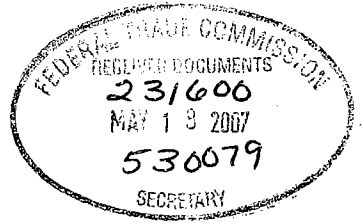


ORIGINAL

UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION



In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

Public

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

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

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Sean Gates", written over a horizontal line.

Sean Gates  
Peggy Bayer Femenella  
Joel Christie  
Linda Holleran  
Christopher Renner

*Counsel Supporting the Complaint*

Bureau of Competition  
Federal Trade Commission  
601 New Jersey Avenue, NW  
Washington, D.C., 20580  
sgates@ftc.gov  
(202) 326-3711  
Facsimile: (202) 326-3496

Dated: May 18, 2007

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

**In the Matter of**

**REALCOMP II LTD.,**

**a corporation.**

**Docket No. 9320**

**Public**

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

Sean Gates  
Peggy Bayer Femenella  
Joel Christie  
Linda Holleran  
Christopher Renner

*Counsel Supporting the Complaint*

Bureau of Competition  
Federal Trade Commission  
601 New Jersey Avenue, NW  
Washington, D.C., 20580  
sgates@ftc.gov  
(202) 326-3711  
Facsimile: (202) 326-3496

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

**I. INTRODUCTION AND BACKGROUND**

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

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

witnesses are also mere post-hoc rationales for the Polices, devoid of any evidentiary value. Accordingly, Complaint Counsel seek an Order precluding such testimony at the hearing of this matter or by deposition.<sup>1</sup>

## II. ARGUMENT

### A. Legal Standard

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

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

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

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

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

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

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

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

Board of Governors passed these rules?

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

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

A. No, I do not.

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

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

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

A. No, I don't.

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

A. No, I don't.

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

A. No.

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

A. No.

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

A. No, I really don't.

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

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

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

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

Complaint Counsel request an Order precluding this testimony.

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

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

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

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

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



A. I just don't know.

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

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

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

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

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

A. No.

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

A. Yes.

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

A. Yes.

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

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

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

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

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

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

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

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

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

**E. Fact Witnesses May Not Provide Expert Testimony.**

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

**III. CONCLUSION**

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

Realcomp's Policies.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Christopher Renner', written over a horizontal line.

Christopher Renner  
Complaint Counsel

Dated: May 18, 2007

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

**In the Matter of**

**REALCOMP II LTD.,**

**a corporation.**

**Docket No. 9320**

**Public**

**DECLARATION OF PEGGY BAYER FEMENELLA**

I, Peggy Bayer Femenella, make the following statement:

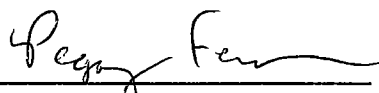
1. I am an Attorney in the Bureau of Competition of the Federal Trade Commission. I serve as Complaint Counsel in this matter.
2. Pursuant to Paragraph 5 of the Scheduling Order, I conferred with Steve Lasher, counsel for Realcomp on May 17, 2007, in an effort in good faith to resolve the issues raised by this Motion, and we have been unable to reach an agreement.
3. Pursuant to Pursuant to Rule 3.24(a)(2) and 3.24(a)(3) of the Commission's Rules of Practice, 16 C.F.R. §§3.24(a)(2) and 3.24(a)(3), I submit this declaration solely to bring before the Court documents and deposition transcripts relevant to Complaint Counsel's Motion in Limine and Memorandum in Support of Motion in Limine Requesting an Order Barring Lay Opinion Testimony Regarding Supposed Justifications For Realcomp's Rules and Policies.
4. The materials submitted to the Court in the Appendix to the Memorandum in Support of Complaint Counsel's Motion in Limine Requesting an Order Barring Lay Opinion Testimony Regarding Supposed Justifications For Realcomp's Rules and Policies are true and correct copies of the following:

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

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

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

Executed on May 18, 2007.

  
Peggy Bayer Femenella

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

**In the Matter of**

**REALCOMP II LTD.,**

**a corporation.**

**Docket No. 9320**

**Public**

**[PROPOSED] ORDER**

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

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

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

**ORDERED:**

Date:

\_\_\_\_\_  
Stephen J. McGuire  
Chief Administrative Law Judge



**CERTIFICATE OF SERVICE**

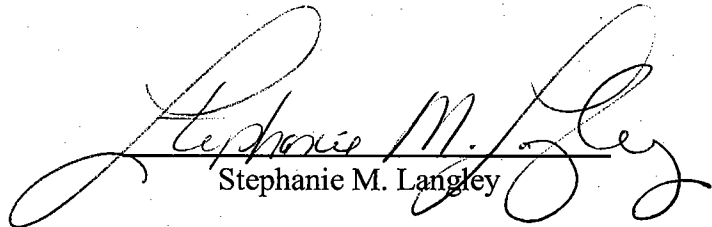
This is to certify that on May 18, 2007, I caused a copy of the attached Complaint Counsel's Motion in Limine to Bar Lay Opinion Testimony Regarding Supposed Justifications for Realcomp's Rules and Policies, the Memorandum in Support of its Motion *In Limine*, a Declaration of Peggy Bayer Femenella and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

by hand delivery to:

The Honorable Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

and by electronic transmission and overnight courier to:

Scott Mandel, Esq.  
Foster, Swift, Collins & Smith P.C.  
313 South Washington Square  
Lansing, MI 48933-2193

  
Stephanie M. Langley

**UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION**

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

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

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

**RESPONDENT WITNESSES**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

**7. Walt Baczkowski**

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

**8. Marty Nowak**

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

**9. Dale Smith**

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

**10. Dreu Adams**

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

**11. Virginia Bratt**

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

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

**12. Dave Elya**

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

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

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

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

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

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

**15. Dan Mulvihill**

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

**16. Gerald Burke**

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

**17. Gary Moody**

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

**18. Albert Hepp**

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

**19. Jeff Kermath**

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



