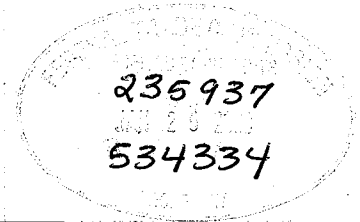


ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9320

PUBLIC VERSION

IN THE MATTER OF
REALCOMP II LTD.

APPEAL BRIEF OF COUNSEL SUPPORTING THE COMPLAINT

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California Dental Association v. FTC, 526 U.S. 756 (1999) *passim*

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League of United Latin American Citizens v. Clements, 999 F.2d 831 (5th
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Multiple Listing Service of the Greater Michigan City Area, Inc., 106 F.T.C.
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<i>United Real Estate Brokers of Rockland, Ltd.</i> , 116 F.T.C. 972 (F.T.C. 1993)	2
<i>United States v. Brown University</i> , 5 F.3d 658 (3d Cir. 1993)	36, 44
<i>United States v. Dentsply International, Inc.</i> , 399 F.3d 181 (3d Cir. 2005)	36
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<i>United States v. General Motors Corp.</i> , 384 U.S. 127 (1966)	26
<i>United States v. National Association of Real Estate Boards</i> , 339 U.S. 485 (1950)	1
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-------------------------------	----

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13 Philip E. Areeda & Herbert Hovenkamp, <i>Antitrust Law</i> § 2220, 2214e (2006)	26, 47
ABA Section of Antitrust Law, <i>Antitrust Law Developments</i> , (6 th Edition 2007)	49
ABA Antitrust Section, Monograph No. 23, <i>The Rule of Reason 108</i> (1999)	44
Federal Trade Commission and U.S. Department of Justice, <i>Competition in the Real Estate Brokerage Industry</i> (April 2007)	<i>passim</i>
Federal Trade Commission Staff Report, <i>The Residential Real Estate Brokerage Industry</i> (December 1983)	<i>passim</i>

I.
STATEMENT OF THE CASE

A. Introduction

The real estate brokerage industry has long exhibited a general lack of price competition¹ and has a history of traditional brokers taking steps to exclude competition from brokers offering innovative or discounted services.² These steps include limiting access to one of the most important competitive tools in the industry – the local multiple listing service (MLS). The MLS is a collaboration of competing local real estate brokers that aggregates and disseminates “listings,” information regarding homes for sale in a local area, enabling wide exposure for members’ listings.³ At first, traditional brokers simply excluded discount brokers from membership in the MLS.⁴ Later, after that tactic was condemned by the courts, traditional brokers allowed discounters to join the MLS but excluded the type of listing they used to offer discounts – the Exclusive Agency (EA) listing.

¹ See, e.g., FTC Staff Report, *The Residential Real Estate Brokerage Industry*, 11-13, 64 (Dec. 1983) (“1983 Report”) (noting uniformity in commission rates); *Competition in the Real Estate Brokerage Industry*, A Report by the Fed. Trade Comm’n and U.S. Dep’t of Justice, 45 (April 2007) (“2007 Report”) (“commission rates are relatively inflexible”). The Commission may be informed by its own reports and enforcement experience in the industry. See, e.g., *North Texas Specialty Physicians*, Dkt. No. 9312, Slip op. at 9 (F.T.C. Nov. 29, 2005).

² See, e.g., *United States v. Nat’l Ass’n of Real Estate Bds.*, 339 U.S. 485, 488-89 (1950) (broker association rules setting rates and barring discounting); 1983 Report at 20-21 (finding disparagement and steering by traditional brokers); 2007 Report at 63-70 (use of MLS rules and steering).

³ See, e.g., *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1370 (5th Cir. 1980); *Oates v. Eastern Bergen Multiple Listing Serv.*, 273 A.2d 795, 800 (N.J. Super. Ch. 1971) (broker without access to MLS at competitive disadvantage because consumers “naturally desire[] the widest market exposure” for their homes).

⁴ See, e.g., *Realty Multi-List*, 629 F.2d at 1370-71 (MLS membership rules excluding certain brokers held anticompetitive).

Through a series of enforcement actions, the Commission addressed this type of rule. An EA listing – unlike the Exclusive Right to Sell (ERTS) listing used by traditional brokers – provides a discount on the broker’s commission if the home is sold to a buyer who is not represented by another broker. By banning the use of EA listings in the MLS, traditional brokers penalized discounting through EA listings by denying the wide exposure only the MLS provided. To protect competition, the Commission issued a number of consent orders prohibiting MLSs from excluding EA listings.⁵

Advised by legal counsel not to entirely exclude EA listings from the MLS, the full service brokers who dominate Realcomp – the largest MLS in Michigan – found another means to stem this competitive threat. While allowing EA listings to be aggregated in the MLS database, Realcomp instituted two policies affecting the dissemination of those listings. First, Realcomp excluded EA listings from its Internet dissemination, which is the only means to reach three of the top four types of real estate websites (the “Website Policy”). Second, Realcomp set the default search within the Realcomp MLS database to include only ERTS listings, thereby limiting the exposure of EA listings to other brokers (the “Search Function Policy”). Finally, to ensure that brokers using ERTS listings in fact provide “full service,” Realcomp defined ERTS listings to include a minimum bundle of services.

Realcomp therefore accomplished the same result the Commission sought to prevent in its previous enforcement actions; the arbitrary handicapping of discount brokers. Realcomp’s

⁵ See *Port Wash. Real Estate Bd., Inc.*, 120 F.T.C. 882 (1995); *United Real Estate Brokers of Rockland, Ltd.*, 116 F.T.C. 972 (1993); *Am. Indus. Real Estate Ass’n*, 116 F.T.C. 704 (1993); *Puget Sound Multiple Listing Serv.*, 113 F.T.C. 733 (1990); *Bellingham-Whatcom County Multiple Listing Bureau*, 113 F.T.C. 724 (1990); *Metro MLS, Inc.*, No. C-3286, 1990 WL 10012611 (F.T.C. Apr. 18, 1990); *Multiple Listing Serv. of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985); *Orange County Bd. of Realtors, Inc.*, 106 F.T.C. 88 (1985).

Policies are plainly anticompetitive. EA listings offer significant savings if the buyer is not represented by a broker – commonly 3% of the sales price (the portion of the commission that would otherwise go to the buyer’s broker). By keeping EA listings off of the key websites and limiting their exposure within the Realcomp database, Realcomp’s broker members are penalizing EA listings and therefore discounting. An agreement to penalize discounting comes very close to a form of price-fixing.

In addition, Realcomp’s Policies are effectively an agreement among Realcomp brokers not to compete using certain packages of services. The Policies removed from the market a product that is highly desired by the consumers of brokerage services – namely, an EA listing that is marketed on key real estate websites.

By denying EA listings the wide exposure reserved for ERTS listings, the Realcomp Policies made EA listings less attractive to consumers. Consumers must either settle for an EA listing with the limited exposure allowed by the competitors of discount brokers or purchase a more expensive ERTS listing with the bundled services. As a consequence, discount brokers exited the market, were deterred from entering, incurred increased costs attempting to alleviate the disadvantage, suffered loss of reputation, and were forced to change their business models to conform more closely with traditional brokers. By 2006, EA listings were virtually non-existent in the Realcomp MLS, comprising less than 1% of all listings – far less than the percentage in MLSs without restrictive policies and far less than what the national figures would suggest. Full service ERTS listings therefore accounted for over 99% of the listings in Realcomp.

B. Summary of Argument

Despite this evidence, the ALJ dismissed the Complaint. The ALJ found that discount brokers use EA listings to offer unbundled services and commissions, thereby putting price

pressure on brokerage commissions. Although he found that the Policies were imposed by a combination of competitors with market power and that the Website Policy is by nature anticompetitive, the ALJ concluded that Complaint Counsel had not demonstrated a sufficient restraint on competition. The ALJ found that EA listings were “sufficiently available” on the Internet and the Realcomp MLS at a “nominal cost” and that the Website Policy is plausibly procompetitive. Although the ALJ found that the Search Function Policy is not anticompetitive by nature, he entered a stipulated order that eliminates the Policy and bars Realcomp from imposing a minimum set of services for a listing to qualify as an ERTS.

The Commission should reverse and enter the proposed order proscribing both Policies.

Although the ALJ found the Website Policy to be anticompetitive by nature, he failed to appreciate that the Policies come very close to a form of price-fixing and that they constitute an agreement among full service brokers to eliminate a valued product from the market. Nor did the ALJ fully recognize that the Policies are but another means to approximate the same stifling of competition as the outright ban of EA listings previously condemned by the Commission.

Instead, the ALJ concluded that EA listings are “sufficiently accessible” on Internet sites and in the MLS database. This is wrong as a matter of fact and also reflects a misunderstanding of the anticompetitive character of the restraint.

The ALJ’s conclusion is factually wrong. It is based largely on a single supposed “statistic” that lacks any foundation and that is contradicted by reliable industry studies, website statistics, and broker testimony. In addition, it ignores substantial evidence that the websites from which EA listings have been excluded are, by far, the most important for marketing properties in the relevant area. There are no adequate substitutes for these websites. Their importance is reflected in the record evidence of the impact on discount brokers using EA

listings, including market exit, entry deterrence, and substantially changed (and more expensive) business models. The ALJ also ignored the evidence showing that the Search Function Policy substantially reduced the exposure of EA listings within the Realcomp MLS.

The ALJ's focus is also wrong legally because it ignores the reality that, regardless of how accessible EA listings are, Realcomp's Policies still constitute discriminatory treatment of discounting. When a group of competitors agrees to penalize the use of a lower-priced version of their product, regardless of the severity of the penalty, the conduct is equivalent to an agreement to avoid a form of discounting. Absent an overriding justification, such an agreement must be condemned.

There is no such justification here, the ALJ's ruling to the contrary notwithstanding. As the Commission has already explained in consent orders in similar matters, website policies "advance no procompetitive purpose" and do not address "free riding." The evidence here shows that the same is true for Realcomp's Website Policy; consumers using EA listings pay for the services they receive. The evidence in this case makes clear that Realcomp's full service brokers had no purpose in adopting the Policies other than protecting their "wages."

The ALJ's conclusion that the Realcomp Policies had no effect on consumers is also based on a misunderstanding of the facts and the law. The ALJ wrongly held that consumer injury could not be demonstrated absent a detailed and direct showing of higher prices. Given the nature of the restraint here, no such showing was necessary. In any event, the evidence firmly establishes that home sellers did pay higher prices because EA listings became far less available. The ALJ missed the wealth of qualitative evidence showing that the Policies reduced the effectiveness and value of EA listings, and he misunderstood the quantitative evidence that the Policies reduced the use of EA listings.

C. Statement of Facts⁶

The vast majority of relevant facts in this case are not in dispute. (See RPPF (reply findings stating “no specific response” to majority of Complaint Counsel’s proposed findings)).

1. Real Estate Brokers and Commissions

The essence of the real estate brokerage industry is matching willing sellers with willing buyers. (RRPF 1133; *see also* 1983 Report at 9). Listing brokers⁷ assist sellers to find buyers. (IDF 13 (over 80% of sellers use broker)). Their core service is marketing the home. In addition, listing brokers may provide a number of other services, such as helping set the initial list price, negotiating with potential buyers, and assisting in the “closing” of the transaction. (IDF 21; RPPF 149). These brokers traditionally receive a commission based on a percentage of the sale price of the home, though they may also be compensated by an up-front fee and commission combination. (IDF 28; RPPF 156). A 6% commission is common. (ID 1; IDF 53).

Cooperating brokers assist buyers to find a home.⁸ (IDF 31). Their core service is searching for and identifying properties that match the buyer’s preferences. (RRPF 158; *see also* 1983 Report at 26-27). They do this by searching MLS listings, advising buyers on the various offerings, and escorting buyers to view homes for sale – often providing access through a “lock

⁶ The following abbreviations are used throughout:

ID	Initial Decision
IDF	Initial Decision Finding
CCPTB	Complaint Counsel’s Post-Trial Brief
CCPF	Complaint Counsel’s Proposed Findings
CCRF	Complaint Counsel’s Response to Realcomp’s Proposed Findings
RRPF	Respondent’s Reply to Complaint Counsel’s Proposed Findings

⁷ We use “real estate broker” to encompass brokers and their agents.

⁸ Cooperating brokers may represent the buyer as a “buyer’s agent” or may act as a “sub-agent” for the seller as a “selling agent.” (IDF 32-39; RPPF 159-60).

box.” (RRPF 158). In addition, cooperating brokers may give advice to the buyer regarding the price to offer, the terms of the offer, responding to counter offers, and may assist in the closing. (RRPF 158).

Listing brokers seek to market homes to buyers working with cooperating brokers by making (in agreement with the seller) an “offer of compensation” to pay a portion of the listing broker’s commission to any cooperating broker who “procures” the buyer. (IDF 40-42; RRPF 166). The offer of compensation is typically a percentage of the selling price of the home; 3% is common. (IDF 54; RRPF 1141). In a brokered transaction in which both sides are represented, therefore, the seller essentially pays a commission to both the listing broker and the cooperating broker. (IDF 41; RRPF 167).

Listing brokers also seek to market homes directly to buyers. Some of these buyers are not working with a cooperating broker; thus, a transaction may involve only the listing broker. (CX 413 (Kersten, Dep. at 45-46) (sales to unrepresented buyers “happens all the time in open house”); CCPF 173). The commission paid to the listing broker under these circumstances depends on the type of listing agreement between the seller and the listing broker.

a. Exclusive Right to Sell Listings, Exclusive Agency Listings, and Commissions

Traditional brokers provide a bundled set of services to sellers that includes listing the property on the MLS, holding open houses, showing the property to potential buyers, and assisting with the closing of the transaction. (RRPF 149, 180, 333). Traditional brokers are thus “full service.” (RRPF 189, 1132).

Full service brokers use Exclusive Right to Sell (ERTS) listing agreements. (IDF 52; CX 32-003-004 (Answer)). In fact, until after it signed the stipulated order, Realcomp specifically

defined ERTS listings as “full service,” requiring a minimum bundle of five services. (CCPF 182). Under an ERTS listing agreement, the seller “agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker.” (RRPF 176). Thus, even “if the home seller finds the home buyer on his or her own (such as through a relative or a friend at work) rather than through the marketing efforts by the listing broker, the listing broker is still entitled to and will receive the entire negotiated commission.” (RRPF 177; IDF 54-55). In short, the seller receives no discount if the buyer is unrepresented. (RRPF 177). It is thus undisputed that the “significant economic factor of an Exclusive Right to Sell listing is that the home seller commits to pay the full amount of the negotiated commission (both the listing commission and the offer of compensation) if the house sells during the contract period, regardless of whether or not a cooperating broker is involved in the transaction.” (RRPF 1144).

Under an Exclusive Agency (EA) listing, by contrast, the listing broker agrees to give a contingent discount on the commission. If the property is sold to a buyer that is not represented by a cooperating broker, the listing broker agrees to discount the commission by the amount of the offer of compensation. (RRPF 183-85). EA listings therefore “allow sellers to save the cost of an offer of compensation to a cooperating broker – money that under an Exclusive Right to Sell listing would be paid to the listing broker – if the seller sells the property to an unrepresented buyer.” (RRPF 184).

Discount brokers use EA listings to break from the traditional model by unbundling commissions and services. (IDF 69-78; RRPF 191-98, 341). Instead of offering only the full bundle of services, these brokers allow consumers to select from a menu of brokerage services and to “self supply” the other services. (RRPF 192-93). EA listings unbundle the listing and

cooperating broker portions of the commission, thereby allowing for a contingent discount. (CCPF 202-03; IDF 77-78).

b. Competition Among Full Service and Discount Brokers

Real estate brokers compete in local markets to obtain listings. (IDF 79-87; RRPf 204-06). Historically, however, there has been very little price competition among brokers. (CCPF 1130-31; *see also* 1983 Report at 54; 2007 Report at 44-45).

Discount brokers have long faced obstacles created by traditional brokers. For instance, full service brokers have limited entry by steering buyers away from discount broker listings. (*See, e.g.*, 1983 Report at 40, 140, 156-57 (survey results showing that 49% of alternative brokers reported frequent steering); 2007 Report at 68). Thus, discount brokers have not, until recently, made significant entry into the real estate brokerage market. (IDF 90 (discount brokers accounted for only 2% of the market in 2003); *see also* 1983 Report at 20 (discount brokers were approximately 2% of the market)).

The growth of the Internet has mitigated some of these obstacles and contributed to the recent growth of discount brokers. (IDF 92). For instance, if discount broker listings are available on the Internet, full service brokers are less able to steer buyers away from those listings. (CX 421 (Whitehouse, Dep. at 131 (describing “problem” with feeding EA listings to the Internet is that “buyers can see them and then ask their agents to show them”)); 2007 Report at 70). National statistics show that the market shares of discount brokers have increased from 2% in 2003 to 15% of all home sales in 2005. (IDF 90; CCPF 214). Although one study showed that this figure declined to 8% of all home sales in 2006, a national survey conducted by the National Association of Realtors (NAR) shows that the market share of discount brokers was

17% of all brokered sales (approximately 15% of all sales) in 2006. (IDF 90; CX 373-080; RX 154-A-20).

With the rise of the Internet, therefore, discount brokers have “the potential to change the competitive landscape of residential real estate brokerage.” (CX 533-040; IDF 88; CX 403-009 (“Online brokerage models or low-service market discounters will put continuing pressure on broker or agent commissions”)). As one industry publication put it, “In the past, consumers faced a stark choice: engage a full-service broker or manage the entire process without a real estate professional. . . . The [limited service] model represents an additional choice for consumers who may be willing to perform some but not all of the tasks involved in selling a home.” (RRPF 193). Discount brokers “meet a ‘consumer demand for lower cost brokerage services.’” (IDF 73). Where they are present, discount brokers put price pressure on traditional, full service brokers. (IDF 99-101; RRPF 198, 221-26).

2. The Realcomp MLS

The local MLS facilitates wide exposure of listings. (*See, e.g.*, 1983 Report at 16; 2007 Report at 12-14). Wide exposure of real estate listings is critical to matching willing sellers with willing buyers. (RRPF 454-62, 1185-97; *see also* 1983 Report at 10, 31 (explaining sellers’ “need to maximize exposure”)). The local MLS aggregates and disseminates the listings of all MLS members, serving as the most comprehensive source of listings of homes for sale and providing by far the widest dissemination. (IDF 21; RRPF 466, 232 (only brokers who are members of the MLS can list properties); *see also* 2007 Report at 10-11).

In the past, MLSs disseminated listings only to members through a closed, nonpublic database system. (RRPF 232; *see also* 1983 Report at 16-17). It is in this closed, nonpublic database that listing brokers communicate the offer of compensation. In fact, the MLS requires

that listing brokers (and therefore sellers) make an offer of compensation, which is enforceable through binding arbitration, making the MLS unique among information sources about homes for sale by ensuring that cooperating brokers are paid for services provided to the seller. (IDF 45, 112-13; RRPf 234, 237-38, 314, 350, 362-63). More recently, as the Internet became a critical means of exposing listings (RRPF 536-98), MLSs began also to disseminate listing information from the MLS database to various public websites – enabling brokers to efficiently market their clients’ listings directly to consumers. (IDF 114; *see also* 2007 Report at 22).

Realcomp – which is owned and controlled by competing real estate brokers – operates the largest MLS in Michigan. (IDF 136-39, 142, 159; RRPf 253-56, 282). It has over 2,200 real estate office members and approximately 14,000 members (about one-half of the Realtors in Michigan), who “compete with one another to provide residential real estate brokerage services to consumers” in Southeastern Michigan, *i.e.*, Oakland, Wayne, Livingston, and Macomb counties. (IDF 157-59; CX 32-002 (Answer ¶ 4); RRPf 278-79, 282, 719-20). Realcomp disseminates listings to cooperating brokers through a closed database system, and it disseminates listing information from the MLS database to a network of public real estate websites – the “Approved Websites” – that fall into four categories:

- Realtor.com, NAR’s consumer website;
- MoveInMichigan.com, Realcomp’s own public MLS website;⁹
- Realcomp brokerage firm websites through the Realcomp IDX;¹⁰ and
- Realcomp agent websites, also through the IDX.

⁹ MoveInMichigan.com is the exclusive provider of listing information for the website of a local TV station, ClickOnDetroit.com, the most popular website in Southeastern Michigan. (IDF 237-40).

¹⁰ IDX (Internet Data Exchange) is the means by which the MLS disseminates listing information to member websites. (RRPF 245-47).

(RRPF 369, 405, 407). These are the top four categories of websites most visited by buyers. (CCPF 588-600). This dissemination allows listing brokers to achieve wide Internet exposure with minimal effort; Realcomp brokers' new listings and any updates are automatically forwarded to the Approved Websites. (RRPF 600). As Realcomp puts it, through the Realcomp MLS, listing brokers can reach:

- 1) Approximately 15,000 Realcomp II Ltd. MLS Subscribing REALTORS.
- 2) Millions of Internet users shopping for homes on MoveInMichigan.com, REALTOR.COM, and Realcomp Subscribing Brokers' IDX (Internet Data Exchange) websites.

(CX 272).

3. Realcomp Adopted Policies to Limit the Exposure of EA Listings Because They Allow Consumers to Pay a Reduced Commission

Beginning in June 2001, the Realcomp Board of Governors – comprised entirely of full service brokers – adopted a set of rules targeting EA listings. (IDF 142, 349-414). Realcomp considered banning EA listings from the MLS altogether but was advised by “more than one” legal counsel not to do so. (IDF 416; CX 29). Instead, the rules adopted by Realcomp:

- (1) exclude EA listings from Realcomp's feed of listing information to the Approved Websites (the “Website Policy”), (IDF 349-60; RRPf 766, 780-783);
- (2) default “all searches” on the Realcomp MLS database “to include only Exclusive Right to Sell Listings” (the “Search Function Policy”), (CX 9-003; IDF 361; RRPf 793-796); and
- (3) define ERTS listings as “full service” listings, under which brokers must provide a minimum bundle of five services, (RRPF 330, 333).

Realcomp does not dispute that these Policies were adopted in response to limited service brokers entering the market. (RRPF 771). It is likewise clear that the reason Realcomp maintains its Website Policy is that EA listings allow consumers to pay a discounted commission

when no cooperating broker is involved. (*See, e.g.*, Kage, Tr. 1050-52 (Realcomp's CEO explaining "problem" with EA contracts is that "the seller has the option of selling a property themselves, without paying a commission"); CX 38 (Gleason, Dep. at 31-33); CX 421 (Whitehouse, Dep. at 151-52)). In fact, after the Commission filed its Complaint, Realcomp issued a "Call to Action" to its members that explained that the Website Policy is intended to protect brokers' "right to receive wages." (CX 89).

4. The Impact of Realcomp's Policies on the Exposure of EA Listings

There is no dispute that wide exposure is key to selling real estate. (RRPF 454-62, 1185-97; *see also* 1983 Report at 10). There is also no real dispute that the two most critical means of exposing listings are the MLS and the Internet. (RRPF 463-93, 536-98). Realcomp's Policies limit the ability of limited service brokers to expose their EA listings to both cooperating brokers through the MLS and directly to buyers through marketing on the Approved Websites.

a. The Website Policy Substantially Limits Exposure of EA Listings to Buyers

Internet marketing is critical to selling real estate – 80% of buyers now use the Internet as part of their home search. (RRPF 536). The importance of the Internet in marketing homes is confirmed by industry studies on buyer behavior, statistics on the usage of real estate websites, surveys on how brokers market their clients' homes, industry expert opinion, broker testimony and industry white papers. (RRPF 537-87; *see also* RRPF 543, 556, 580-87 (Southeastern Michigan data and broker testimony)). As the CEO of Realcomp admitted, the "majority of home buying and selling now begins on the Internet," so "if you miss that consumer connection, you miss a lot of potential commissions and fees." (RRPF 376).

It is also undisputed that “Internet marketing is only a competitive advantage to brokers to the extent that a significant number of buyers in the relevant geographic area are actually visiting the relevant site.” (RRPF 592). Reliable industry studies consistently identify the same four categories of websites as the ones most visited by buyers: Realtor.com, MLS websites, and broker and agent websites (or “IDX websites”). (RRPF 592-97). Forty to 53% of buyers report visiting each of these types of websites:

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WEB SITES USED IN HOME SEARCH BY FIRST-TIME AND REPEAT BUYERS
(Percent of Respondents Among Buyers Who Used the Internet)

	All Buyers	First-time Buyers	Repeat Buyers
Multiple Listing Services (MLS) Web site	53%	54%	53%
REALTOR.com®	52	46	55
Real estate company Web site	41	43	40
Real estate agent Web site	40	41	40
Newspaper Web site	14	16	12
Real estate magazine Web site	6	7	6
Other	10	9	10

(CX 373-046; *see also* RRPF 597 (data from the Realcomp area are consistent with national statistics)).

The exposure gained through the Realcomp dissemination to the Approved Websites is therefore competitively significant. Consumers in Southeastern Michigan specifically demand that their homes be posted on the Approved Websites and complain when their listings are not. (CCPF 870, 962-63, 981, 986, 991-92, 1042; RRPF 1164-73). The reason for this is simple: the Approved Websites are “where the buyers are.” (CCPF 675; *see also* RRPF 673-76). As recognized by the president of Realcomp’s largest shareholder board, “sellers want their information at the website that is going to best market them and best attract the consumer.” (RRPF 592).

The Website Policy, however, excludes EA listings from the Realcomp dissemination to the Approved Websites – the top four categories of websites visited by buyers. (RRPF 368-72, 376-412, 599). EA listings have no means to reach three of these categories: MLS websites (MoveInMichigan.com)¹¹ and broker and agent sites (Realcomp IDX sites). (RRPF 875-80). Although brokers can send EA listings to Realtor.com by joining a second MLS that does not have its own Website Policy, they must incur the cost and time of “double-listing” the EA listing on the second MLS. (CCPF 882; RRPf 495-501).¹² The Website Policy therefore significantly limits the exposure of EA listings and reduces their value to consumers.

b. The Realcomp Search Function Policy Limited Exposure of EA Listings to Cooperating Brokers

While the Website Policy affects the exposure of EA listings through the Internet, the Search Function Policy affected the exposure of listings through the MLS. It is undisputed that Realcomp’s data show that cooperating brokers viewed and emailed EA listings in the Realcomp MLS database far less often than ERTS listings. (RRPF 911-19 (ERTS viewed on average 201 times per month, EA 94 times per month; ERTS emailed on average 286 times per month, EA only 1 time per month)).

¹¹ Because MoveInMichigan.com is the exclusive provider of listings to ClickOnDetroit.com, EA listings are also excluded from that website. (RRPF 876-77).

¹² Although the ALJ found the costs of “double-listing” to be “nominal” (ID 103), broker testimony shows that the costs and burdens of belonging to two MLSs and double-listing were a “significant cost only to be incurred if necessary,” and that “actually the bigger cost” is the administrative burden of inputting and maintaining the additional listings in the second MLS. (CCPF 883; *see also* RRPf 498-500; CX 42 (Nead, Dep. at 96-97) (admitting that belonging to two MLSs was perceived as a disadvantage for brokers); RRPf 501 (national movement to consolidate MLSs to avoid costs of double-listing)).

5. The Impact of the Realcomp Policies on Competitors and Consumers

The Realcomp Policies restrict competition. No one disputes that where they are present, discount brokers put price pressure on traditional brokers. (RRPF 221-26; IDF 99-101).

Nationally, discount brokers have grown dramatically from a 2% market share in 2003 to an 8-15% market share in 2006. Discount brokers, however, have gained very little ground in the Realcomp MLS. (IDF 131; *see also* IDF 487 (EA listings account for less than 1% of market)).

Realcomp's full-service-broker trial witness could therefore testify that his brokerage is "not in the least as concerned about [limited service brokerage models] . . . because I've seen that it hasn't taken a strong foothold in our marketplace." (Sweeney, Tr. 1352).

a. Discount Brokers Face Obstacles to Using EA Listings in Realcomp

The Realcomp Policies impair brokers' ability to offer discounts through EA listings by making those listings less attractive to consumers. Discount brokers consistently testified that their EA listings in Realcomp received less activity and are less successful than their EA listings in non-restrictive Michigan MLSs. (CCPF 1037; Mincy, Tr. 419; D. Moody, Tr. 535-37). These brokers also uniformly testified of customer complaints and brokers being unable to find EA listings in the Realcomp MLS, complaints and calls they do not receive in other MLSs. (RRPF 931, 933-35, 964, 986, 1042, 1048 (customers complaining that EA listing not found in MLS or on IDX sites); RRPF 932, 936, 1018 (Realcomp agents not able to find EA listings in MLS search)).

The reduced exposure significantly impacts the discount brokers' ability to use EA contracts to compete for listings. Discount brokers are forced to explain the limitations imposed by the Policies to potential customers. (CCPF 942-943, 1059-67). For instance, one discount broker explains on his website that because of Realcomp's Policies:

1. EA listings are not included in the default search on the Realcomp MLS, thus “you will not be found some of the time when Realtors do searches.”
2. Realcomp will not allow these listings to go to MoveInMichigan.com. “This is huge! This is Realcomps public MLS site where thousands of people search!”
3. Realcomp will not allow these listings on the Realcomp IDX. “Many people these days surf Realtor websites and unless you’re an erts listing, you will not be found.”
4. Realcomp will not allow these listings to go to Realtor.com.

(RX 12-007; CCPF 1063-68). Another discount broker testified that he “lost a substantial amount of business” after explaining to potential customers that there is “no way of getting their [EA] listing . . . onto MoveInMichigan.com or . . . the IDX system.” (Mincy, Tr. 422-23, 425; CCPF 1013, 1025-28).

b. The Policies Deterred Entry and Caused Discount Brokers to Change Their Business Models and Lose Business

By making EA listings less attractive to consumers, the Policies forced discount brokers to change their business models to survive. First, to obtain at least some Internet exposure for their EA listings through Realtor.com, discount brokers “double-list” them on another MLS. To offset the additional costs, these brokers charge additional fees (from \$50 to \$100) for this service. (CX 435-001-003; CX 439). These additional fees represent a 17 to 20% increase over the basic EA listing package, and EA listings are still excluded from three of the top four categories of websites.

Second, to obtain the full exposure Realcomp offers, discount brokers offered ERTS listing packages, which included the minimum bundle of five services. (CCPF 636, 1034, 1053). The brokers developed these packages even though their customers did not want the bundle of services. (D. Moody, Tr. 499-500, 512 (customers wanted to “retain control” of the selling

process)). Discount brokers typically charge an up-front fee for these ERTS listings that is higher than their EA packages by 20% or more plus a commission equal to the offer of compensation. (CCPF 1032-34; D. Moody, Tr. 488-90; CX 439 (discount broker who charges no up-front fee but caps commission at 4.5%)). As an ERTS listing, there is of course no contingent discount – the full commission is paid by the home seller whether or not the buyer is represented. (RRPF 1012; D. Moody, Tr. 489-90).

These ERTS packages have enabled the few discount brokers who have remained in Southeastern Michigan to continue operating. These brokers consistently testified that their ERTS listings receive more activity than EA listings in the Realcomp MLS. (CCPF 1041, 1055; D. Moody, Tr. 532-33 (EA listings in Realcomp get less activity than ERTS, not the case in other MLSs)). These ERTS packages are also more popular in the Realcomp area than in other areas. (Mincy, Tr. 386; RRPF 1012). Consumers, however, end up paying substantially more for these packages and receive services that they do not necessarily desire.

Finally, one broker developed a different way to deal with the limitations of the Realcomp Policies – he labels EA listings as ERTS. Called a “flat fee ERTS” listing in this litigation, it is offered only in the Realcomp MLS. (RRPF 1052-53). Under this “flat fee ERTS,” the seller pays an up-front fee that is \$200 more than this broker’s EA listings and agrees to pay a commission equal to the offer of compensation (usually 3%). Though he provides the five minimum services required by Realcomp’s rules, this broker does not require the seller to pay the commission if the buyer is unrepresented. (RX 12). In other words, this “flat fee ERTS” is an EA listing that the broker labels as an ERTS to circumvent the Realcomp restrictions. In the past, Realcomp has caught brokers “mislabeling” EA listings as ERTS through reports that the listing broker did not perform the minimum services or the listing was

placed on for-sale-by-owner websites. (IDF 380-87). By providing the minimum services, this broker has managed for the moment to avoid Realcomp's fines and having the listings re-labeled as EA listings, thereby removing them from the Approved Websites.

Discount brokers that did not change their business models either exited or were deterred from entering the market. For instance, one discount brokerage that has entered numerous areas around the country, did not enter the Southeastern Michigan market because of the Policies, instead referring Realcomp area customers to others. (CCPF 973-1006 ("We can't do it with the existing rules as they are.")). Even his referrals have resulted in numerous complaints, lost customers, and extra costs due to the Realcomp Policies. (Hepp, Tr. 606-07, 634-35, 640-42, 653-54 (testifying to lost business and costs through credit card charge backs, threats to sue, *etc.*)). Another discount broker active in several other markets, YourIgloo, stopped doing business in Michigan due to the Policies. (CX 422 (Aronson, Dep. at 28-29) (attributing drop in company revenues "to the fact that Realcomp prevented [his company] from performing [its] business model")). Although the ALJ found that YourIgloo left the market because of management problems, those problems were precipitated by Realcomp's Policies, which YourIgloo unsuccessfully tried to control. (CX 526 (Groggins, Dep. at 19-21) (explaining that in order to do business, YourIgloo would have to switch to ERTS listings but customers did not want this)). Regardless, the Policies prevent YourIgloo from reentering the market. (CX 422 (Aronson, Dep. at 40-43)).

c. Consumers Pay More or Receive Less

The Policies clearly affected consumer choice. To obtain the same exposure as available through a full service broker, consumers must pay more for an ERTS listing (an additional up-front fee of \$200 to \$300 *and* up to 3% of the sale price more (depending on whether the buyer is

represented)). If consumers want to obtain the contingent discount offered by an EA listing, they must settle for inferior exposure. Consumers simply cannot purchase EA listings that have the same or equivalent exposure as full service ERTS listings.

The availability of a “flat fee ERTS” listing from a single broker (or even a handful) does not eliminate the competitive harm. First, the listing is more expensive because of the Realcomp Policies. (IDF 57, 68). Second, this bypass of the Realcomp Policies can easily be shut down at any time; Realcomp has in the past redefined ERTS listings in ways to stem discounting. (CCPF 833 (Realcomp determination that listings posted on for-sale-by-owner sites cannot be ERTS); RRPf 330-33 (Realcomp defines ERTS as “full service”). In other words, Realcomp is free to take action against “flat fee ERTS” listings to accomplish its goal of eliminating listings that offer discounts in the event that a buyer is not represented by a broker.

d. Market Data Confirm That EA Listings Are Rare in Realcomp

Market data confirm that the Realcomp Policies decreased the use of EA listings in the Realcomp MLS. EA listings have declined to less than 1%, and the share of EA listings in Realcomp is far lower than in MLSs without restrictive policies.

i. Time Series Analyses

Two time series analyses support the conclusion that Realcomp’s Policies decreased the use of EA listings. (CCPF 1073-84, 1105-1107). First, a time series analysis for the Realcomp MLS demonstrates a decline in EA listing share after Realcomp’s Policies were adopted. Listing type data was not available in the Realcomp MLS until late 2003. (CCPF 1080-84). The Realcomp Website Policy was adopted in 2001, likely impacting the share of EA listings before late 2003. (CCPF 1083). Nonetheless, the available data show that the share of EA listings fell 52%, from approximately 1.7% in early 2004 to less than 0.8% in late 2006. (CCPF 1081; *see*

also CX 523). Second, the conclusion that the Realcomp Policies caused a decrease in EA listings is consistent with a time series analysis of the Boulder MLS data performed by Realcomp's expert. That analysis shows that after a website policy was implemented, the percentage of EA listings decreased by over 50%, from an average of 2.03% to an average of 0.98%. (CCPF 1106-07).

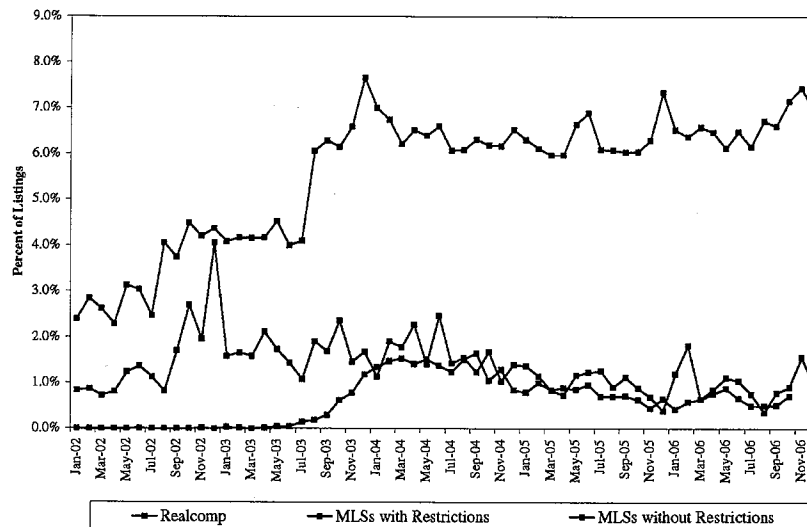
ii. Benchmark Comparisons

Benchmark comparisons of Realcomp with nine other MLSs also support the conclusion that Realcomp's Policies caused a decrease in the usage of EA listings. These show that the Realcomp EA listing share is significantly less than that of each of six MLSs without restrictive policies, the average share of these six MLSs, and the average share of the combined listings from all six MLSs. (CCPF 1085-88, 1092; DX 7-010; RX 161-28). Two other MLSs with website policies also exhibit low EA shares, and the average EA listing share for the combined data of these two MLSs and Realcomp is substantially lower than the average of the combined data for the MLSs without restrictions. (CCPF 1089-1092).

Comparison of Realcomp With MLSs without Restrictions			
MLS		EA Share	% Realcomp Share is Lower
Realcomp		1.01%	--
MLSs w/o Restrictions	Dayton	1.24%	18.5%
	Toledo	3.4%	70.2%
	Memphis	5.95%	83.0%
	Charlotte	6.15%	83.5%
	Denver	13.78%	92.6%
	Wichita	4.2%	75.9%
Average of MLSs w/o Restrictions		5.82%	82.6%
Average of Combined MLS Data w/o Restrictions ("weighted average")		5.6%	81.9%
MLSs w/ Restrictions	Williamsburg	1.7%	
	Greenbay/Appleton	1.3%	
Average of Combined Data w/ Restrictions (including Realcomp) ("weighted average")		1.4%	

(RX 161-28; CCPF 1092, 1190-99). These data over time are set forth below:

Comparison of MLSs With and Without Access Restrictions
Percent of NON-ERTS Listings



(CX 524).
Source: MLS Listing Data from various MLSs.

Realcomp's expert found consistent results in comparing the EA share in Realcomp with that in the Ann Arbor MLS, an MLS adjacent to Realcomp without restrictive rules. (CCPF 1108-13). This benchmark comparison also supports the conclusion that Realcomp's Policies reduced the usage of EA listings:

Comparison of Realcomp with Ann Arbor MLS	
MLS Data	EA Share
Realcomp	0.74%
Ann Arbor MLS	4.2%
Ann Arbor MLS (Washtenaw County only)	1.6%
Ann Arbor MLS (excluding Realcomp counties)	3.59%

iii. Regression Analyses

Regression analyses also demonstrate that the Realcomp Policies substantially reduced the use of EA listings. In his initial report and surrebuttal report, Complaint Counsel's economist performed a total of ten regression analyses to confirm that the Realcomp Policies are associated with the observed difference between the share of EA listings in Realcomp and that share in MLSs without restrictions. These analyses demonstrate that the Realcomp Policies are associated with a 5.5 to 5.8 percentage point (84-86%) decline in the expected share of EA listings. (CCPF 1102, 1197-98).

D. Proceedings Below

The administrative hearing in this matter was held from June 19 to June 28, 2007. Eight witnesses testified in person, and deposition excerpts from twenty-eight witnesses were admitted as evidence. Over 800 exhibits were admitted. The ALJ issued an Initial Decision dismissing the Complaint on December 10, 2007. Complaint Counsel filed a timely appeal.

Although the ALJ dismissed the Complaint, the Initial Decision incorporates the parties' Joint Stipulation Regarding Respondent's Search Function Policy. (Attachment 2). This

stipulation prohibits Respondent from treating EA listings less favorably than ERTS listings with respect to searches performed by members in the Realcomp MLS database. In addition, it bars Respondent from requiring members to provide certain minimum services in order for their listings to be treated by the MLS as ERTS listings. (ID 3-4).

E. Standard of Review

The Commission reviews the ALJ's Initial Decision on a *de novo* basis. *Rambus, Inc.*, Dkt. No. 9302, 2006 FTC LEXIS 101, *44 (Aug. 20, 2006); 16 C.F.R. § 3.54 (2008). The Commission may consider in its review "such parts of the record as are cited or as may be necessary to resolve the issues presented and . . . exercise all the powers which it could have exercised if it had made the initial decision." 16 C.F.R. § 3.54(a).

**II.
ISSUES PRESENTED**

1. Whether policies imposed by a combination of brokers with market power that penalize discounting and limit the packages of services brokers can offer to consumers are reasonably likely to harm competition.
2. Whether a combination of competitors with market power that imposes a restraint that is by nature anticompetitive may escape condemnation by proffering theoretical justifications for the restraint without any showing that the restraint produces any procompetitive effects.
3. Whether a plaintiff that proves a combination of competitors has market power and has imposed a restraint that is by nature anticompetitive must further prove actual anticompetitive effects to sustain its burden under a rule of reason analysis.
4. Whether evidence that a restraint causes a 50% or more decrease in the use of a product used to offer discounted commissions and discounted services is insufficient to show anticompetitive effects merely because this product comprises a small portion of the market.

III. ARGUMENT

The ALJ correctly found that the restraints in this case were imposed by a combination of competitors with market power in the market for multiple listing services in Southeastern Michigan (Wayne, Oakland, Livingston, and Macomb counties), which gives it power over price in the market for real estate brokerage services in that geographic market. (ID 80-85, 97; IDF 282-348). Realcomp has not appealed these findings.

As the Supreme Court has repeated, the essential inquiry when examining agreements among competitors is “whether or not the challenged restraint enhances competition.” *California Dental Assoc. v. FTC*, 526 U.S. 756, 779-80 (1999) (*CDA*) (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 104 (1984)). To determine whether this is the case under a rule of reason analysis, the Commission conducts an analysis sufficient to arrive at a “confident conclusion about the principal tendency of a restriction.” *Id.* at 781.

A. The ALJ Failed to Understand That the Principal Tendency of Realcomp’s Policies is to Stifle Competition

It is well established that although competitor collaborations such as MLSs (sometimes called “open membership” joint ventures) may create procompetitive benefits, they cannot use the advantages achieved by their collective means to suppress competition. *See Associated Press v. United States*, 326 U.S. 1, 18-19 (1945). While an MLS “may create significant competitive advantages for both its members and for the general public, there exists the potential for significant competitive harms when the group, having assumed significant power in the market, also assumes the power to exclude other competitors from access to its pooled resources.” *Realty Multi-List*, 629 F.2d at 1370; *see also Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1578-80 (11th Cir. 1991). Thus, where an MLS achieves a degree of market

dominance, it cannot adopt discriminatory rules that restrict competition. *See* 13 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 2220 (2006) (“ANTITRUST LAW”).

The ALJ found that the nature of the Website Policy is likely to restrain competition, but he failed to understand the anticompetitive nature of the Search Function Policy and underestimated the pernicious impact of Realcomp’s Policies on competition. (*See* ID 94-95, 128). Realcomp’s Policies restrain competition in two ways. First, the Policies restrict price competition by penalizing discounting. By restricting the dissemination of EA listings, the Realcomp Policies impose a substantial and competitively significant penalty on the use of EA listings and the discounting that they represent. Second, the Policies limit consumer choice and restrict competition by restricting the packages of services available in the market. Consumers must settle for EA listings with diminished exposure or purchase more expensive ERTS listings.

1. The Policies Penalize Discounting

Concerted action by competitors “to protect themselves from competition by discounters” generally constitutes horizontal price-fixing. For instance, in *Denny’s Marina, Inc. v. Renfro Prods., Inc.*, the Seventh Circuit held that an agreement among competing boat dealers to exclude a discounter from two boat shows because of its policy to “meet or beat” competitors’ prices was in effect a price-fixing agreement. 8 F.3d 1217, 1220-22 (7th Cir. 1993); *see also United States v. General Motors Corp.*, 384 U.S. 127, 145-47 (1966) (conspiracy among automobile dealers to pressure manufacturer not to deal with discounters is form of price fixing).

Realcomp’s Policies are similar in effect because they restrain a form of discounting. Brokers use EA listings to offer (1) a discount contingent on a sale to an unrepresented buyer and (2) discounted services through unbundling. The Realcomp Policies penalize this conduct by conditioning the wide exposure offered by Realcomp on the use of ERTS listings, which do

not offer a discount if the buyer is unrepresented and included a minimum bundle of services. The Policies therefore reduce the appeal of EA listings to consumers and discourage their use, restraining an important source of price competition.

Courts have specifically recognized that the denial of the “wide exposure” of listings available through an MLS can penalize discounting. *See, e.g., Realty Multi-List*, 629 F.2d at 1370-71; *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 935-36 (Cal. 1976) (rule denying multiple listing services “seriously hampers the competitive effectiveness of nonmember licensed brokers”); *Oates v. Eastern Bergen County Multiple Listing Serv., Inc.*, 273 A.2d 795, 800 (N.J. Super. Ch. 1971). The competitive harm in these cases is two-fold. “First, the excluded broker’s listings will not be distributed as widely as possible, resulting in inefficient sales prices. Second, the exclusion reduces the competition among brokers and could result in less competition for brokerage fees.” *Thompson*, 934 F.2d at 1580. As the Fifth Circuit further explained, the denial may restrict entry by discounters:

the public is denied the incentive to competition that new entry may bring. A new entrant into the market might, for example, be more aggressive and willing to accept a lower commission rate. Exclusion of such a broker would tend to reduce the amount of price competition in the market.

Realty Multi-List, 629 F.2d at 1371 (citations omitted); *see also Palsson*, 16 Cal. 3d at 937 (such rules “tend to limit entry into a competitive field”).

The ALJ distinguished these cases, emphasizing that, despite the Policies, discount brokers may join and place EA listings on the Realcomp MLS. (*See* ID 93-94). This reasoning is wrong. While discount brokers may join the MLS, Realcomp’s Policies diminish their competitive force by penalizing the use of EA listings. The MLS was significant in these cases because it provided “wide exposure” of listings. *Thompson*, 934 F.2d at 1580; *Realty Multi-List*,

629 F.2d at 1370-71. The mechanism of harm is the same: competitors agreeing to withhold from certain listings the “wide exposure” provided by the MLS. In the past, wide exposure of listings was obtained only through the dissemination of the MLS database to other brokers. Currently, MLSs provide critical exposure both through the closed database *and* the dissemination of listings to public websites. The Realcomp Policies completely exclude EA listings from the dissemination to the Approved Websites and limit exposure within the MLS, thereby achieving an effect similar to the denial of membership in the MLS in the past. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 286, 297 n.6 (1985) (recognizing that a rule providing only discriminatory access to the collaboration’s services – a concerted refusal to deal *on substantially equal terms* – would violate the antitrust laws if it restricted competition).

2. The Policies Limit Consumer Choice and Restrict Competition by Reducing the Packages of Services Available in the Market

The Realcomp Policies also prevent brokers from providing a product that consumers want: an EA listing with the full exposure offered by Realcomp. (CCPF 870, 962-65, 991-92, 1042, 1164-73). In other words, a collaboration of competitors have agreed on the terms in which they will offer and compete for business. An agreement among competitors to “withhold from their customers a particular service that they desire” is plainly anticompetitive. *CDA*, 526 U.S. at 770.

In *FTC v. Indiana Federation of Dentists (IFD)*, a collaboration of dentists refused to provide x-rays to insurance companies who sought the x-rays in order to review requests for dental treatment before any procedure. 476 U.S. 447, 449, 457 (1986). The Court concluded that such agreements unreasonably limited consumer choice:

A refusal to compete with respect to the package of services offered to customers, no less than a refusal to compete with respect to the price term of an agreement, impairs the ability of the market to advance social welfare Absent some countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services . . . such an agreement limiting consumer choice by impeding the ‘ordinary give and take of the market place,’ . . . cannot be sustained under the Rule of Reason.

Id. at 459; *see also Sullivan v. NFL*, 34 F.3d 1091, 1101 (1st Cir. 1994) (condemning horizontal agreement that “completely wipes out” a certain product (a type of ownership interest in an NFL team), making the market “plainly unresponsive to consumer demand”).

Realcomp’s Policies similarly restrict competition. By significantly reducing the effectiveness of EA listings, the Policies are in effect an agreement not to compete “with respect to a package of services,” *i.e.*, by offering a contingent discount and unbundled services. This sort of restriction is anticompetitive. *See, e.g., United States v. VISA U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) (joint venture rules prohibiting members from competing “in a manner which the consortium considers harmful to its combined interests” was exemplar of anticompetitive behavior); *United States v. Gasoline Retailers Ass’n*, 285 F.2d 688, 690-91 (7th Cir. 1961) (agreement not to compete by giving retail customers “trading stamps” was anticompetitive); *National Macaroni Mfrs. Ass’n v. FTC*, 345 F.2d 421, 424 (7th Cir. 1965) (agreement among manufacturers not to compete by using certain type of wheat was anticompetitive). It was also effective; not a single full service broker or Realcomp Governor testified that they used EA listings. (CCPF 189, 772).

B. The ALJ’s Conclusion That EA Listings Are “Sufficiently Accessible” is Wrong and Reflects a Misunderstanding of the Character of the Restraints

The penalty imposed on broker use of EA listings (and the discounting that use represents) is substantial and reduces the competitive effectiveness of EA listings. Reducing

market exposure has particularly deleterious effects in the real estate industry because each home is different and each buyer has unique preferences. (RRPF 1185-97, *see also* 1983 Report at 10).

Thus, as one Realcomp Governor explained, less exposure:

means less price, more marketing time, more expenses involved, lower price on your home, more days on the market, more carrying costs; in other words, it's more expensive for everybody concerned.

(RRPF 458; CX 38 (Gleason, Dep. at 123-124)). Not surprisingly, sellers demand wide exposure of their listings. (RRPF 460-62).

Realcomp's Policies restrict the exposure of EA listings through the two most critical channels – the MLS and the Internet. (RRPF 463-93 (importance of MLS); RRP 536-98 (importance of Internet)). The Website Policy penalizes discounting because it wholly excludes EA listings from three of the top four most popular categories of websites and raises the cost to reach the fourth. *See* Section I.C.4.a. The Search Function Policy limited exposure of EA listings within the Realcomp MLS database. *See* Section I.C.4.b. The ALJ severely underestimated the impact of this penalty.

1. The ALJ's Heavy Reliance on a Single Unsupported "Statistic" is Misplaced

The ALJ's conclusion was driven by his heavy reliance on a supposed "statistic" claiming that access to the MLS and Realtor.com provides "near-maximum" exposure for listings. (ID 126). According to this, "[e]ighty percent of all home buyers are reached by the MLS," and with the MLS "in combination with Realtor.com, ninety percent of all home buyers are reached." (ID 100; *see also* IDF 431, 435). This "statistic" appears on two discount broker websites, but neither broker could provide any basis for the "statistic." (Mincy, Tr. 461 (admitting he had no idea where the numbers came from)). In fact, there is nothing – no study,

no survey, no industry report, no testimony – to support this “statistic”; it is a myth.

This myth is in fact contrary to data and studies whose reliability is well established. (RRPF 482-84, 549 (reliability of NAR studies and comScore data undisputed)). The notion that the MLS alone reaches 80% of the buyers both overstates the importance of the MLS and understates the importance of the Internet. For example, reliable industry studies show that 24% of buyers in 2005 and 2006 first found the home they ultimately purchased on the Internet – an increase from 2% in 1997. (RRPF 554). In comparison, only 36% of buyers in 2006 first found the home they ultimately purchased through their broker (*i.e.*, through the MLS) – down from 50% in 1997. (RRPF 555).

The myth also fails to take into account the undisputed research findings that most buyers search the Internet for homes *before* they even contact a broker. (RRPF 562; CX 532-006 (Internet buyers spent on average 4.8 weeks investigating homes before contacting agent); *see also* RRPF 584-85 (Realcomp broker testimony)). Further, just because a listing is on the MLS does not mean it “reaches” all buyers using cooperating brokers. Because of possible steering by brokers, poor communication between buyers and their brokers or other reasons (such as the Realcomp Search Function Policy), buyers may not learn of a home they would otherwise be interested in purchasing even if it is listed on the MLS. (*See* RRPF 586 (broker recommending buyers search Internet because buyers sometime buy homes outside of their initial search criteria)).

2. The ALJ Failed to Understand the Competitive Significance of MoveInMichigan.com and the Realcomp IDX

The ALJ’s finding also ignores the competitive significance of exclusion from MoveInMichigan.com and the Realcomp IDX, which encompass three of the top four categories

of websites. Realcomp members testified that buyers want to search local websites, like MoveInMichigan.com and the Realcomp broker IDX websites. (RRPF 649-50).

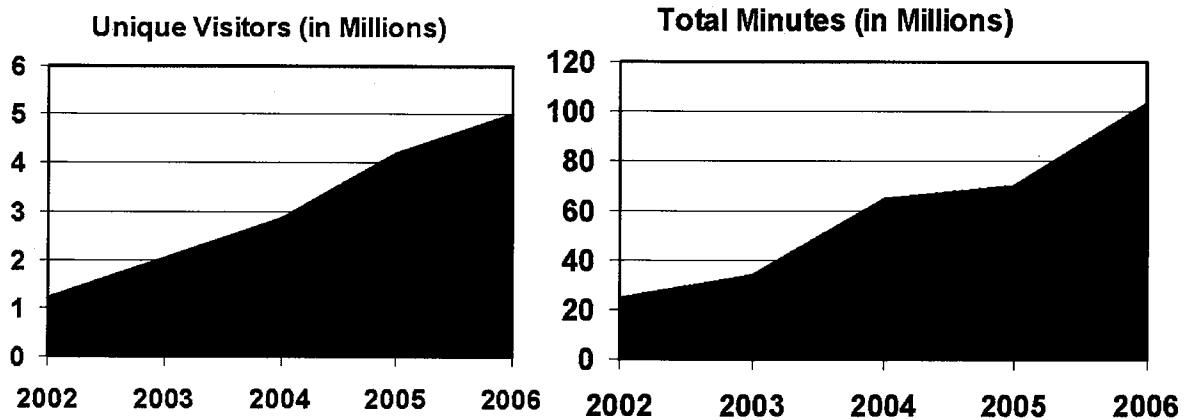
MoveInMichigan.com has become increasingly important. (RRPF 609-36; RRPF 615 (describing MoveInMichigan.com as a “very local version of Realtor.com”). It receives on average over 700,000 hits a month, a number that Realcomp brokers describe as “large” and “significant.” (RRPF 631-34). Realcomp spends substantial sums promoting the website, and brokers testified that the importance of MoveInMichigan.com is increasing due to these efforts. (RRPF 619-20, 636). In addition, MoveInMichigan.com is the exclusive provider of real estate listings for the number one website in Southeastern Michigan, ClickOnDetroit.com, which receives over 3.3 millions hits per month. (RRPF 624-30).

The competitive significance of the Realcomp IDX is “large and growing.” (CCPF 645). Indeed, NAR made it mandatory for all affiliated MLSs to provide IDX feeds, explaining that IDX was “the next stage in the evolution of the MLS.” (RRPF 669; *see also* RRPF 670-671). Even Realcomp’s own trial witness admitted that not participating in the IDX when your competitors were would be a “competitive disadvantage in the marketplace.” (RRPF 655, 667 (describing non-participation as “business suicide”); *see also* RRPF 649-55 (Realcomp broker testimony on the importance of IDX)). As Realcomp’s expert explained:

[L]ocal-broker and individual agent operated websites are increasing in popularity and constitute a real competitive threat to Realtor.com. In fact, broker-owned, agent-owned, and franchise-owned web sites were, in that order of importance, more important sources of internet exposure to members of NAR than Realtor.com.

(RRPF 898 (citing CX 133-019)).

This evidence is confirmed by reliable empirical data showing that the total unique users and minutes spent on IDX websites has grown substantially since 2002:



(CCPF 645-46; *see also* CCPF 647 (users of IDX websites far exceed users of Realtor.com)).

In fact, these website statistics underestimate the total usage for IDX websites because they do not include all IDX sites. (RRPF 648, 584 (local broker site receiving 120,000 hits/month)).

3. The ALJ Failed to Understand That All Other Real Estate Websites Combined Reach Only a Small Fraction of Buyers

Though there are a substantial number of other real estate websites, the ALJ overstated their competitive significance and understated his own finding that these other websites “do not reach nearly as many home buyers as the Approved Websites.” (IDF 449). Industry studies show that these “other” websites – including Google, Trulia and thousands of other real estate websites – were *collectively* visited by only 10% of buyers. (CX 373-046). Thus, a broker could market their listings on Google, Trulia, and *all* of the thousands of “other” real estate websites and the broker would still only reach one quarter of the buyers that would be reached by marketing on any one of the Approved Websites. (See RRPf 592-97). In fact, there is no evidence of real consumer demand to be listed on Google, Trulia or any of the other thousands of real estate websites – in sharp contrast to the consumer complaints when listings are not posted

on the Approved Websites. (CCPF 581-82, 870, 962-65, 991-92, 1042, 1164-73; CCPF 905 (lack of consumer demand for other websites)).

The ALJ nonetheless credited the admitted speculation of a non-broker that Google may soon exceed the IDX in importance. (IDF 451). In doing so, the ALJ ignored the industry expert's opinion, which is backed by data, that Google "does not have much of a Web presence" in real estate. (CCPF 903, 899-907). Additionally, he failed to consider the additional costs to list on Google. Although Google does not charge a posting fee, it "is not easy" to send listings to Google; therefore, the only broker offering this service charges consumers an additional \$75. (G. Moody, Tr. 885). Listings on Google (or any other non-Approved Website) must also be updated individually, adding substantial administrative cost. (RRPF 384, 907, 1024).

4. The ALJ Ignored the Impact of the Search Function Policy

In addition, the ALJ concluded that the Search Function Policy "can, at best, be characterized as a *de minimus* [sic] restraint." (ID 95-96). This is wrong. Realcomp's own data show that EA listings were viewed and emailed by cooperating brokers only a fraction as often as ERTS listings. (RRPF 911-19). Realcomp does not dispute that this loss of exposure would disadvantage listing brokers using EA listings "in their ability to compete effectively and find buyers for their client's homes." (RRPF 922).

The ALJ did not grapple with the disparity in the data. Instead, the ALJ's analysis went no further than the testimony that cooperating brokers can easily override the search default. (IDF 95-96). The ALJ ignored undisputed evidence that these differences were caused by the Search Function Policy. Numerous studies in the record show that default settings affect user choices. (RRPF 937-40). Realcomp did not dispute the industry expert's opinion that the disparity was caused by the Search Function Policy. (RRPF 921). Discount brokers continually

received calls from other Realcomp brokers who could not find the EA listings through their search on the Realcomp MLS. (RRPF 931-36, 964-65, 988, 1018-19, 1046-48, 1061; CCPF 986-90). They also uniformly testified about numerous complaints from customers that EA listings “didn’t show up” on the Realcomp MLS. (CCPF 923-26; RX 67-005; CCPF 933).

5. The ALJ’s Focus on Alternatives Demonstrates a Misunderstanding of the Principal Tendency of the Policies

The ALJ’s conclusion that Realcomp’s Policies do not degrade the exposure of EA listings to a sufficient degree, reflects a misconception of the principal tendency of the Policies. However great the limitation on the exposure of EA listings, the Policies still penalize discounting and thereby constitute an agreement among competitors that comes close to a form of price-fixing. *See Denny’s Marina*, 8 F.3d at 1220-22. The Policies also constitute an agreement among competitors to withhold from consumers services that they desire. *See IFD*, 476 U.S. at 459-62. These are the types of competitor agreements that courts condemn, even without any evidence of market power. This is true even if the additional exposure withheld from consumers is “in fact completely useless,” because a combination of competitors is “not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand.” *IFD*, 476 U.S. at 462. Here, of course, the evidence shows that Realcomp has market power. Absent an overriding procompetitive virtue, therefore, the Policies should be condemned regardless of the extent they limit EA listing exposure. *See Cantor v. Multiple Listing Serv. of Dutchess Cty*, 568 F. Supp. 424, 427 n.6, 430 (S.D.N.Y. 1983) (holding that MLS rule preventing use of yard signs with name brands was unreasonable restraint of trade).

