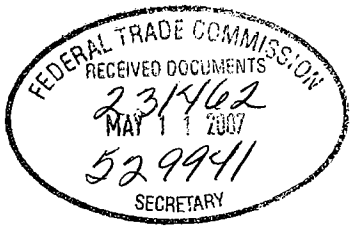
# ORIGINAL

**PUBLIC VERSION**




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

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

**Docket No. 9320**

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

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## I. Introduction

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

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

## II. Factual Background

### A. Industry Background

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

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

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

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

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

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

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

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

[2] Specifically, these services are: (1) Arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) Accept and present to the seller(s) offers to purchase procured by Cooperating Brokers; (3) Advise the seller(s) as to the merits of the offer to purchase; (4) Assist the seller(s) in developing, communicating, or presenting counteroffers; and (5) Participate on behalf of seller(s) in negotiations leading to the sale of listed property. (Realcomp Admissions, No. 4; CX 100 at RC 1341.)

the MLS but does not provide any of the five minimum services. (CX 100 at RC 1341.) Limited service brokers typically use EA contracts that are considered to be either LS or MEO listings under Realcomp rules.

**B. Challenged Conduct**

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

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

## III. Legal Standard for Summary Decision

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

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

## IV. Argument

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

### A. The Challenged Conduct Represents Concerted Action

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## C. Realcomp Has Market Power

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

In cases challenging the membership criteria of an MLS as a concerted refusal to deal, courts have found market power based on evidence that the MLS has sufficient economic importance such that the broker's exclusion results in the denial of an opportunity to compete effectively on equal terms.[6] *See, e.g.*, *Realty Multi-List*, 629 F.2d at 1373 (specifically rejecting requirement that the MLS must be a monopoly in the relevant market); *Thompson*, 934 F.2d at 1580 (adopting *Realty Mutli-List* standard); *accord Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 296 (1985) (holding that group boycott would be subject to *per se* treatment if the cooperative "possesses market power or exclusive access to an element essential to effective competition"). "At the least, when broker participation in the listing service is high, the service itself is economically successful and competition from other listing services is lacking," the MLS should be found to have market power and any unjustified exclusionary rules should be deemed unreasonable. *See Realty Multi-List*, 629 F.2d at 1373-74.[7]

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

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

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

**[REDACTED]**

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

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

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

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

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

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

[8] **[REDACTED]**

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

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

**[REDACTED]**

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

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

**D. Realcomp's Alternative Requests for Relief Should Be Denied**

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

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[9] **[REDACTED]**

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

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

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

Date: May 11, 2007

Respectfully Submitted,

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PUBLIC VERSION

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## COMPLAINT COUNSEL'S STATEMENT OF DISPUTED FACTS

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

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

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