath's marketing materials demonstrate that for a flat-fee of \$699, a seller can have an

ERTS listing which reaches the Approved Web Sites at issue here: the IDX, Realtor.com and MoveInMichigan.com. (RCCPF ¶ 1146).

Indeed, flat-fee ERTS contracts appear to be more prevalent in the Realcomp Service Area, evidencing that the allegation of reduced availability of alternative brokerage arrangements in Realcomp's Service Area is untrue. (RPF ¶ 115).

In addition, Realcomp has eliminated what was referred to as the "minimum service requirement" for ERTS listings. (RCCPF ¶¶ 36, 829, 836). As a result, brokers can offer limited service ERTS listings and receive all the promotional benefits of full-service ERTS listings on the Realcomp MLS. (*Id.*). In any event, as described above, flat-fee ERTS listings, which do embody those additional services under Realcomp's prior definition of an ERTS listing, are available in the Realcomp Service Area for as little as \$200 more than EA Listings (RCCPF ¶¶ 613, 1200, 1228).

### **3. The Realcomp Policies Have Not Excluded EA Listings from Public Exposure**

A significant theme of Complaint Counsel's case is the concept of "exposure" for residential real estate listings, and Complaint Counsel maintains that the Realcomp Web Site Policy limits the "exposure" of EA listings. Complaint Counsel's Post-Trial Brief at 27-29. However, with respect to the exposure of EA Listings in the Realcomp Service Area, the record demonstrates that there has been no restriction on the form of Internet exposure deemed to be the most important and no practical restriction on the exposure to the second most important Internet site.

The discount brokers who testified in this matter agree that the MLS is the most important form of Internet exposure. (RPF ¶ 98). Realcomp has never restricted Exclusive Agents from being listed on its MLS. (RPF ¶ 99). They ranked Realtor.com as being the second most important source of Internet exposure. (RPF ¶ 100).

Brokers in the Realcomp Service Area can have their EA listings placed onto Realtor.com through several readily available means. First, EA listings can be placed on the Realcomp MLS and published to Realtor.com simply by listing the property in the first place on another MLS, with which Realcomp has a data sharing agreement. (RPF ¶ 102). Realcomp has data sharing arrangements with seven MLSs in Southeastern Michigan. (RPF ¶ 103). Second, an Exclusive Agency property can be listed on Realtor.com by listing the property on another MLS that downloads Exclusive Agency Listings to Realtor.com. (RPF ¶ 105). Discount brokers have availed themselves of this means for having their EA listings placed on Realtor.com. (RPF ¶¶ 105, 106). The Record shows that limited service/discount brokers called by Complaint Counsel used the Ann Arbor, Shiawassee and Flint MLSs to list their EA listings on Realtor.com. (RPF ¶ 107). Discount brokers also can now have their listings sent to Realtor.com by placing them in MiRealSource in light of its Consent Decree with the FTC. (RPF ¶ 108). The costs associated with this type of dual-listing are nominal. (RPF ¶ 109). Those charges, as an example, are \$55 per month to be a member of the Ann Arbor MLS. (RPF ¶ 109(a)).

While some of the Exclusive Agents contended that there was a "time cost" associated with listing on more than one MLS (*i.e.*, to by-pass Realcomp), those costs are also nominal as it is estimated that the time associated with this dual entry can take from 40 minutes to 2 hours over the life of a listing and discount brokers pay anywhere from \$7 to \$20 per hour for data

entry. (RPF ¶ 110(a) and (b)). Additionally, Realcomp will enter listing data without charge to its members. (RPF ¶ 110(c)).

Exclusive Agents can avoid those costs altogether through the data sharing agreements as persons can have their listings sent to Realcomp without even joining Realcomp, and therefore without incurring the cost of joining more than one MLS. (RPF ¶ 111). Moreover, some Exclusive Agents charge customers nominal additional fees (\$50 to \$100) to cover the dual listing cost. (RPF ¶ 113).

By placing their EA listings into the MLS, limited service brokers reach 80% of all buyers. (RPF ¶ 101). If one combines that with also placing those EA Listings onto Realtor.com, the combination reaches 90% of all buyers. (RPF ¶ 101). Against that backdrop, it is not surprising that Mr. Kermath represents to the public that while he has better success with ERTS listings, he has "great success" with limited service listings. (RCCPF ¶ 636).

Additionally, public web sites (*i.e.*, other than the "Approved Web Sites") are numerous, and listings reach those web sites without regard to Realcomp's Policies. (RPF ¶ 119). In light of their growing popularity, these other web sites are an economically viable and effective channel for reaching prospective buyers. (RPF ¶ 119). These other publicly-available web sites that are available for Exclusive Agents, include Google and Trulia, each of which is gaining momentum. (RPF ¶ 121). Complaint Counsel's witness Gary Moody, the owner of the Exclusive Agency, Greater Michigan Realty, believes Google Base will be more important than the IDX in the near future. (RPF ¶ 121(d)).

To the extent that Realcomp's Policies are perceived as adversely affecting the exposure of EA Listings, consumers can avoid those effects altogether by paying slightly more (\$100) to

agents offering Exclusive Agency Listings to have their listings sent to Realtor.com or, alternatively, have an Exclusive Right to Sell Listing for a flat fee that is only nominally more expensive (\$200) than an EA Listing. (RPF ¶ 114; RCCPF ¶¶ 1146, 1200 and 1228).

**4. The Realcomp Policies Have Not Impeded the Ability of Discount Brokers to Compete**

Complaint Counsel maintains that limited service brokers "uniformly testified" that their ability to compete has been affected by the Realcomp Policies. Complaint Counsel specifically asserts that the Realcomp Policies forced discount brokers from the market, deterred the market entry of other discount brokers, and hampered the remaining competition. Complaint Counsel's Post-Trial Brief at 30-34. This is not so.

**a. *There Is No Credible Evidence That the Realcomp Policies Forced Any Broker to Exit the Market***

No agents offering Exclusive Agency Listings in Southeastern Michigan suggested that they left Michigan because of Realcomp's Policies, except YourIgloo.com, on which Complaint Counsel relies. But YourIgloo's story is highly questionable as this discount broker has not actually abandoned Michigan, and continues to do a substantial referral business. (RPF ¶ 166). Further, the evidence showed that YourIgloo left Michigan for multiple reasons, specifically: (1) YourIgloo faced new competition in Michigan in 2003 and 2004; (2) YourIgloo's associate broker based in Michigan, Anita Groggins, was let go in 2004 because business was tough, she was not a morning person, and she had difficulty keeping the hours required; and (3) YourIgloo represented to MiRealSource that it was leaving the state because it did not care for MiRealSource's procedures and membership fees. (RPF ¶ 166(e)). (Indeed, YourIgloo also encountered problems in New Jersey and Pennsylvania during the same period and withdrew from those states.) (RPF ¶ 166(e)(1)). After ostensibly leaving Michigan in 2004, YourIgloo

has sent between 50 and 100 referrals to discount brokers operating on YourIgloo's behalf in the State of Michigan. (RPF ¶ 166(e)(6)).

**b. *There Is No Credible Evidence That the Realcomp Policies Have Deterred Market Entry***

The only Exclusive Agent claiming to have been deterred from entering Southeastern Michigan due to Realcomp's Policies, and the only witness so cited by Complaint Counsel, was Albert Hepp. (CCPF ¶ 972). Yet, Mr. Hepp in fact has done business in Southeast Michigan since 2004 and acknowledges that his Exclusive Agency business in that area has grown 10% to 35% since 2004. (RPF ¶ 163(a)).

**c. *The Evidence Shows That Discount Brokers Compete Successfully***

**(1) *The Discount Brokers Who Testified Admitted That Their Businesses Are Successful and Growing***

The record demonstrates that despite Michigan's economic downturn, brokers offering Exclusive Agency Listings are thriving in Southeastern Michigan. (RPF ¶ 163). The discount brokers called by Complaint Counsel all testified that their EA businesses have been growing and that they have done very well. (RPF ¶ 163 (a-d)). It is implausible that the Realcomp Policies are impeding alternative business models when those business models are growing by leaps and bounds. (RPF ¶ 164).

**(2) *No Discount Broker Performed an Empirical Study of the Effects of the Realcomp Policies***

None of the discount brokers on whose testimony Complaint Counsel relies performed any study or analysis to support Complaint Counsel's claim that their business or any home seller has been adversely affected by Realcomp's Policies. Craig Mincy of MichiganListing.com acknowledged that he did no study or analysis concerning the number of Exclusive Agency

Listings that he has allegedly "lost," yet he also acknowledged that his business was growing substantially. (RCCPF ¶ 1028). Likewise, Albert Hepp (Hepp, Tr. 712-715); Denise Moody (D. Moody, Tr. 563); and Jeff Kermath (Kermath, Tr. 741), performed no studies or analyses on relevant issues, including days on the market statistics or the effect of the Realcomp Policies on sale prices of homes. (RCCPF ¶ 1028).

**B. A Truncated Rule of Reason ("Quick Look") Analysis Is Not Appropriate For This Case**

Complaint Counsel asserts that this matter should be resolved through a truncated rule of reason analysis. Neither the law nor the facts support this view. The nature of the Realcomp Policies and the circumstances of this case, as discussed more fully in Respondent's opening brief, require Complaint Counsel to prove that the challenged practices " cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition" – *i.e.*, that the Policies are "injurious in [their] net effects." 15 U.S.C. § 45; *Policy Statement on Unfairness* (FTC, Dec. 17, 1980). This determination necessitates a full rule of reason inquiry. *California Dental Assn. v. FTC*, 526 U.S. 756, 770 (1999); *United States v. Brown University*, 5 F.3d 658, 668-69 (3<sup>rd</sup> Cir. 1993)

**1. Taking Heed of *California Dental*, Recent Court of Appeals Decisions Affirm That The "Quick Look" Approach Is To Be Applied Cautiously**

In *California Dental*, the Supreme Court rejected the Commission's "quick look" analysis of advertising restrictions adopted by a professional association. There, the members of a dental association made an agreement that effectively ended all advertising on the basis of quality or cost in order to protect consumers from misleading advertisements. Bans on price advertising are generally condemned as anticompetitive because such advertising is closely linked to the

furtherance or encouragement of price competition. The Commission had condemned the restrictions in a truncated analysis that rejected the proffered justifications for the restrictions without inquiry into their competitive effects, and the Ninth Circuit affirmed.

In reversing, the Supreme Court held that the threat of a misled consumer could be a valid justification for the advertising restrictions because consumers may lack the expertise required to assess dentists' professional services and dental advertising claims. The Court emphasized that differences in fact patterns must be taken into account when determining antitrust liability. The Court criticized the Ninth Circuit for not distinguishing the restrictions on professional advertising at issue from more common bans on price advertising and for not recognizing that the Dental Association's policies could affect competition differently than similar policies in other markets. 526 U.S. at 773-74. The Court stressed that courts must have a solid theoretical foundation for concluding that challenged practices have anticompetitive consequences under a "quick look" analysis. 526 U.S. at 775 n.12 (when the facts and circumstances "are somewhat complex, assumption alone will not do"). Significantly, the Court also held that, provided that the defendant proffers a "plausible" efficiency justification for a restraint, the plaintiff retains the burden to prove by empirical evidence that the restraint is anticompetitive. 526 U.S. at 774-776.

**a. *Three Circuits Subsequently Have Followed the Supreme Court's Cautionary Approach In Applying the Truncated Rule of Reason***

Since *California Dental*, four Circuits have specifically considered the applicability of a truncated rule of reason analysis to cases involving unique market circumstances. Complaint Counsel relies on one of those – the roundly criticized *PolyGram Holding* decision – as support

for its argument in favor of a quick look here. But the holdings of other Circuits reflect the more cautious view articulated by the Supreme Court.

Thus, in *Brookins v. International Motor Contest Assn.*, 219 F.3d 849, 854 (8th Cir. 2000), the Eighth Circuit held that rules imposed by an auto racing governing body allegedly aimed at precluding the use of a transmission made by plaintiff were "not the kind of 'naked restraint' on competition that justify foregoing the market analysis normally required in Section 1 rule-of-reason cases." Similarly, *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004), ruled that an "abbreviated or 'quick-look' analysis may only be employed where the contours of the market and, where relevant, submarket, are sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition . . . where, as here, the precise product market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice." Finally, *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 512 (4th Cir. 2002), rejected the quick look approach in a case challenging carry-on luggage size restrictions, finding that the lower court erred in not considering the unique architecture of the airport, and that the procompetitive justifications offered by the defendant were plausible.

These analyses are consistent with the views of Areeda and Hovenkamp that the "quick look" approach is reserved for circumstances in which the restraint is sufficiently threatening to **place it presumptively in the *per se* category**, but for a lack of judicial experience that requires at least some consideration of proffered defenses or justifications. P. Areeda & H. Hovenkamp, *Antitrust Law* at ¶ 1911a (emphasis added).

The Realcomp Policies are not a naked restraint that might otherwise call for *per se* treatment. As described in Respondent's Opening Brief, there is no price-related restraint at issue here. Further, the Realcomp Policies do not directly or indirectly allocate geographic markets among the Realcomp members, or between traditional brokers and non-traditional ("discount") brokers. Additionally, the Realcomp Policies involve no concerted refusal to deal with disfavored suppliers or customers. Finally, this case does not involve the type of complete and naked exclusion from an essential element of competition held to implicate *per se* liability by longstanding judicial precedent. See Post-Trial Brief of Respondent at 9-12.

**b. *The Decision in PolyGram Holding Is Not Consistent With California Dental or the Decisions of the Fourth, Sixth, and Eight Circuits.***

Complaint Counsel pins its hopes of avoiding the need to prove anticompetitive effects principally on one case – *PolyGram Holding, Inc. v. FTC*, 416 F.3d 329 (D.C. Cir. 2005). *PolyGram* is, to say the least, a curious decision, and one that has been the subject of disapproving commentary throughout its short history.

The case involved a joint venture agreement between two recording companies to market the third in a series of recordings by the "Three Tenors" (José Carreras, Plácido Domingo, and Luciano Pavarotti). Each of the joint venture parties owned the distribution rights to one of the preceding two recordings. The decision to joint venture was based on a determination that greater risk attended the third recording than had been the case with the other two. As part of the joint venture agreement, the parties agreed to a "moratorium" under which neither would advertise or discount the prior two recordings during a ten-week period surrounding the release of the third recording.

The FTC held that the moratorium agreement violated Section 5 of the FTC Act, reviving and applying the Commission's own "quick look" standard articulated in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).<sup>5</sup> That standard, unique to the FTC, asks, first, whether the restraint is "inherently suspect." If it is, the burden shifts to the respondent to proffer a justification that is both "cognizable under the antitrust laws" and "facially plausible." Finally, if such a justification is proffered, a full rule of reason analysis may still be avoided if the plaintiff can make "a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition." 110 F.T.C. at 604. The Commission has never explained, however, how this last determination can be made without a rule of reason analysis.

The Commission ruled that the moratorium in *Polygram* was "inherently suspect" based on the admitted fact that the restraint eliminated price competition between the third recording and its two closest substitutes (*i.e.*, the prior two recordings) for the ten-week period of the moratorium. It then ruled that the proffered justification—to avoid free-riding by the first two recordings that could undermine promotion of the third was "not cognizable under the antitrust laws" because the moratorium restrained products outside the joint venture and was entered into after the venture was formed.

The Court of Appeals affirmed this decision, accepting both the Commission's *Massachusetts Board* framework and, without detailed analysis, the Commission's assertion that the *Massachusetts Board* framework is not inconsistent with the Supreme Court's more recent explication of the quick look rule of reason in *California Dental*. 516 F.3d at 35-37.

The fundamental deficiency of the *PolyGram* decision and the underlying *Massachusetts Board* framework has been succinctly articulated by William Kolasky, a former Assistant

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<sup>5</sup> Complaint Counsel also relies on *Massachusetts Board* here. Complaint Counsel's Post-Trial Brief at 42.

Attorney General in the Antitrust Division of the Department of Justice. Framing the question as whether the FTC can require the parties to an alleged restraint to justify a restraint before the FTC proves that the restraint harmed or is likely to harm competition in a way that would harm consumer welfare by raising price or restricting output, he states:

We had thought this debate was decisively resolved by the Supreme Court in *California Dental*, but current and former FTC officials continue to wage a rearguard action, seeking to limit that decision's analytical framework to the professional advertising context in which it arose. *California Dental* will bear no such limitation. In it, the Supreme Court held that so long as the defendant proffers a "plausible" efficiency justification for a restraint, the plaintiff must show with empirical evidence that the restraint is anticompetitive before the burden shifts to the defendant to prove the justification for it. ...

By seeking to use a subjective label ("inherently suspect") as a substitute for empirical evidence of market power and harm to competition, the *Massachusetts Board* framework runs a great risk of leading agencies and courts to commit the kind of Type I (false positive) error the Commission committed in *Three Tenors*. Nothing in the Supreme Court's decisions in *BMI*, *NCAA*, or *California Dental* sanctions such an approach. The ease with which lower courts now apply the traditional three-step rule of reason framework shows that whatever gain in administrability the authors of *Massachusetts Board* hoped to achieve can no longer justify the increased risk of error.

W. Kolasky and R. Elliott, "The Federal Trade Commission's *Three Tenors* Decision: '*Qual due fiori a un solo stello*'"<sup>6</sup> 19 *Antitrust* 50, 54 (Spring, 2004) (citations omitted). See also D. Meyer and D. Ludwin, "Three Tenors and the Section 1 Analytical Framework," 20 *Antitrust* 63, 67 (Fall 2005) (arguing that *PolyGram Holding* supplants *California Dental* with a regime in which the FTC presumes to "know obviously conduct when they see it"); J. Keyte and N. Stoll, "Markets? We Don't Need No Stinking Markets! The FTC and Market Definition" 49 *Antitrust*

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<sup>6</sup> "Like two flowers on a single stem." The quote, taken from Donizetti's opera *Lucrezia Borgia* refers to the Commission's failure (by adopting the "inherently suspect" label) to acknowledge the unity of interests attendant to a covenant not to compete between partners in a common business enterprise. Cf. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd, 175 U.S. 211 (1899) (benchmark explanation of why and how the antitrust laws countenance non-competition agreements in joint ventures).

*Bull.* 593, 611 (Fall 2004) (arguing that in light of *PolyGram Holding*, the FTC's construction of the "quick look" begins to look more like an expanded *per se* rule).

But even holding aside the criticisms of *PolyGram Holding*, that decision provides poor guidance for the present case. The "inherently suspect" conduct at issue in *PolyGram* (as the Commission itself determined) was an express agreement by the parties to cease price competition outside of the joint venture. Here, the Realcomp Policies are stipulated to be non-price conduct, and the alleged effects of those policies on competition are inferential and strongly disputed. Attempting to label the Realcomp Policies as suspect

**c. *Complaint Counsel's Other Authorities Do Not Have Weight Here***

Complaint Counsel further argues that the use of a quick look analysis is permissible here by analogy to *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5<sup>th</sup> Cir. 1980) and *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11<sup>th</sup> Cir. 1991). Beyond the fact that both of these cases pre-date *California Dental*, they are factually inapposite to the question of whether the Realcomp Policies merit truncated analysis. Both cases involved restrictive membership requirements (characterized by the plaintiffs as group boycotts and, in the case of *Thompson*, also as an unlawful tying arrangement) that impeded the ability of brokers to become members of the subject multiple listing service. The market effects of these restrictions were not subtle (an excluded member had no access to an MLS) nor (apparently) were the effects disputed. Thus, the disposition of the boycott claims in these cases turned solely on market power and the rationale for the membership requirements.

The Realcomp Policies effect no exclusion from membership. The effects of the Policies are pointedly disputed by the parties, Complaint Counsel's own witnesses have testified inconsistently as to the effect of the Policies on their businesses, and Respondent has raised

serious questions as to whether consumers have suffered any harm at all. This case is nothing like *Thompson* or *Realty Multi-List*.

**2. This Case Is Not Appropriate for Truncated Analysis**

**a. *The Nature of the "Restraints" Effected by the Realcomp Policies Is Not Predictable by Only a "Rudimentary Understanding of Economics"***

The quick look analysis may be applied when "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 770. Contrary to the over-simplified assertions of Complaint Counsel, this condition is not satisfied.

**(1) The Realcomp Policies Do Not Exclude EA Listings or Brokers Who Use EA Listings from the Market**

Complaint Counsel seeks to label the Realcomp Policies as facially anticompetitive (*i.e.*, "inherently suspect") based on court cases involving complete exclusion of real estate brokers from MLSs, and an attempted analogy to an outcome labeled "product exclusion." There is no factual basis to condemn the Realcomp Policies on their face. It is undisputed that Realcomp has never restricted Exclusive Agents from being listed on its MLS. (RPF ¶ 99).

**(a) *The Case Law on Which Complaint Counsel Relies Is Factually Distinguishable and Unpersuasive***

Complaint Counsel's attempt to analogize the Realcomp Policies to *Realty Multi-List* and other cases involving membership exclusion fails because the black-and-white implications of membership exclusion simply are not present here. Complaint Counsel's serial one-line quotations from those cases is intended to paint the Realcomp Policies with criticisms leveled by courts in fact situations completely dissimilar to this case.

For example, Complaint Counsel cites *Marin County Bd. of Realtors v. Palsson*, 16 Cal. 3d 920, 935-36 (1976) for the proposition that an MLS rule denying multiple listing services to part-time brokers “seriously hampers the competitive effectiveness of nonmember licensed brokers”. Complaint Counsel's Post-Trial Brief at 48.<sup>7</sup> Complaint Counsel goes on to quote the California Supreme Court as stating that such rules “tend to limit entry into a competitive field [and] . . . [c]onsumer choice is thereby narrowed.” *Id.* at 48. The implication, of course, is that Realcomp is similarly restricting entry into the market.

This is a serious misrepresentation. The issue in *Palsson* was not just that Mr. Palsson was denied access to the MLS, but that the MLS rule in effect precluded Mr. Palsson from being employed by any broker in Marin County who was a member of the MLS, and the court's view of the exclusionary nature of the part-time broker rule was amplified by this fact. *See* 449 P.2d at 835, 843. Restricting Mr. Palsson's employment opportunities indeed restricted his entry into the market. The issue in *Palsson* was plainly unlike that here, where there is no credible allegation or evidence that the Realcomp Policies have resulted in denial of employment opportunities to licensed agents or brokers.

Similarly, Complaint Counsel relies on *Oates v. Eastern Bergen County Multiple Listing Service*, 273 A.2d 795, 800 (N.J. Super. Ch. 1971) for the proposition that consumers “naturally desire[] the widest market exposure possible,” and are “unlikely to use a broker denied MLS services.” Complaint Counsel's Post-Trial Brief at 48. Complaint Counsel seeks the inference that the *Oates* court would condemn the conduct here. However, the comments of the *Oates* court were directed to an MLS that – unlike Realcomp – was a true “closed shop.” Its bylaws

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<sup>7</sup> We note that, with respect to this case and others relied upon by Complaint Counsel pre-date *California Dental* by twenty and, in some cases thirty, years.

authorized a fixed number of shareholders, and no new members were permitted except by approved succession to an existing member. *See* 273 A.2d at 797-98. Thus, the restriction at issue in *Oates* precluded new entry into the market altogether, which the court treated as a *per se* violation of New Jersey's antitrust law.<sup>8</sup> Again, these facts bear no analogy to Realcomp.

Complaint Counsel also relies again here on *Realty Multi-List* and *Thompson*, discussed above. Both of those cases concerned rules that precluded licensed brokers and agents from participating in the MLS at all and thereby prevented entry into the market. *Realty Multi-List* condemned what were essentially subjective membership criteria (that overlapped, but added nothing to, existing state regulation of real estate agents) as well as an excessive membership fee imposed by the MLS. *See* 629 F.2d at 1376 ("a multiple listing service may not validly assert a generalized concern with the competency and professionalism of real estate brokers as a rationale for exclusion"), and at 1386 ("A sizeable membership fee which bears no relation to [the MLS's costs] may ... create a significant barrier to new entry ...") In combination, these rules were alleged to arbitrarily exclude competitors from the local real estate market. *Id.* at 1369. Similarly, the plaintiffs *Thompson* challenged a tying arrangement that required MLS users to become members of the parent Board of Realtors, and which – in that particular case – had the effect of impairing competition from members of another Real Estate Board that historically served African-American home buyers. *See* 934 F.2d at 1570.

Neither *Realty Multi-List* or *Thompson* is persuasive in Complaint Counsel's effort to paint the Realcomp Policies as facially invalid. The rules challenged in those cases excluded certain brokers from the market altogether, and no elaborate inquiry was required to ascertain

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<sup>8</sup> At least one other court considering an alleged exclusion from an MLS has declined to rely on *Oates* because of its classification of the conduct as a *per se* violation. *See Blake v. H-F Group Multiple Listing Service*, 36 Ill. App. 3d 730, 744 (1976).

that fact. Here, there is no credible evidence that any broker using EA contracts has been excluded from the Realcomp MLS, let alone from the market. (RPF ¶ 166). Complaint Counsel's effort to attribute the courts' criticisms in those cases to the disputed facts here is, at best, a stretch that misses the mark.

(b) *Complaint Counsel's Effort to Build a Theory of Facial Invalidity Based on "Similarity" to Membership Exclusions Is Misplaced*

Complaint Counsel next argues that the Realcomp Policies cause competitive harm "similar to" a denial of membership. Complaint Counsel's Post-Trial Brief at 49. Complaint Counsel also suggests that the Realcomp Policies may be categorized as "product exclusion." Complaint Counsel's Post-Trial Brief at 47. Neither argument is grounded in the law or the facts.

Complaint Counsel's argument for "similarity" relies on *Northwest Wholesale Stationers*, and the fact that the plaintiff in that case was denied some, but not all, benefits of participation in the defendant buying cooperative following its expulsion. Complaint Counsel's inference is that the partial exclusion of the plaintiff in *Northwest* describes the situation of Southeast Michigan brokers who use EA contracts. There are several problems with this analogy.

First, the issue decided in *Northwest Wholesale Stationers* was not whether disparate rules for non-members are generally proscribed by the Sherman Act under the rule of reason. Rather, the relevant issue was whether such treatment constituted a *per se* violation of the Sherman Act (and the Court ruled that it was not). 472 U.S. at 286 ("The case also raises the

broader question as to when *per se* antitrust analysis is appropriately applied to joint activity that is susceptible of being characterized as a concerted refusal to deal.")<sup>9</sup>

Moreover, the Court's observations regarding disparate treatment (as cited by Complaint Counsel) were made wholly in the context of addressing the question of whether the conduct could be properly characterized as a group boycott. "Because Pacific has not been wholly excluded from access to Northwest's wholesale operations, there is perhaps some question whether the challenged activity is properly characterized as a concerted refusal to deal." 472 U.S. at 295 n. 6. The Court did not generalize its determination to condemn all such disparate treatment. Indeed, the Court observed that disparate treatment "**might**" violate the antitrust laws "**if** it placed a competing firm at a **severe** competitive disadvantage." *Id.* (emphasis added). This is not a statement in which the court can wrap the Realcomp Policies. Even if the context were similar (which it is not), it begs the question of a "severe competitive disadvantage," which is a question of fact that is highly disputed here. Moreover, as we described at the outset of this brief and discuss further at Section II.C.5, *infra*, any disparate treatment in this case concerns listing types, not competitors, and one cannot extrapolate from one to the other.

Finally, *Northwest Wholesale* was a membership exclusion case, and the conduct in question concerned whether the defendant had an obligation under the antitrust laws to deal with non-members on the same terms as members (with an overtone of pretextual expulsion from membership). The issue here is whether Realcomp can establish different rules for different "products" when its members have different preferences for the two products. That is a very different question than the issue presented in *Northwest Wholesale*, and highlights the logical

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<sup>9</sup> To clarify the quotation, the other issue in the case was whether a Section 1 violation occurs when membership exclusion occurs without any procedural means for challenging the decision. *Id.*

difficulty of analogizing the Realcomp Policies to membership exclusion. Complaint Counsel's efforts to bootstrap the facts of this case into a membership exclusion or something "similar" are unavailing for purposes of avoiding an inquiry into actual competitive effects.<sup>10</sup>

Complaint Counsel also seeks to avoid its burden of proving competitive effects by labeling the Realcomp Policies as "product exclusion." Complaint Counsel's Post-Trial Brief at 47. Complaint Counsel has identified no case law in support of its position. Moreover, and more to the point, whether the Realcomp Policies have prevented EA listings from reaching the market is the centrally disputed factual issue in this case. Complaint Counsel cannot avoid its burden by simply attaching a label to the Policies and suggesting that this "can be" as anticompetitive as "member exclusion." Complaint Counsel's Post-Trial Brief at 47. Actual proof is required where a solid theoretical foundation for attributing anticompetitive consequences to the challenged practices is lacking. *California Dental*, 526 U.S. at 775 n.12

Complaint Counsel additionally cites *Cantor v. Multiple Listing Service of Dutchess County, Inc.*, 568 F. Supp. 424 (S.D.N.Y. 1983) for the generalized proposition that "courts" [plural] have condemned MLS rules that prevent brokers from using effective means of gaining exposure for their listings.<sup>11</sup> As discussed above, it is by no means clear (let alone facially obvious) that the Realcomp Policies have had any such effect. (RPF ¶¶ 154-161 and 163). Moreover, Complaint Counsel's description of this case implies that the court found the

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<sup>10</sup> Complaint Counsel also cites *Kreuzer v. American Acad. of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984) for the proposition that the court there identified harm from a refusal to deal with competitors on substantially equal terms. Here again, Complaint Counsel seeks to draw an inference that is unwarranted. In *Kreuzer*, a professional association maintained a rule that prevented the plaintiff from being designated as an "active" member because the plaintiff was not engaged in the full-time practice of periodontology, as defined by the association. Plaintiff alleged that he received fewer referrals as a result. Although the appellate court speculated as to both the potential harms and the potential benefits that might flow from such a rule, it made no findings in either respect, but rather remanded to the trial court to apply the rule of reason "anew." 735 F.2d at 1493-94, 1496.

<sup>11</sup> The *Cantor* opinion, even if it can be read to so state, cites no other opinions for this proposition.

restrictions in *Cantor* unlawful *because* it found that some brokers had been discriminatorily prevented from advertising their listings. In fact, this is not true. The rule at issue in *Cantor* was a "level playing field" rule. It required all brokers who were members of the MLS to use only MLS-branded yard signs, to the exclusion of signs branded by the specific brokerage (*e.g.*, "Century 21"). As the Court observed, the MLS "virtually conceded" that the intent and purpose of this rule was to remove the competitive brand name advantage that some MLS members might have over other MLS members. 568 F. Supp. at 430. The purpose of the challenged rule was not to disadvantage certain types of listings – the requirement to use an MLS-branded yard sign applied to all listings equally. Brokers in the Dutchess County MLS were free to advertise their listings, including by the use of yard signs. The competitive problem existed because those yard signs could not be branded by the individual brokerage. The opinion simply does not stand for Complaint Counsel's proposition.

(c) *The Search Function Policy Is Neither Intuitively nor Unduly Restrictive*

Complaint Counsel also offers a broad generalization with respect to the Search Function Policy, stating that "courts" [plural] have recognized that "search defaults can have negative competitive effects even when they are easy to override." Complaint Counsel's Post-Trial Brief at 50. For this proposition, Complaint Counsel cites only *United Air Lines, Inc. v. Civil Aeronautics Bd.*, 766 F.2d 1107, 1110, 1113 (7th Cir. 1985), and quotes the court's statement that "[l]oyal and skillful travel agents no doubt correct for [biases]" by simply pushing a button, "but not all travel agents are either."

Complaint Counsel's reliance on this case is perplexing. First, *United Air Lines* is a 1985 decision concerning a Civil Aeronautics Board ("C.A.B.") rulemaking that began in 1982. No

doubt that some people were in fact computer-savvy in the early 1980's, but the widespread acceptance of computers in everyday business and living was a long way into the future, and the court's observation regarding computer skills is unquestionably tied to the time period in which it was made.<sup>12</sup> The evidence in this case is abundantly clear, however. The Realcomp MLS is entirely computer-based. (RCCPF ¶ 305). A facility with computers and databases is essential to participation in today's real estate business. (RPF ¶ 124). Even Complaint Counsel's witnesses admitted that it is no great task to overcome the Realcomp search default. (RPF ¶¶ 131-132).

Second, the ruling in *United Air Lines* was not, as Complaint Counsel would have the court infer, an adjudication as to whether a private firm's decision to implement a computer search default violated the antitrust laws. Rather, *United Air Lines* was a challenge to a C.A.B. rulemaking that concerned, in part, "biasing" in computerized reservation systems. Thus, the court did **not** decide that a search default was unlawful. Rather, it decided that the C.A.B. had adequate authority and followed appropriate procedures to proscribe "biasing" in computer reservation systems. And, as the court noted, even in the C.A.B.'s rulemaking, "no effort to resolve 'a disputed set of facts' was made." 766 F.2d at 1119.

Complaint Counsel is searching for any port in a storm. There is no case law (including *United Air Lines*) that would turn the Search Default Policy into a facial antitrust violation.

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<sup>12</sup> The first IBM PC was introduced in 1981, as was version 1.0 of DOS. Apple introduced the Apple II (its first mass market computer) in 1980 and the MacIntosh in 1984. R. Allan, *A History of the Personal Computer* (2001).

## (2) The Realcomp Policies Do Not Eliminate A Desired Product

In a further effort to bolster its argument for a quick look, Complaint Counsel asserts that the Realcomp Policies eliminate a product called "Exclusive Agency listings with full exposure," and further describes the Policies as an agreement to limit the offering of a "package" of services. Complaint Counsel's Post-Trial Brief at 51-52<sup>13</sup>. By focusing on this "product," Complaint Counsel apparently concedes that the Realcomp Policies have not prevented consumer access to EA contracts generally, and indeed the record shows that this is true. (RPF ¶ 163(a-d)). But Complaint Counsel now argues that the impact of the Realcomp Policies actually is to eliminate a different product – one consisting of a bundled "package" of EA listings and "exposure." Complaint Counsel relies on *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986) to argue that the elimination of this new product can be condemned with a truncated rule of reason analysis.

There would seem to be no small irony in the fact that Complaint Counsel, on the one hand, complains that Realcomp (allegedly) has denied EA home sellers (or, more precisely, their brokers) a "bundled" package of promotional efforts to accompany their EA listings, but – just 50 pages earlier – avers that competition from limited service brokers arises precisely because they "unbundle" the services offered to home sellers, such that sellers can purchase only the services they need and desire. Complaint Counsel's Post-Trial Brief at 2. As we explain below, this unbundling in fact permits home sellers to obtain exposure without undue expense. *See* Section II.C.2, *infra*. Moreover, the fact that (as discussed) limited service brokers have grown in Southeast Michigan demonstrates that, as a group, they have not been fatally impaired by the inability to obtain this "package" from Realcomp.

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<sup>13</sup> Complaint Counsel does not define what "full exposure" means.

In any event, Complaint Counsel's effort to label the Realcomp Policies facially anticompetitive based on the asserted elimination of a new packaged product is not supported by the facts or law. First, there is no expert testimony in this case to support a finding that a bundle of services consisting of EA listings plus "exposure" is a product distinct from its components. Complaint Counsel's expert, Dr. Williams, testified to an input product market consisting (broadly) of multiple listings services provided to real estate brokers, but he did not testify that some or any of those services only had value to either brokers or consumers as a package, or that they had more value as a full package.

Significantly, even if one were to assume that this "package" of services is distinctive and valued by consumers, there is substantial evidence in this case that consumers are able to acquire the package if they choose to do so. Specifically:

- Brokers can, and do, sell services "a la carte." (RPF ¶ 114).
- Brokers obtain "exposure" for their clients on significant Internet sites by dual-listing and unbundling publication to major web sites. (RPF ¶ 106).
- Brokers can obtain "exposure" for their clients by joining Realcomp's data sharing partners. (RPF ¶¶ 102, 119-120).
- Discount brokers in the Realcomp service area sell fixed fee ERTS listings that provide all of the benefits (including "exposure") of traditional, more expensive, ERTS listings for as little as \$200 additional to the cost of purchasing an EA listing. (RPF ¶¶ 114(a), 115).

Indeed, the effect, if any, of the Realcomp Policies on the prevalence of EA listings or the degree of competition from discount brokers is strongly disputed by the parties here. It would be inappropriate to, in effect, assume the answer to that question merely by labeling the Realcomp Policies as some form of product exclusion.

Moreover, by arguing that home sellers using EA contracts, who compete with Realcomp cooperating brokers to find a buyer for their homes, want the same advertising services ("exposure") from Realcomp afforded to ERTS listings, Complaint Counsel actually has verified the free-riding concern that motivated the Realcomp Policies.

Complaint Counsel's principal legal authority, *Indiana Federation of Dentists*, is a well-known exposition of the truncated rule of reason, but it provides a poor analogy to the facts of this case. Central to every element of *Indiana Federation* was the naked character of the restraint. The Indiana Federation of Dentists had no other purpose than to organize and enforce the boycott of dental insurance companies. *See* 476 U.S. at 451, 454. Indeed, the boycott was a continuation of a prior, but abandoned, boycott organized by the Indiana Dental Association. *Id.* at 449-51. In contrast, multiple listing services like Realcomp are joint ventures that are considered procompetitive. *See, e.g., Realty Multi-List*, 629 F.2d at 1356. Courts have acknowledged that MLSs may impose restrictions related to the efficient functioning of the venture, *e.g., Reifert v. South Central Wisconsin MLS*, 450 F.3d 312, 321 (7<sup>th</sup> Cir. 2006) (competitive restriction on "stealing" properties listed by another member). Thus, even if one were to try analogizing the Realcomp Policies to the dentists' refusal to provide a "product" that included cooperating with insurers, the fact remains that the latter was a naked boycott and the former is not. The application of a "quick look" is supported by neither the facts nor the law here.<sup>14</sup>

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<sup>14</sup> Complaint Counsel also cites *Glen Holly Entertainment, Inc. v. Tektronix Inc.*, 352 F.3d 367 (9<sup>th</sup> Cir. 2003) and *Welchlin v. Tenet Healthcare Corp.*, 366 F. Supp. 2d 338 (D.S.C. 2005) as support for its theory. Complaint Counsel's Post-Trial Brief at 40. It is difficult to see how either case supports Complaint Counsel. As more fully discussed at note 23, *infra*, *Glen Holly* concerned a *per se* unlawful market allocation agreement that completely eliminated a competitor, a very different set of facts from which no inferences can or should be drawn here. The court in *Welchlin* concluded that a hospital bylaw requiring medical staff members to have certain specialty certifications (and which in turn had a disparate impact on osteopathic physicians) did not subject the osteopaths to

**b. *Complaint Counsel's Expert Did Not Credibly Prove a Relevant Market and Hence Did Not Establish That Realcomp Has Market Power in a Relevant Market***

Complaint Counsel bears the burden of proving a relevant market and establishing that Respondent has market power in that market. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 238 (2d Cir. 2003). Although Complaint Counsel avers that it has met this burden, its assertions of Realcomp's market power are based on inadequate definition of the relevant markets. Accordingly, Complaint Counsel's evidence of market power is not credible and is entitled to no cognizance here.<sup>15</sup>

Complaint Counsel asserts that there are two, related relevant product markets in this case: the market for residential real estate brokerage services and a market for the "supply of multiple listings services to real estate brokers." Complaint Counsel further asserts that the relevant geographic market for both "products" is Wayne, Oakland, Livingston, and Macomb counties. Complaint Counsel's Post-Trial Brief at 56.

Allegations of market power intrinsically beg the question of how the market is to be defined. Consequently, the courts are clear in holding that definition of the relevant product and geographic markets is a prerequisite to determining whether a defendant has market power. *U.S. v. Eastman Kodak Co.*, 63 F.3d 95, 104 (2d Cir. 1995) ("In determining whether a firm possesses market power, 'the first step in a court's analysis must be a definition of the relevant market.'"); *U.S. Anchor Mfg., Inc. v. Rule Industries, Inc.* 7 F.3d 986, 995-996 (11<sup>th</sup> Cir. 1993) ("the very

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more discriminatory treatment than M.D.s and the rule was not "predominantly anticompetitive." 366 F. Supp. 2d at 345, 347 n. 14. *Welchlin* thus actually supports Respondent's argument in this regard.

<sup>15</sup> Complaint Counsel does argue that MLSs exhibit "network effects" in the sense that an MLS that has many listing brokers is more attractive to cooperating brokers and vice-versa, and that these network effects constitute a barrier to entry. Complaint Counsel's Post-Trial Brief at 55-56. Ironically – and erroneously – Complaint Counsel fails to acknowledge that these same network effects support Respondent's claimed efficiencies that certain types of listings (ERTS) are more attractive to cooperating brokers and enhance MLS membership. See Post-Trial Brief of Respondent at 46-47.

purpose of defining the relevant market ... is to determine whether a monopolist, cartel, or oligopoly in that market would be able to ... raise marketwide prices above competitive levels."); *Berlyn, Inc. v. Gazette Newspapers, Inc.*, 214 F. Supp. 2d 530, 537 (D. Md. 2002) ("a reliable definition of relevant market is an obvious prerequisite to determining whether a defendant has market power.").

Complaint Counsel bears the burden of persuasion in defining the relevant market. It is not the obligation of Respondent to offer any alternative market definition. *Gordon v. Lewiston Hospital*, 423 F.3d 184 (3d Cir. 2005); *U.S. v. Engelhard Corp.*, 126 F.3d 1302, 1305 (11<sup>th</sup> Cir. 1997) ("Establishing the relevant product market is an essential element of the Government's case.").

Both the courts and the federal antitrust agencies themselves have articulated standards for proper market definition. Complaint Counsel has met neither standard.

Over a considerable period of time, the federal courts have adopted and approved fundamental concepts that apply to the definition of relevant antitrust markets. With regard to product markets, the courts have emphasized two factors in particular: first, the extent to which the defendant's product is reasonably interchangeable in use with alternative products and, second, the degree of cross-elasticity of demand between the defendant's product and the potential substitute for it. *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481-82 (1992); *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 394-95 (1956); *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 325 (1962); *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 437 (3<sup>rd</sup> Cir. 1997) ("When assessing reasonable interchangeability, '[f]actors to be considered include price, use, and qualities.' ... reasonable interchangeability is also indicated by 'cross-elasticity of demand between the product itself and substitutes for it.' ... in

other words, the rise in the price of a good within a relevant market would tend to create a greater demand for other like goods in that market."").

The definition of a relevant geographic market likewise is concerned with the existence and viability of substitutes. It requires an inquiry into the geographic area within which the defendant's customers can practicably turn to other sellers in the event of an attempted exercise of market power by the defendant. *United States v. Philadelphia Natl. Bank*, 374 U.S. 321, 359 (1963); *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *FTC v. Tenet Health Care Corp.*, 186 F.3d 1045, 1052 (8<sup>th</sup> Cir. 1999) (District Court erred in failing to consider where "consumers could practicably go" for inpatient hospital services. "A geographic market is the area within which consumers can practically turn for alternative sources of the product and in which the antitrust defendants face competition.")

The FTC and the Department of Justice have adopted similar, but arguably more limiting, market definition standards as part of the *Horizontal Merger Guidelines* ("Guidelines").<sup>16</sup> The Guidelines focus on an examination of factors influencing demand substitution in preference to those relating to supply substitution. For both product and geographic markets (separately), the Guidelines ask the question of whether, for a given aggregation of products (or geography), a firm that was the only supplier could profitably impose a "small but significant and nontransitory increase in price" without pulling in substitute products (or suppliers, as the case may be). The Guidelines go on to articulate specific factors to be considered in this regard.

- Evidence that buyers have shifted or have considered shifting purchases between products (or geographic locations) in response to relative changes in price or other competitive variables.

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<sup>16</sup> Department of Justice and Federal Trade Commission, *Horizontal Merger Guidelines* (1992, amended Apr. 1997).

- Evidence that sellers base business decisions on the prospect of buyer substitution between products (or geographic locations) in response to changes in price or other competitive variables.
- The influence of downstream competition faced by the buyers in their output markets.
- The timing and costs of switching products (or suppliers).

Guidelines, §§ 1.11, 1.21.

Complaint Counsel relied on the work of its economic expert, Dr. Williams, to define the relevant markets.<sup>17</sup> But Dr. Williams did not present anything approaching a rigorous economic examination of the interchangeability of products or suppliers, cross-elasticities of demand or supply, or the practicability of alternatives. He did not present any form of systematic examination of the specific evidence deemed essential by the Guidelines.

Complaint Counsel wishes the market to be intuitive. That is, Realcomp provides most of its MLS services to brokers in four counties; therefore Complaint Counsel argues that the market can be defined as MLS services in four counties. This is not the analysis that the law requires.<sup>18</sup>

Exactly what services comprise this input market has never been disclosed by Complaint Counsel, and Dr. Williams did not describe the elements of this market. By defining the input market as "MLS services," Dr. Williams assumes away the issue of whether some other data base of listings or services are substitutes to an MLS for a broker. Dr. Williams made no study of substitutability (either between Internet advertising and other forms of advertising or among

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<sup>17</sup> Market definition ordinarily requires expert testimony. *Welchlin*, 366 F. Supp. 2d at 348.

<sup>18</sup> Indeed, this is the type of FTC market definition specifically rejected by the Eighth Circuit in *FTC v. Tenet Health Care Corp.*, *supra*, and *FTC v. Freeman Hospital*, 69 F.3d 260 (8<sup>th</sup> Cir. 1995).

alternative Internet sites) in connection with the business decisions of real estate brokers (the "buyers" of the MLS input services).

With respect to the alleged output market – the market for real estate brokerage services – Dr. Williams did no analysis concerning the substitutability of non-brokerage services for brokerage services. He virtually asserts that real estate brokerage services must comprise the relevant output market without any analytical determination of whether a hypothetical price increase of all brokerage services within the alleged geographic market would induce sufficient substitution of For-Sale-by-Owner (FSBO) listings to make that price increase less than fully profitable. Moreover, Complaint Counsel's real estate industry expert, Dr. Murray, describes FSBO listings as a substitute for EA listings (RCCPF ¶ 191) and Dr. Williams completely ignored that evidence in defining markets.

Fundamentally, the issue of whether the Realcomp Policies represent the equivalent of "small but significant non-transitory increase" in the cost of brokerage services and, if so, whether those Policies have induced sufficient substitution to FSBO listings for FSBO listings to be properly included in the relevant output market along with real estate brokerage services is an issue obviously pertinent to the proper definition of the alleged markets in this matter. Yet, this issue was completely ignored by Dr. Williams.

The failure to plead and prove a relevant market in accordance with appropriate standards of interchangeability and substitution is a failure of proof of a Section 1 claim. *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 66-68 (1<sup>st</sup> Cir. 2004) (Plaintiffs' reliance on an economically defective market definition constitutes a failure to prove the requisite actual or threatened competitive injury within a properly defined relevant market); *Apani Southwest Inc. v. Coca-Cola Enterprises, Inc.*, 300 F.3d 620, 628 (5<sup>th</sup> Cir. 2002) ("Where

the plaintiff fails to define its relevant market with reference to the rule of reasonable interchangeability and cross-elasticity of demand, or alleges a proposed relevant market that clearly does not encompass all interchangeable products even when all factual inferences are granted in plaintiff's favor, the relevant market is legally insufficient, and a motion to dismiss may be granted."); *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F3d 499, 509 (4<sup>th</sup> Cir. 2002) ("In [rule of reason] cases a plaintiff 'must prove what market ... was restrained ...").

Complaint Counsel has not carried the burden of persuasion concerning the contours of the allegedly affected markets. Consequently, the market share evidence offered by Complaint Counsel cannot be accepted as proof of market power.

**c. *Realcomp's Justifications for the Policies Are Plausible***

As the Supreme Court held in *California Dental*, 526 U.S. at 778, when determining in the first instance whether to apply rule of reason analysis to non-price restrictions, the issue is not whether the restrictions *were* procompetitive, but whether they *could be*. ("[T]he plausibility of competing claims about the effects of the professional advertising restrictions rules out the indulgently abbreviated review to which the Commission's order was treated."). See also Areeda & Hovenkamp, *Antitrust Law* at ¶ 1911b (stating that courts must consider the *plausibility* of procompetitive effects when determining which mode of analysis to apply).<sup>19</sup>

The concept of plausibility is illustrated by one of Complaint Counsel's frequently cited cases, *Realty Multi-List*. There, the defendant MLS required that members have a favorable credit report and business reputation, and maintain an active real estate office open during normal business hours. The MLS explained that assurances of professional integrity were

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<sup>19</sup> See also *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (whether practices justified by "plausible" efficiency arguments).

necessary to encourage broker participation and the proper functioning of the MLS. The Court determined, however, that the same concerns were addressed by Georgia law and the investigative powers of the Georgia Real Estate Commission. That is, the MLS would be required to show that the state's enforcement did not vindicate the MLS's needs, and that any standards beyond those of state law were not inherently subjective. 629 F.2d at 1351.

The *Realty Multi-List* rules could not be plausibly explained in the face of an overlapping state regulatory scheme. In contrast, Realcomp has offered credible testimony from its Executive Director and Dr. Eisenstadt that the Realcomp Policies address a plausible free-riding concern and are procompetitive. Specifically, the Realcomp Policies (1) curtail free-riding by home sellers using EA contracts (RPF ¶¶56-57, 186, 190); (2) benefit home buyers who wish to work with a cooperating broker to purchase an EA property by enhancing the incentives of these brokers to show and promote EA properties to their buyer-clients (RPF ¶¶183, 244) and by reducing the bidding disadvantage which those buyers otherwise might incur (RPF ¶¶188, 248); and (3) promote the attractiveness of MLS to cooperating brokers and thereby increase the efficiency of the cooperative "platform" (RPF ¶ 247).

As described in Respondent's Opening Brief, Complaint Counsel has not refuted these arguments, let alone established that they are implausible. *See* Post-Trial Brief of Respondent at 43-47. For purposes of establishing that a "quick look" analysis is inappropriate in this case, however, Respondent has demonstrated the plausibility of its efficiency arguments.

**C. The Realcomp Policies Do Not Unreasonably Restrain Competition**

Complaint Counsel avers that courts "typically" do not require proof of actual effects even under a full rule of reason analysis, and instead may rely solely on the fact of defendants'

market power. Complaint Counsel's Post-Trial Brief at 62. This attempt to marginalize the rule of reason (or to confound it with "quick look" analysis) is novel, but incorrect.

The framework of a full rule of reason analysis is well established:

For the government to prevail in a rule of reason case under Section 1, ... the following must be shown: As an initial matter, the government must demonstrate that the defendant conspirators have "market power" in a particular market for goods or services. Next, the government must demonstrate that within the relevant market, the defendants' actions have had substantial adverse effects on competition, such as increases in price, or decreases in output or quality. *See, e.g., Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 ... (1990). Once that initial burden is met, the burden of production shifts to the defendants, who must provide a procompetitive justification for the challenged restraint. If the defendants do so, the government must prove either that the challenged restraint is not reasonably necessary to achieve the defendants' procompetitive justifications, or that those objectives may be achieved in a manner less restrictive of free competition.

*Visa*, 344 F.3d at 238 (footnote and additional citations omitted).

The mere possession of market power is not, and never has been, a violation of the antitrust laws. Of course, as the *Visa* court also noted, the Supreme Court held in *Indiana Federation* that the first step (proof of market power) can be obviated by evidence of actual anticompetitive effects. *Visa*, 344 F.3d at 238 n.4. However, the Supreme Court has never suggested that the second step is avoidable in a full rule of reason case (*i.e.*, it has never held that no evidence of substantial anticompetitive effects – whether actual or predictive – is needed) if market power is proven.<sup>20</sup> To hold otherwise plainly would threaten a wide range of otherwise lawful conduct with antitrust liability. Thus, even under the "quick look" (as described in *Indiana Federation*, a plaintiff must additionally present credible evidence that "the 'arrangement

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<sup>20</sup> Specifically, the Supreme Court stated, "Since the purpose of inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, proof of actual detrimental effects ... can obviate the need for inquiry into market power, which is but a surrogate for detrimental effects." *Indiana Federation of Dentists*, 476 U.S. at 462 (emphasis added). In that decision, of course, the Supreme Court was defining a truncated rule of reason ("quick look"). *See* Complaint Counsel's Post-Trial Brief at 43, citing the same pages of the opinion as an illustration of the truncated rule of reason.

has the potential for genuine adverse effects on competition,' for example, substantial market foreclosure" in order to rely on inferences of anticompetitive effects drawn from market power (*i.e.*, in lieu of evidence of actual adverse effects). *Capital Imaging Assocs. v. Mohawk Valley Assoc.*, 996 F.2d 537, 546 (2d Cir. 1993) (quoting *Indiana Federation of Dentists*, 476 U.S. at 460-61).

But, again, this construction only describes the "quick look," as Complaint Counsel must concede. *See* note 20, *supra*. As demonstrated in the preceding sections, Complaint Counsel lacks a credible basis in fact or law to argue that the Realcomp Policies are predictably anticompetitive. A full rule of reason analysis is appropriate to this case, and Complaint Counsel has not met its burden. The evidence shows that the Realcomp Policies are not anticompetitive in fact.

**1. Complaint Counsel's Evidence of Reduced "Limited Service Brokerage Activity" Is Not Credible**

**a. *Dr. Williams' Analyses Are Methodologically Unsound***

Complaint Counsel's arguments concerning the effects of the Realcomp Policies are based primarily on the analyses of its expert, Dr. Williams. Complaint Counsel's Post-Trial Brief at 34-37; 63-64. Respondent's opening brief explained at length the fundamental flaws in Dr. Williams' work, and the results that Dr. Eisenstadt obtained – showing no effect on the prevalence of EA listings – when those flaws were corrected. We also discussed Dr. Eisenstadt's additional work, empirically demonstrating the absence of harm to consumers from the Realcomp Policies. Post-Trial Brief of Respondent at 37-42. With one exception, all of Complaint Counsel's arguments were rebutted there.

Complaint Counsel asserts, however, that Dr. Williams "reran his own statistical analyses adding the economic and demographic variables that Respondent's economist [Dr. Eisenstadt] believed were significant" and that those results also showed adverse effects on EA listings. Complaint Counsel's Post-Trial Brief at 36-37. This is incorrect. Dr. Williams used some, but not all, of Dr. Eisenstadt's additional variables, and this accounted for the different result. Dr. Eisenstadt testified at trial as to Dr. Williams' omissions and explained the reasons for including all of the additional variables in the analysis. (RCCPF ¶1101).

More specifically, Dr. Williams did not think it necessary to include economic and demographic variables at both the MSA and zip code levels, which he deemed "double-counting." (Eisenstadt, Tr. 1471-1472). However, Dr. Eisenstadt explained that the factors should be measured at both the county or zip code level, as appropriate, as well as at the MSA level, "because there could be metropolitan-wide effects that would affect a seller's decision as to what type of listing contract to choose, and there could be more localized effects that you would want to also control for in the analysis." (RCCPF ¶1101). He went on to explain that controlling for the same factor at both the MSA and zip code level is not "double counting" (as Dr. Williams opined): "You are not measuring the same variable twice as I just explained. There are both neighborhood characteristics of buyers and sellers that you want to control for, and there may be metropolitan-wide characteristics of buyers and sellers that you want to control for in the analysis. It's not completely duplicative." (RCCPF ¶1101).<sup>21</sup>

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<sup>21</sup> Dr. Williams also measured some variables at two levels, e.g., the percentage change in one-year and five-year housing price index, as well as house size measured by the number of bedrooms and square footage. (RCCPF ¶ 1100). This fact makes Dr. Williams' selective omission of certain variables from the re-estimation of Dr. Eisenstadt's analyses even more suspect.

