

ORIGINAL

PUBLIC

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



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

Docket No. 9320

ANSWERING BRIEF OF RESPONDENT

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CCBr	Appeal Brief of Counsel Supporting the Complaint (Jan. 25, 2008)
CCPF	Complaint Counsel's Proposed Findings of Fact (July 31, 2007)
CCRB	Complaint Counsel's Post Trial Reply Brief (Aug. 16, 2007)
IDF (#)	Initial Decision Findings of Fact (#)
ID	Initial Decision (Dec. 10, 2007)
RCCPF	Respondent's Reply to Complaint Counsel's Proposed Findings of Fact (Aug. 17, 2007)
RPF	Respondent's Proposed Findings of Fact and Conclusions of Law (July 31, 2007)

Introduction

This case asks a straightforward question. Did Realcomp's establishment of the Website Policy and the Search Function Policy (the "Realcomp Policies") – different rules for different types of real estate listing "products" – create cognizable adverse competitive effects in a specific market (four counties of Southeast Michigan)? The evidence in this case demonstrated that there were no such effects. The case was properly dismissed.

Complaint Counsel implies that this case may be about other things, but those implications are inaccurate. This case is not about the wisdom or effects of similar rules in other markets investigated by the FTC. Nor can the issue in this case be decided by analogy to altogether different conduct undertaken by real estate brokers in other markets that came before courts in 1950 or 1971 or 1980. This case is not about determining public policy for the real estate industry. The complaint in this case concerns Southeast Michigan. The Initial Decision was properly based on the evidence from Southeast Michigan.

This case is not about competition between so-called traditional brokers and non-traditional (limited service or discount) brokers. The Realcomp Policies concern types of listings, not types of brokers. All participants in the Realcomp MLS are equally subject to the Realcomp Policies, and the evidence shows that both traditional and non-traditional brokers use both types of listings.

Having failed to persuade Chief Administrative Law Judge McGuire ("ALJ") that the Realcomp Policies diminished competition in Southeast Michigan, this appeal finds Complaint Counsel challenging the credibility of its own witnesses, and backpedaling to find

a viable legal argument – purporting to reveal the Realcomp Policies as disguised price restraints. These arguments cannot obscure the fact that Complaint Counsel failed to meet its burden. The ALJ's opinion should be sustained, and the complaint should be dismissed.

Factual Background

A. Respondent and Its Environment.

The fundamental facts concerning Respondent, types of listing agreements, the operation of the Realcomp MLS, and the Southeast Michigan real estate market are largely undisputed and reflected in the ALJ's findings of fact. *See* IDF 50-78; 132-281.

B. The Realcomp Policies

1. The Website Policy

As a service to its members, Realcomp transmits Realcomp MLS listing information to certain public websites. These include Realcomp's MoveInMichigan.com, and Realtor.com, the website of the National Association of Realtors®. (RPF ¶89). The MoveInMichigan website, in turn, is "framed" by ClickOnDetroit.com, another public website containing various information concerning the Detroit metropolitan area. (IDF 211; RPF ¶89(b)). Realcomp is under no legal obligation to transmit any listing information to any public website at any time.

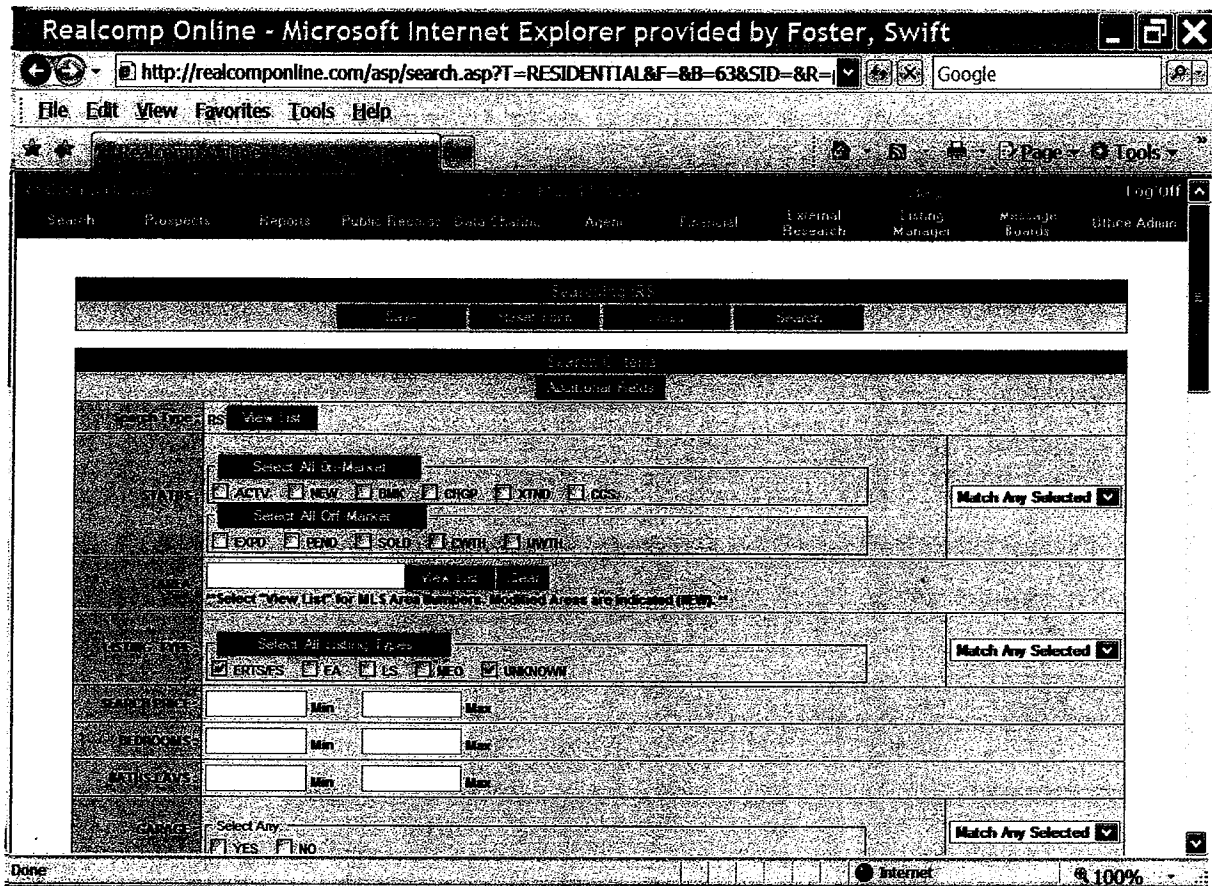
Realcomp also feeds listings to the individual websites of its member brokers. To receive those listing feeds, a broker must agree to permit his or her own listings to be transmitted to other member-broker websites. (RPF ¶89). This is referred to as the Internet Data Exchange ("IDX"). (Kage, Tr. 947-48).

In 2001, Realcomp adopted the "Website Policy," which prevents Exclusive Agency ("EA") listings from being sent to "Approved Websites", meaning Realtor.com, MoveInMichigan.com and the Internet Data Exchange ("IDX"). (IDF 349, 350, 355). Due to the fact that Realcomp did not require listing types to be disclosed by listing brokers until late in 2003, the Website Policy was not implemented until 2004. (RPF ¶¶89, 91).

2. The Search Function Policy

Realcomp members search the MLS for listed properties using Realcomp Online. In or about the fall of 2003, Realcomp changed the Realcomp Online search program to default to Exclusive Right to Sell ("ERTS") and "Unknown" listings ("Search Function Policy"). (RPF ¶¶90-91, 124). Specifically, the search program allows a Realcomp member to search (by checking a box) any or all of the following listing types: ERTS, EA, MLS-Entry Only, and Unknown. Pursuant to the Search Function Policy, the ERTS and Unknown types were pre-selected for each search query. If a member wished to also search EA listings, for example, the member had to check the EA box on the search screen. Similarly, if the member did not want to search ERTS listings, the member had to de-select the ERTS box. In either event, the required action is a single click of the computer mouse. (RPF ¶¶125-126).¹ The ease of making that selection is shown from the screen seen by the user (RX 159) as depicted below:

¹ Members could individually change the initial defaults so that a different combination of listing types (or no listing type) would be pre-selected. (RPF ¶¶127-128).



In April, 2007, Realcomp repealed the Search Function Policy. (IDF 370). It also repealed the definitional requirement that ERTS listings be full-service brokerage agreements. (IDF 375; ID 92).

Argument

I. A wide range of evidence demonstrates that no adverse competitive effects are attributable to the Realcomp Policies.

A. The ALJ's assessments of credibility are entitled to deference.

The witnesses in this case were called predominantly by Complaint Counsel. As we discuss below, those witnesses provided some of the most compelling testimony *against* the position advanced by Complaint Counsel. Although Complaint Counsel protests that the ALJ did not give decisive weight to other testimony of the same witnesses favorable to its position,

the ALJ's observations of those witnesses and his assessment of their credibility is entitled to significant weight. *Universal Camera Corp v NLRB*, 340 U.S. 474, 496-97 (1951) (conclusions drawn by "an impartial, experienced examiner who has observed the witnesses and lived with the case" is given "significance" in assessing NLRB's contrary conclusions); *see also NLRB v. Michigan Conference of Teamsters Welfare Fund*, 13 F.3d 911, 917 (6th Cir. 1993) ("an ALJ's decision to discount a witness' testimony can rest solely on such considerations as the witness' affect or manner, rather than on the existence of contradictory testimony"); *Roadway Express, Inc. v NLRB*, 831 F.2d 1285, 1289 (6th Cir. 1987) ("this court ordinarily will not disturb credibility evaluations by an ALJ who observed the witnesses' demeanor"); *NLRB v. Horizons Hotel Corp*, 49 F.3d 795 (1st Cir. 1995) ("credibility determinations are disturbed only where it is apparent that the ALJ 'overstepped the bounds of reason'").

B. This case is not about competition between full service and discount brokers, and the evidence must be understood in its proper context.

Complaint Counsel's theory of impaired competition rests on the assumption that EA listings are synonymous with discount brokers and ERTS listings are synonymous with more costly traditional brokers. This premise is false.

"Discount" brokers in Southeast Michigan offer discounted (flat fee) ERTS listings (in addition to EA listings). (RPF ¶114). Flat fee 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).

testimony of those discount brokers, as well as other record evidence, belies the theory that the Realcomp Policies have had a significant effect on competition. As the ALJ correctly observed, even in the face of a depressed housing market, the picture that finally emerges from their testimony is one of prosperity and growth. (IDF 464-468; ID 98-99).³

1. The Realcomp Policies have not eliminated consumer choice.

Complaint Counsel argues that the Realcomp Policies prevent brokers from providing a product that consumers want (defined as a bundle of an EA listing with "full exposure") and restrict competition by reducing the package of services available in the market, and further argues that this fact renders the Realcomp Policies anticompetitive on their face. (CCBr. at 26, 28-29). This asserted basis for labeling the Realcomp Policies facially anticompetitive is not supported by the facts or law.⁴ 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 economic expert, Darrell Williams, Ph.D., 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.

³ Although Complaint Counsel's brief argues in the broadest of generalizations, we are compelled to assume that Complaint Counsel selected its witnesses carefully and that, if other brokers had better stories, their stories would be in evidence.

⁴ Complaint Counsel reads *FTC v. Indiana Federation of Dentists*, 476 U.S. 459 as facially condemning any agreement to withhold a service that consumers desire. (CCBr. at 28-29, 35). *Indiana Federation* is a well-known exposition of the truncated rule of reason, but it provides an extremely 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 449-51, 454. In contrast, multiple listing services like Realcomp are joint ventures that are considered procompetitive, e.g., *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1356 (5th Cir. 1980), and may impose restrictions related to the efficient functioning of the venture, e.g., *Reifert v. South Central Wisconsin MLS*, 450 F.3d 312, 321 (7th Cir. 2006).

Moreover, as the ALJ observed (ID 96) 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 websites. (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).

a. Complaint Counsel's argument affirms the existence of a free-rider problem.

By arguing that home sellers using EA contracts, who by definition compete with Realcomp cooperating brokers to find a buyer for their homes (IDF 608-611; ID 121), want the same advertising services ("exposure") from Realcomp afforded to ERTS listings (CCBr. at 28), Complaint Counsel validates the free-riding concern that motivated the Realcomp Policies. *See* §III.A, below.

b. Flat-fee ERTS listings are prevalent in Southeast Michigan.

Flat fee ERTS listings are available in the Realcomp Service Area. (RCCPF ¶1242) and in fact appear to be more prevalent in the Realcomp Service Area than elsewhere (RPF ¶115). 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, Mr. Kermath, a discount broker

who testified for Complaint Counsel, advertises that for a flat-fee of \$699, a seller can have an ERTS listing that reaches the Approved Websites at issue here: the IDX, Realtor.com and MoveInMichigan.com. (RCCPF ¶1146). For comparison, Mr. Kermath offers EA listings for \$499. (RPF ¶114(a); RX 1).

Further, Realcomp has eliminated its "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.*).

c. Nonetheless, the Realcomp Policies have not excluded EA listings from public exposure.

Based on record evidence, the ALJ concluded that, by placing their EA listings into the MLS, which Realcomp has always permitted. (RPF ¶99), limited service brokers reach 80% of all buyers. (IDF 431; ID100; RPF ¶101). If one combines that with also placing those EA Listings onto Realtor.com, which can be done by dual listing the property in another MLS for a nominal charge, (RPF ¶102) the combination reaches 90% of all buyers. (IDF 435; ID 100; RPF ¶101).

Complaint Counsel disputes the ALJ's reliance on these statistics (CCBr. at 30-31), notwithstanding that they come from Complaint Counsel's own witnesses. Those witnesses are market participants whom Complaint Counsel presented to the court as the parties most directly affected by the Realcomp Policies.

(i) The MLS is by far the most important means of disseminating listing information.

The estimates of the significance of the MLS accepted by the ALJ are fully consistent with the entirety of the testimony of Complaint Counsel's witnesses. Mr. Hepp testified that the MLS is substantially more important than any other tool for the sale of residential real estate in Southeastern Michigan, and that the MLS finds a buyer three times more often than any other home selling tool. (RPF ¶98 (a)-(c)). Similarly, Wayne Aronson testified that the MLS is a "considerably more effective" means of promoting residential real estate in Michigan than other websites, including Realtor.com. (RPF ¶98 (d)). Mr. Mincy testified that the MLS reaches 80 percent of all buyers. (Mincy, Tr. 449-450). His website states that the MLS and Realtor.com in combination reach up to 90% of all buyers. (RX 109). Likewise, Mr. Kermath acknowledged that his website tells prospective customers that the MLS and Realtor.com in combination are responsible for 85% to 90% of home sales. (Kermath, Tr. 795; RX 4; RX 5). Mr. Kermath represents to the public that while he has better success with ERTS listings, he nonetheless has "great success" with limited service listings. (RCCPF ¶636).

This testimony is significant because only brokers have access to the MLS. A prospective buyer, sitting at a home computer, does not. The Realcomp MLS is open to discount brokers and traditional brokers alike. (RPF ¶35). Discount brokers receive the benefits of exposure to other brokers that comes from participation in the MLS, and this benefit is not affected by the Realcomp Website Policy.

(ii) Realcomp does not control access to Realtor.com.

To the extent discount brokers wish to place their listings on Realtor.com, they can do so (and they in fact do so) by "dual-listing" the property with another MLS. (IDF 436). The costs of dual-listing are nominal, and the ALJ so found. (IDF 442-443).

Dual-listing is a common practice among discount brokerage firms. (IDF 436). Listings are sometimes entered in more than one MLS for reasons that are completely unrelated to accessing public websites, such as situations in which a sale property is located near a county border. (RPF ¶116).

The discount broker witnesses in this case use the Ann Arbor, Shiawassee and Flint MLSs to get their Exclusive Agency Listings on Realtor.com. (RPF ¶107). Brokers also can place their listings on Realtor.com by listing them in the MiRealSource MLS, following the consent decree between MiRealSource and the FTC that was due to become effective in April 2007. (RPF ¶108).

The costs of dual listing are not significant. The MLSs used by discount brokers to bypass Realcomp charge membership fees (dues) that are comparable to those charged by Realcomp. (RPF ¶109). Even those modest dues payments are avoidable, because brokers can join one of the seven MLSs that have data sharing arrangements with Realcomp, and thereby have their listings posted on the Realcomp MLS without joining Realcomp. (RPF ¶¶102-104).

Any labor cost associated with dual listing is nominal and recoverable. (IDF 443-444). For example, Mr. Mincy dual-lists on the Shiawassee MLS. (RPF ¶107) He charges his clients an additional fee of \$100 for dual-listing, and he convinces virtually all of his

clients to pay the fee. (RPF ¶113). It is not uncommon for discount brokers to charge these additional fees. (RPF ¶113).

Mr. Mincy pays his assistant \$10 per hour to input the dual listings.⁵ (RPF ¶110). The time required to input and update a listing over its entire lifespan is between forty minutes and two hours. (RPF ¶110). Thus, it is a fair inference that Mr. Mincy actually makes a profit from dual listing his properties.⁶

(iii) Other public websites offer an expanding avenue for "exposure."

Websites other than the "Approved Websites" are growing in significance. Complaint Counsel attempts to discredit this testimony (CCBr. at 33-34) without acknowledging that it comes from Complaint Counsel's own witnesses.

Realtor.com and the other Approved Websites are but a few among numerous Internet sources from which the general public can, and does, obtain information about real estate listings (RPF ¶120). The witnesses in this case recognized that the Internet is dynamic, and the question of which sites provide the greatest value to real estate marketing efforts is a "moving target." (RPF ¶118). In light of their growing popularity, those other websites are an economically viable and effective channel for reaching prospective buyers. (RPF ¶119).

Complaint Counsel's discount brokers testified that other publicly available websites for Exclusive Agents, such as Google and Trulia are gaining momentum. (RPF ¶121). Complaint Counsel's expert, Mr. Murray, testified that Google presently has a site that is open

⁵ The testimony indicated that exclusive agents pay anywhere from \$7.00 to \$20.00 per hour for data entry. (RPF ¶110). In fact, Realcomp will enter listing data free of charge to members and subscribers. It takes the Realcomp staff 10-15 minutes to enter a listing, and an additional one to five minutes to update a listing over its life. (RPF ¶110(c)).

⁶ This belies Mr. Mincy's testimony that dual-listing on another MLS (in addition to Realcomp) is an inconvenience and an additional cost. (RPF ¶110 (b)).

to Exclusive Agency Listings, and there is no charge for putting a listing into Google. He acknowledged that Google has publicly announced that it intends to build as large and robust a real estate site as possible. (Murray, Tr. 259-260). Mr. Murray also noted that Trulia is a public website that does not charge for listings and that has grown substantially in the last several months. (RPF ¶121 (a)-(c)).⁷

Mr. Moody believes Google Base will be more important than the IDX in the near future, as the ALJ observed. (IDF 451). (Complaint Counsel calls this statement the "admitted speculation of a non-broker," (CCBr. at 34), notwithstanding that Mr. Moody is Complaint Counsel's own witness, whose testimony Complaint Counsel cites affirmatively in the same paragraph.)⁸ Mr. Moody further testified that MLSs across Michigan are beginning to put their data on to Google Base and Trulia. (RPF ¶121 (d)-(e)).

2. Realcomp Policies have not impeded the ability of discount brokers to compete.

Complaint Counsel argues in the broadest of generalizations that the Realcomp Policies forced discount brokers from the market, deterred the entry of other brokers, and generally impaired their ability to compete. (CCBr. at 19). But the thin testimony on these points provides no credible support for such generalizations.

⁷ The testimony of Complaint Counsel's witnesses undercuts Complaint Counsel's contention that there is no evidence of consumer demand for these services. (CCBr. at 33).

⁸ Mr. Moody's opinion has weight in this regard because he has been involved with computers and databases since 1982 or 1983, website programming since 1985, and database programming since the late eighties, having received an undergraduate degree in electrical engineering, with computers and controls from Michigan Technical University. (RPF ¶121(d)).

a. There is no credible evidence that discount brokers were forced to exit the market.

No discount broker testified that he or she was forced from the market by the Realcomp Policies, except Wayne Aronson of YourIgloo, Inc., an EA real estate company located in Florida.⁹ Mr. Aronson testified that, due to Realcomp's rules, YourIgloo stopped doing business in Michigan. (RPF ¶166 (a)-(d)). Mr. Aronson admitted, however, that his company actually continues to do a substantial referral business in Michigan, and receives compensation for each referral. (RPF ¶166(e)(6)).

More significantly, Mr. Aronson and his Michigan-based broker, Anita Groggins, testified that material problems, having nothing to do with Realcomp, plagued YourIgloo's operations. Among these problems was *increased* competition. Mr. Aronson testified that in 2001, when YourIgloo first entered the Michigan market, it faced few competitors, but by 2004, when YourIgloo decided to exit the market, additional competition had "popped up." (RPF ¶166(e)(2)). YourIgloo's operations also were impaired by bad working relations between the company's management and Ms. Groggins, its on-site broker in Michigan. (RPF ¶166 (e)).

Further, contrary to Mr. Aronson's statements concerning Realcomp, YourIgloo told MiRealSource (a different MLS to which it also belonged) that it was leaving Michigan because it did not like MiRealSource's requirement that a broker located in Michigan be responsible for payments of MiRealSource's fees and charges. (RPF ¶166 (e)). Indeed,

⁹ Thus there is categorically no support for Complaint Counsel's persistent hyperbolic characterization of, e.g., the "few discount brokers who have remained in Southeast Michigan." (CCBr. at 18). Complaint Counsel offered no evidence at trial concerning the market shares of discount brokers. To the contrary, the discount brokers who testified in this case admit that their businesses are growing. (RPF ¶163).

YourIgloo has withdrawn from local operations in other states besides Michigan due to similar business problems. (RPF ¶166 (e)).

There is nothing in the YourIgloo story that lends credence to the idea that the Realcomp Policies caused the company to leave the market. Rather, unlike Mr. Aronson's competitors who testified that their businesses are thriving, YourIgloo suffered from management problems that made it an ineffective competitor. (ID 99).

b. There is no credible evidence that the Realcomp Policies deterred market entry.

The only discount broker 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 has done business in Southeast Michigan since 2004 (when the Realcomp Policies became effective) and acknowledges that his Exclusive Agency business in that area has grown 10% to 35% since 2004. (RPF ¶163(a)).

c. Discount brokers compete successfully in Southeast Michigan.

All of the discount brokers who testified for Complaint Counsel admitted that their businesses are growing in the face of a difficult housing market. Illustrative is Mr. Mincy, who testified that his business has grown since it began in 2004, grew 30% between 2005 and 2006, and was trending upward in February 2007. He expects his business to keep growing throughout Southeastern Michigan. (RPF ¶163(c)).

Similarly, Mr. Hepp testified that his business has grown 10% to 35% in Southeastern Michigan since 2004. (RPF ¶163 (a)). Mr. Kermath testified that AmeriSell has grown substantially since 2003, with over \$46 million in listings – more listings statewide than any

other company. (RPF ¶163 (b)). Mr. Moody testified that Greater Michigan Realty has done very well and is growing. (RPF ¶163(d)). Ms. Moody confirmed that Greater Michigan had approximately 600 listings in 2006, (D. Moody, Tr. 560), compared to an industry average of 25, and generated \$23,275,000 in homes sales in its first year of operation. (RPF ¶163(d)).

This testimony is contrary to Complaint Counsel's theory that discount brokers have been competitively impaired by the Realcomp Policies. If the Realcomp Policies had hindered the ability of discount brokers to offer EA and limited service brokerage contracts in the manner portrayed by Complaint Counsel, one would expect brokers in the market to testify that their revenues and profits have declined, but they did not. It is hard to accept the contention that traditional brokers are stacking the rules against alternative business models, when they are "growing by leaps and bounds." (RPF ¶164).

Complaint Counsel would marginalize this testimony by arguing that even if some brokers are doing well, it does not mean that all brokers are doing well. (CCBr. at 46). Certainly, the adverse economy of Southeast Michigan has had an effect on the livelihoods of *all* real estate brokers, and Realcomp's membership indeed has declined in recent years. (RPF ¶¶82-83). However, no trial witness presented by Complaint Counsel was able, based on first hand knowledge, to relate the Realcomp Policies to any decline in the prospects of his or her business. Indeed, all of the testimony was to the contrary.

Complaint Counsel further avers that the contrary testimony of its own witnesses should be ignored because much of the growth they have experienced is due to business outside of Southeast Michigan. (CCBr. at 46). Again, the record does not support this assertion. No broker testified specifically to this effect. Moreover, the brokers who testified

that they are doing well predominantly conduct their businesses in Southeast Michigan. Mr. Hepp expressly testified as to his company's growth in Southeast Michigan. (Hepp, Tr. 699). Sixty-five percent of Mr. Kermath's listings are in Realcomp, and he is the #2 listing agent in Oakland County (Kermath, Tr. 741, 794; RX 5). Ms. Moody confirmed that 50 to 60 percent of Greater Michigan Realty's listings in 2006 were in Oakland, Wayne, Macomb and Livingston Counties (D. Moody, Tr. 560). Mr. Mincy testified that he is expanding his business in Southeast Michigan and is increasing his advertising in that part of the state. (Mincy, Tr. 429-30).

d. The record shows that many factors affect the use of discount brokers and EA listings.

The evidence shows that discount brokers continue to do business successfully within the Realcomp Service Area, even though sellers (and all types of brokers) of Michigan real estate are enduring a difficult period due to the distressed economy of Southeast Michigan. To the extent discount brokers face challenges, it is not from the Realcomp Policies, but from promoting a business model based on a reduced level of services in a faltering housing market.

The brokers who testified in this matter agreed that Southeast Michigan is a "buyers' market" – *i.e.*, a difficult market for sellers. (RPF ¶¶68-74). Consequently, it is very difficult at present for *any* broker to do business in the Southeastern Michigan residential real estate market. Listings are staying on the market for a long time and there are very few sales. (RPF ¶77). Real estate agents are leaving the business because of these conditions. (RPF ¶¶82-83).

Discount brokers sell a different "product" than traditional brokers. To that point, discount brokers testified that agents who offer EA listings in Southeastern Michigan compete

with other agents offering EA listings. (RPF ¶165). Mr. Sweeney, a traditional broker, agreed, stating that traditional agents in Southeastern Michigan do not perceive discount brokers to be a threat. (RPF ¶179). Mr. Sweeney explained that EA brokers are not considered as competitors to ERTS brokers as they appeal to a different market segment altogether. (Sweeney, Tr. 1326).

In the face of a difficult economy, EA listings have not made significant inroads in Southeastern Michigan. (RPF ¶179). But Complaint Counsel's expert, Mr. Murray, testified that brokers offering EA listings are not growing nationally either. (RPF ¶180). He noted that brokers offering Exclusive Agency listings do not provide the same level of personal service, and do not compete well with full service brokers for trust and professionalism. (IDF 89). Mr. Murray testified that, while 77% of sellers using traditional brokers thought that their agent was paid fair compensation, only 58% of sellers using alternative brokers had the same opinion. (RPF ¶182). Considering that the traditional brokerage model usually bases compensation on a percentage of the sale price, versus the lower, flat-fee compensation prevalent for alternative brokerages, this statistic speaks volumes about the inability of discount brokers to meet seller expectations generally, let alone to meet expectations in a depressed real estate market.

The testifying discount brokers confirmed that they do not provide a significant level of personal service. Mr. Hepp does not meet any Michigan customers face-to-face. (IDF 89; RPF ¶181 (a)). Mr. Kermath likewise testified that he "rarely" meets customers face-to-face. (IDF 89; RPF ¶181(b)). Ms. Moody testified that, generally, she does not meet with her customers on a daily basis or have personal contact with them. (IDF 89; RPF ¶181(c)).

In contrast, Mr. Sweeney testified that in a declining or distressed market, where both the value of a home and the seller's equity are constantly declining, more sellers will choose full service ERTS listings over EA listings because they want and need the professional marketing services of a full-service broker. (RPF ¶197.)

Mr. Murray (Complaint Counsel's expert) described national statistics that are consistent with these observations. Nationally, EA listings grew significantly between 2002 and 2005, from 2% to 15% of listings, which Mr. Murray attributed in considerable part to a "hot" real estate market. (RPF ¶168). However, between 2005 and 2006, the percentage of EA listings fell from 15% to 8%, which Mr. Murray attributed to a cooling of the housing market marked by a decrease in sales and increase in inventory. (RPF ¶169). (Complaint Counsel attempts to obscure this cogent observation as the testimony of "one witness" – not acknowledging that Mr. Murray is Complaint Counsel's chosen expert.) Mr. Murray concluded that alternative brokerage models are not getting the "traction" that the "industry buzz" would suggest. (RPF ¶171).

Mr. Murray's observations are consistent with the data presented by Complaint Counsel's economic expert, Dr. Williams. His data showed that, in the six "Control MSAs" used in his study (*i.e.*, where the local MLS had no restrictions similar to the Realcomp Policies), the share of EA listings was roughly flat (*i.e.*, no growth) from September 2003 through the end of 2006. Respondent's economic expert, David Eisenstadt, Ph.D., reviewed those data and concluded that the evidence does not suggest that discount brokers are going to grow significantly over time beyond their current market share. (RPF ¶173).

e. **"Contrary" evidence cited by Complaint Counsel is not persuasive.**

Complaint Counsel argues that no full service broker or Realcomp Governor testified that they use EA listings, which supposedly demonstrates that the Realcomp Policies were effective in restricting competition from discount brokers. (CCBr. at 29). That syllogism is inconsistent with the record, which shows one full service broker declining to sell EA listings for business reasons (Sweeney, Tr. 1322), discount brokers stating that they compete in Southeastern Michigan with other discount brokers, not full service brokers (RPF ¶165), and Dr. Eisenstadt's finding that traditional brokers account for as much as 60% of the EA listings on the Realcomp MLS. (RCCPF ¶190). Thus, no adverse inference can be drawn from the fact that some brokers cited by Complaint Counsel prefer one business model over another.

Complaint Counsel also argues that cooperating brokers viewed and e-mailed EA listings with less frequency than ERTS listings. From this, Complaint Counsel infers that the Realcomp Search Function Policy was effective in limiting "exposure" of EA listings. (CCBr. at 15, 34). Although the statistics cited by Complaint Counsel are correct, the inference is not. The limited service business model is, by definition, one of providing less than full services to home sellers. Some limited service brokers provide no assistance with marketing or negotiation. EA listings involve the inherent possibility that the home seller will elect to find a buyer without the services of a cooperating broker. The record contains ample testimony showing that such factors can discourage brokers from pursuing EA listings. (Kage, Tr. 1038 (home sellers impose on cooperating agents to provide services that their limited service listing broker does not provide); CX 43 (Hardy, Dep. at 127-28) (EA listings impose " a significant amount of work" on the cooperating broker); CX 421 (Whitehouse,

Dep. at 114-15) (risk of non-compensation); Sweeney, Tr. 1358 (EA listings burdensome to cooperating broker)). These observations indicate that one cannot confidently attribute cooperating brokers' lack of enthusiasm for EA listings to the Search Function Policy.

3. The expert evidence on which Complaint Counsel seeks to rely is critically flawed.

The ALJ correctly gave little weight to the analyses of Complaint Counsel's expert, Dr. Williams, finding them methodologically flawed and unreliable. (IDF 511; ID 105). Respondent's economic expert, Dr. Eisenstadt presented contradictory findings and testified specifically to the deficiencies in Dr. Williams' analysis. Dr. Williams failed to rebut Dr. Eisenstadt's testimony.

a. Dr. Williams' time series analysis is unsound.

Judge McGuire was not mistaken in rejecting Dr. Williams' time series analysis. Dr. Williams claimed he found evidence of adverse effects from the Realcomp Policies in his determination that the average monthly share of new EA listings (*i.e.*, as a percentage of total new listings) declined from approximately 1.5% to approximately 0.7%, between January, 2004 and September, 2006. (RPF ¶196). He claimed that using the monthly average percent of new EA listings insulated the calculation from "market flux" because the percentage ratio of EA to ERTS listings should not change even if total listings decline. (RPF ¶197). This is an incorrect assumption.

Dr. Williams admitted that he is not a real estate expert. (RPF ¶197). Respondent's witness, Kelly Sweeney, an experienced broker in Southeast Michigan since 1975 (Sweeney, Tr. 1302-1304), testified that in a buyers' market, more sellers will choose full service ERTS listings over EA listings because they want and need the professional marketing services of a

full-service broker. Mr. Sweeney observed that the EA model is therefore more prevalent in sellers' markets such as California or Arizona, than in Southeast Michigan. (RPF ¶197). This is consistent with testimony offered by Mr. Murray concerning the declining use of EA listings nationally. (RPF ¶169).

Thus, in a distressed market such as Southeast Michigan, one *indeed* would expect the relative percentage of EA listings to decline over time. (ID 106). Because Dr. Williams failed to take into account the likely impact of market conditions, his time series analysis is not reliable evidence that the Realcomp Policies had any effect on the percentage of EA listings.

b. Dr. Williams' benchmark comparisons are likewise flawed.

Two of Dr. Williams' analyses relied on comparisons of the prevalence of EA listings in Metropolitan Statistical Areas (MSAs) where the local MLS had no restrictions similar to the Realcomp Policies during 2005-2006 (the "Control MLSs") to that in MSAs (including Southeast Michigan) where such restrictions existed during that period (the "Restriction MLSs").

(i) Dr. Williams' methodology for selecting the Control MSAs was unsound.

Dr. Williams selected six Control MLSs (Charlotte, Dayton, Denver, Memphis, Toledo, and Wichita) on the basis of seven economic and demographic characteristics that he believes are "likely to affect the level of non-ERTS listings". (RPF ¶199). He selected the Control MLSs by ranking his possible choices according to their respective "closeness" to the Detroit MSA across the economic and demographic characteristics. He did so by computing

the difference in standard deviation units from Detroit for each of the characteristics and then summing the (absolute value) of those differences for each MSA. (RPF ¶200).

As Dr. Eisenstadt explained, the problems with this methodology are significant. Dr. Williams never explained why any of his criteria (*i.e.*, the economic and demographic characteristics) would affect the choice of an EA contract, or why he gave all of the factors equal weight. Weighting each factor the same would only make sense if each factor had the same potential effect on the share of EA listings, a condition which is both implausible and counter to the facts. (RPF ¶201).

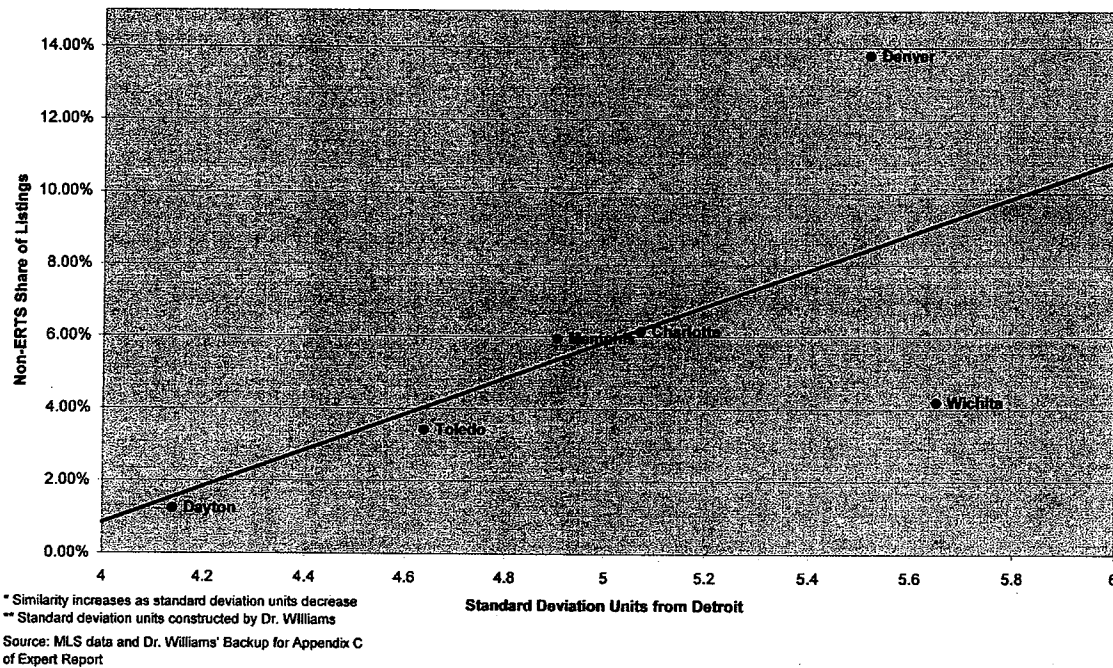
The list of potential choices from which Dr. Williams selected his Control MSAs omits cities (*e.g.*, Pittsburgh) that intuitively might be more similar to Detroit in terms of being Midwestern industrial areas than, for example Charlotte or Memphis. (RPF ¶202).

The flaws of Dr. Williams' comparisons are shown by the wide variation in the percentage of EA listings within that group. The percentages range from a low of approximately 1% in Dayton to a high of almost 14% in Denver. Dayton, the MSA closest to Detroit under Dr. Williams' methodology, (RPF ¶ 148(b)) had an EA share (1.24%) only slightly above Realcomp's (1.01%). The next lowest MSA, Toledo, has an EA share (3.4%) nearly three times that of Dayton. The MSA with highest EA share, Denver, which was 5th (out of 6) in closeness to Detroit, had a share more than 10 times that of Dayton. (RPF ¶203). As Dr. Eisenstadt noted, if Dr. Williams had correctly identified economic and demographic factors that determine the share of EA contracts at the MSA level, one would expect the EA shares of the Control MSAs to be very similar. Instead, the wide variation demonstrates that

Dr. Williams did not account for the factors that actually determine EA shares in the Control MSAs. (RPF ¶204).¹⁰

This conclusion is dramatically illustrated by RX 161-Page 36, which depicts the strong positive association between a Control MSA's similarity to Detroit and its EA share. MSAs that are statistically "closest" to the Detroit MSA (by Dr. Williams' criteria) have lower EA shares than control MSAs that are statistically more distant. (RPF ¶206).

Figure I
Non-ERTS Shares of Control MLSs and Similarity to Detroit



RX 161-Page 36

¹⁰ Significant differences exist among the six control MSAs even with respect to the different economic and demographic characteristics that Dr. Williams used. (RPF ¶205).

(ii) The selection of the Restriction MSAs was arbitrary.

In addition to Realcomp, Dr. Williams' group of Restriction MLSs included Green Bay, Williamsburg, and Boulder, all of which are much smaller urban areas than Detroit.¹¹ Significantly, the selection of this grouping was not made by Dr. Williams, but by FTC staff, and Dr. Williams could not describe any criteria for their selection other than the availability of data. (RPF ¶207). But if Dr. Williams believed that the integrity of his work depended on selecting Control MSAs based on their comparability to Detroit (*i.e.*, using his economic and demographic factors), the Restriction MSAs would need to be comparable as well. Dr. Williams' failure to do so means that he attributed differences in EA shares between Control MSAs and Restriction MSAs to the restrictions when those differences could instead be due to variations in his economic and demographic factors. (RPF ¶208).

c. Dr. Williams' resulting "benchmark" comparisons are not probative.

Dr. Williams attempted to compare the prevalence of EA listings in Control MSAs and Restriction MSAs over time. The purported difference in EA shares between the two types of MLSs ranged between 5 and 6 percentage points. (RPF ¶¶209-210). The ALJ correctly found this evidence had no probative value. (ID109).

As Dr. Williams explained, his calculations of the average EA percentages for the Control MSAs and the Restriction MSAs were weighted based on the number of listings. This means that larger MSAs counted more toward the average than the smaller MSAs. Further, by pooling or combining all Control MSAs together, the closeness of any MSA to

¹¹ Dr. Williams' analysis shows that the MSA in which Williamsburg is located ranks 28th in terms of closeness to Detroit, significantly more distant than any of the Control MSAs. Green Bay-Appleton and Boulder each have populations less than 500,000, and for that reason alone they would have been excluded from Dr. Williams' sample of Control MSAs. (RPF ¶207).

Detroit (*i.e.*, the lowest summed standard deviations) was not a factor in Dr. Williams' estimate of the difference between EA shares in the two types of MSAs (*i.e.*, those with restrictions similar to the Realcomp Policies, and those without). (RPF ¶211).

As the ALJ found, the outcome of Dr. Williams' analysis was pre-ordained. (ID 109). Denver, the largest of the Control MSAs, is both (a) the second most *dis*-similar Control MSA to Detroit and (b) the MSA with the highest EA share. (RPF ¶212). Dr. Williams' method of analysis gave Denver significantly more weight in this comparison of Control MSAs to Restriction MSAs than, for example, Dayton – the Control MSA most similar to Detroit but having the smallest EA share among the Control MSAs. (RPF ¶213).

Thus, as the ALJ observed, "It is wholly unsurprising that Dr. Williams was able to conclude that the Control Group MSAs had a higher percentage of EA listings." (ID 109). Dr. Williams' analysis says nothing about the competitive effects of the Realcomp Policies. Dr. Williams offered no opinion as to why Denver should have more influence in this analysis than Dayton or any of the other Control MSAs. This was not a scientific method.

Respondent's expert, Dr. Eisenstadt, also performed direct comparisons of Realcomp (*i.e.*, the Detroit MSA) to Dr. Williams' Control MSAs. Dr. Eisenstadt testified that, using Dr. Williams' rankings of the Control MSAs, it would be most logical to compare Realcomp to Dayton, the MSA most statistically similar to Detroit. As noted, Dayton's percentage of EA listings (1.24%) was not significantly different from Realcomp's EA share during the same period (1.01%). (RPF ¶214).

Complaint Counsel attempts to argue (CCBr. at 52) that Dr. Williams' comparisons are nonetheless valid for two reasons. One is that the unweighted average EA share of the

Control MLSs is also higher than that of Realcomp. But as noted above and as illustrated by RX 161-Page 36 (reproduced above), the Control MLSs vary widely in terms of "closeness" to the Detroit MSA using Dr. Williams' criteria. Thus, whether weighted or unweighted, the comparison of averages to Realcomp (the Detroit MSA) has no informative value.

Complaint Counsel also argues (CCBr. at 52) that low EA listing shares of the Restriction MLSs confirms that the Realcomp Policies accounted for the small EA share on the Realcomp MLS, and argues that the fact that the Restriction MLS cities are dissimilar from Detroit bolsters the conclusion. This is nothing more than Complaint Counsel's speculation. Dr. Williams did not perform an econometric analysis of the Restriction MLSs, and did not testify to this point. Moreover, if the "closeness" factors relied upon by Dr. Williams mattered for purposes of comparing Realcomp to the Control MLSs (as Dr. Williams testified), then they must also matter for purposes of drawing a comparison among the Restriction MLSs, and Complaint Counsel is now contradicting its own expert. Further, the only Restriction MSA (Williamsburg) that appears in Dr. Williams' "closeness" rankings was not only dissimilar to Detroit but was also dissimilar to the Control MSAs.¹² This more logically suggests, consistent with the ALJ's criticism of Dr. Williams' methodology, that economic and demographic characteristics explain low EA listing shares in the Restriction MLSs, rather than the existence of restrictions.

¹² The six Control MLSs ranked 2nd, 3rd, 6th, 7th, 9th, and 10th in Dr. Williams' array. Williamsburg ranked 28th.

d. Dr. Williams' regression analyses were methodologically unsound.

Dr. Williams also relied on statistical regression analyses in an attempt to estimate the effects of the Realcomp Policies. Dr. Williams believed that his results showed that, all else equal, the prevalence of EA listings in the Restriction MLSs is 5.5 percentage points lower than in the Control MLSs. (RPF ¶140). From this, Dr. Williams predicted that the percentage of EA listings in Realcomp would be higher, and the use of ERTS listings would be lower, in the absence of the Realcomp Policies. (RPF ¶217). However, Dr. Williams' predictions were appropriately discredited by the ALJ. (ID 110-112).

As discussed above, in evaluating and selecting the Control MSAs, Dr. Williams identified eight economic and demographic factors that he believed are likely to affect home sellers' choice listing contract type (*i.e.*, EA or ERTS) (RPF ¶219), although he never revealed the bases for his beliefs. Nonetheless, Dr. Williams did not actually use any of those eight factors as independent variables in his regression analysis. (RPF ¶220). That means that – even though Dr. Williams believed that the eight factors affected the choice of listing contract type – he did not isolate the effects of those factors from the existence or absence of MLS restrictions in trying to decide whether MLS restrictions affected the use of EA contracts in the MSAs.

As Dr. Eisenstadt explained, Dr. Williams' omission would not be a problem if the eight factors did not vary much from MSA to MSA. But Dr. Eisenstadt found that the eight factors varied dramatically from MSA to MSA. (RPF ¶221). Consequently, Dr. Williams' analysis attributed to the existence of MLS restrictions (what he calls the "RULE" variable) outcomes that are affected by – and could be attributable to – economic and demographic

variables. (RPF ¶222). In light of this omission, Dr. Williams' regression results were not reliable and did not establish that the Realcomp Policies adversely affected the use of EA contracts in the Realcomp service area.¹³

e. Dr. Eisenstadt demonstrated no adverse effect when he corrected Dr. Williams' errors.

Dr. Eisenstadt re-estimated Dr. Williams' analysis, using the same regression model but adding separate independent variables for each of the eight economic and demographic factors that Dr. Williams identified as relevant to the prevalence of EA listings (but which he omitted from his analysis), as well as several other economic and demographic factors that Dr. Eisenstadt identified as likely to affect contract choice both across and within the MSAs. (RPF ¶¶226-227). Dr. Eisenstadt's re-estimation demonstrated that additional economic and demographic characteristics should be included as independent variables in the regression, because a high number of them (thirteen) proved to be statistically significant at the generally accepted level of confidence. (RPF ¶228).

When the other relevant variables were included in the analysis, Dr. Eisenstadt found that the effect of the Realcomp Policies on the share of EA contracts was less than one-quarter of one percentage point and that this effect was not statistically significant (*i.e.*, it was not predictably different from zero). (RPF ¶229). Dr. Eisenstadt's results demonstrated that the difference between the percentage of EA listings in the Realcomp service area, and the

¹³ Dr. Williams' analysis did include some housing characteristics as independent variables in one equation. However, only one of those variables (number of bedrooms) was statistically significant to the analysis. (RPF ¶¶223-224). Accordingly, all of the effects Dr. Williams purported to measure from his analysis were incorrectly attributed to the existence of MLS restrictions. As Dr. Eisenstadt explained, Dr. Williams' regression analysis was nothing more than a simple test for the difference between the weighted average EA share in the six Control MSAs versus the weighted average EA share in the four Restriction MSAs. In other words, his results were simply a more convoluted restatement of his "benchmark" analysis. (RPF ¶225).

average EA share for Control MSAs was more likely due to economic and demographic differences than to the Realcomp Policies. (RPF ¶229).

Dr. Eisenstadt then estimated the same regression equation with the inclusion of a separate "RULE" variable for each of the Restriction MSAs. This step isolated the effects (on choice of listing contract type) of the Realcomp Policies from the effects of the restrictions in the other Restriction MSAs. (RPF ¶230). This analysis found that the adverse effect of the Realcomp Policies on the percentage share of EA contracts in the Detroit MSA was less than one ten-thousandth of a percentage point and was not statistically significant. (RPF ¶230).

Dr. Eisenstadt's work demonstrated beyond doubt that Dr. Williams' analyses were unreliable and could not support Complaint Counsel's burden of proving anticompetitive effects from the Realcomp Policies. (ID 113).

f. Dr. Williams' analysis, even if it were valid, did not directly estimate harm to consumers.

Dr. Williams attempted to measure only the purported effect of the Realcomp Policies on the prevalence of EA listings. As Dr. Eisenstadt explained, and the ALJ found, Dr. Williams' analysis thus provided only an indirect test for anticompetitive effect. (IDF 572). That is, Dr. Williams surmised from his (unreliable) estimate of a reduced prevalence of EA listings that consumers would pay higher prices for brokerage services, but Dr. Williams did not specifically attempt to estimate (statistically) any such price effects. He also did not investigate whether sellers of residential properties who used EA listings on the Realcomp MLS received higher or lower sale prices for their properties. (RPF ¶232). Additionally, Dr. Williams specifically testified that he did not analyze the effect of Realcomp's restrictions on the number of days that homes remain on the market before sale, or whether commission rates

on ERTS listings are higher when MLSs impose restrictions in the nature of the Realcomp Policies. (RPF ¶232). Thus, even if Dr. Williams' test and statistical results were valid, they would be insufficient to demonstrate that the Realcomp Policies caused measurable harm to price competition between traditional and non-traditional brokers, or to consumers (home buyers and sellers). (RPF ¶232).

Further, as discussed above, the testimony of the discount brokers in this case was inconsistent with the inferences that Dr. Williams sought to draw from his flawed regression analyses.

g. Dr. Williams' efforts to rehabilitate his work were unsuccessful.

In rebuttal to Dr. Eisenstadt's critique, Dr. Williams re-ran his statistical analyses adding some – but not all – of the economic and demographic variables that Dr. Eisenstadt believed were significant. Dr. Williams testified that those results also showed adverse effects on EA listings. (D. Williams, Tr. 1678-79). The fact that Dr. Williams used some – but not all – of Dr. Eisenstadt's additional variables accounted for the different result. Dr. Eisenstadt testified as to Dr. Williams' omissions and explained the reasons for including all of the additional variables in the analysis. (RCCPF ¶1101).¹⁴

More specifically, Dr. Williams did not think it necessary to include certain economic and demographic variables at both the MSA and zip code levels, which he deemed "double-counting." (Williams, Tr. 1702-03). However, Dr. Eisenstadt explained that those factors should be measured at both the county or zip code level, as well as at the MSA level, "because

¹⁴ Complaint Counsel argues that there is no evidence in the record that buyers actually consider any of these variables. (CCBr. at 54 n. 20). But these characteristics were first identified by Complaint Counsel's own expert, Dr. Williams as "likely to affect the level of non-ERTS listings." (RPF ¶199).

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).¹⁵ The ALJ found this testimony credible in discounting Dr. Williams' attempted rehabilitation of his regression results. (ID 113).

h. The ALJ properly ignored Dr. Williams' testimony regarding "multicollinearity."

Complaint Counsel, far from extolling the validity of its expert's regression analyses, primarily asserts that Judge McGuire erred in failing to accept Dr. Williams' effort to discredit Dr. Eisenstadt on the basis of a statistical issue called "multicollinearity." Complaint Counsel even suggests that Judge McGuire was "mindless" in this regard. (CCBr. at 54-55). However, Judge McGuire correctly found this concern to be inapplicable in light of Dr. Eisenstadt's explanation, as described in the preceding section. (ID 113). Moreover, Dr. Williams' testimony on this point was confused, inconsistent, unreliable, and emblematic of his overall credibility.

¹⁵ 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).