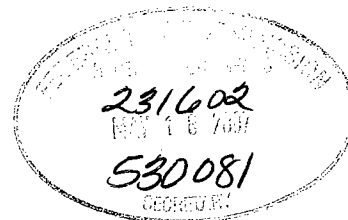


ORIGINAL

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 COMPARISONS OF SOUTHEASTERN  
MICHIGAN WITH OTHER LOCALES.**

Complaint Counsel respectfully submit this Motion *in limine* for an Order barring testimony, whether live or by deposition, by Douglas Hardy, Dale Smith, Kelly Sweeney, Douglas Whitehouse, and any other Respondent witnesses without personal knowledge of the matters testified to, regarding any comparison of the market for residential real estate in southeastern Michigan with any other market or locale, 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 COMPARISONS OF SOUTHEASTERN MICHIGAN WITH OTHER LOCALES

Sean Gates  
Peggy Bayer Femenella  
Joel Christie  
Linda Holleran  
Christopher Renner

*Counsel Supporting the Complaint*

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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 comparisons of the residential real estate market in southeastern Michigan with any other location or market without an adequate foundation in the witness’ personal knowledge.

**I. INTRODUCTION AND BACKGROUND**

In its Final Proposed Witness List, Realcomp has indicated that it expects several of its witnesses – Douglas Hardy, Dale Smith, Kelly Sweeney, and Douglas Whitehouse – to offer testimony, at trial and by deposition, comparing the market for residential real estate in Michigan with other markets around the country. Specifically, Realcomp expects Messrs. Hardy, Sweeney, and Whitehouse to testify to “the residential real estate market in Michigan and how that compares to other markets.” (Realcomp’s Final Proposed Witness List at 2-3.) Realcomp also intends to introduce deposition testimony of Mr. Smith on the “unique” nature of the “Southeastern Michigan residential real estate market” that “has made the market very competitive.” (Realcomp’s Final Proposed Witness List at 5.)

The witnesses’ sworn deposition testimony, however, shows that none have personal knowledge of the market for residential real estate beyond southeastern Michigan. Absent such personal knowledge, any testimony these witnesses give comparing southeastern Michigan with any other locale will necessarily be based entirely on conjecture and hearsay. 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, 404 (3d Cir. 1980); *Hartzell Mfg. v. American Chem. Technologies*, 899 F. Supp. 405, 409 (D. Minn. 1995) (“[a] lay witness’s opinion testimony must be based upon his or her personal perceptions and,

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

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 the State or Condition of the Residential Real Estate Industry Beyond Southeastern Michigan.**

To offer lay opinion testimony comparing the southeastern Michigan real estate market to another market in another locale, the witnesses must have actual personal knowledge of *both* the southeastern Michigan market *and* the market they compare. Courts consistently reject lay testimony offering comparisons when the witness lacks personal knowledge of the facts as to which they offer the comparison. In *Adams v. Wal-Mart Stores, Inc.*, 324 F.3d 935, 940 (7th Cir. 2003), for example, an employment discrimination plaintiff was not allowed to introduce evidence of disparate treatment of comparably situated employees when she had no personal knowledge of the treatment of those employees. Similarly, in *Bogle v. Orange County Bd. of County Comm’rs*, 162 F.3d 653, 658 (11th Cir. 1998), the court rejected “unverified, anecdotal” accounts of disparate treatment of allegedly comparable employees when “the witnesses who testified regarding these other incidents had no personal knowledge [of them].” Because the witnesses lack personal knowledge of any other supposed comparable market, Complaint Counsel request an Order precluding testimony that offers such a comparison.

Mr. Smith, who is not an active real estate practitioner, has no personal knowledge of the real estate market outside southeastern Michigan. As the executive officer of a local association of Realtors in southeastern Michigan since 1998, he has not had the opportunity to gain personal knowledge of current market conditions outside of southeastern Michigan. Smith Dep. at 6:10-

7:4. His opinions on market conditions outside of southeastern Michigan are hearsay:

- Q. Can you just fill me in a little bit further what you mean when you say currently the market is very competitive out there, define kind of geographically what market you're referring to, and how it's competitive? ...
- A. Sure. When I go to the National meetings, I normally go to the meetings where the chief economist is talking about all the great things that are happening around the country. And they're talking about those areas that are experiencing difficulty. They talk about difficulty, meaning where the appreciation rate has slowed down. And then they follow that by saying, but we're not talking about southeast Michigan. They're in a group all by themselves. And so that I believe from talking to my members is pretty much what they're facing out there. Unemployment is higher than in most areas. Housing stays on the market longer from what the people are telling me ... and the presumption at that point would be there'd be less business in that kind of market than there would be in a hot market.

Smith Dep. at 36:15-37:11. Mr. Smith is speculating, and doing so based on the statements of unidentified declarants. This is not the stuff of which reliable, admissible lay opinion testimony is made. *See Bogle*, 162 F.3d at 658 (rejecting “unverifiable, anecdotal” accounts of allegedly comparable employees). In fact, even Mr. Smith’s knowledge of the southeastern Michigan real estate market is based on hearsay:

- Q. Going back a little bit, you indicated given these economic conditions it's your belief that brokers are negotiating everything. Can you elaborate on that a little bit?
- A. I guess it's more from osmosis than it is from research of the market territory. When brokers come in, they have a tendency to say, you know, I've got a great market, and I'm happy, or my market has slowed down, and I'm not happy, and we're getting more of the latter than we are of the former comments. People are telling us that it is a rough market to operate in at this point, and we normally hear that side chatter as we put together committee meetings or meetings for the educational programming.

Smith Dep. at 38:6-38:19. Mr. Smith should not be permitted to opine on the state of the residential real estate market either in or beyond southeastern Michigan, let alone to compare the two, based on this sort of unattributed “chatter.”

Messrs. Hardy, Sweeney, and Whitehouse, all of whom are active real estate practitioners, have no personal knowledge of the real estate market outside of southeastern Michigan. Each is affiliated with a brokerage firm that derives the vast majority of its income from just a few counties in southeastern Michigan. Moreover, because licensing requirements for real estate practitioners are a creature of the laws of each individual State, these witnesses – all of whom are licensed in Michigan – would not even have had the *opportunity* to acquire personal knowledge of real estate markets beyond southeastern Michigan. Indeed, none of these witnesses is a member of a Multiple Listing Service (“MLS”) outside of Michigan. Without any personal knowledge of market conditions beyond southeastern Michigan, and without the opportunity to acquire such knowledge, these witnesses cannot offer admissible testimony concerning comparisons with other markets. *See Adams*, 324 F.3d at 940 (rejecting comparison testimony based on “conclusory assertions about incidents outside [the witness’] personal knowledge”).

Mr. Hardy has no personal knowledge of the real estate market outside southeastern Michigan. Mr. Hardy is affiliated with two brokerages, both of which are focused on southeastern Michigan:

Q. Okay. And why don't you tell me which areas your Century 21 Today covers.

A. Oakland and Wayne County, and some Macomb County.

...

Q. What about Sotheby's, your Sotheby's franchise, you have a hundred agents there, what geographic areas do they list houses in?

A. Most all Oakland County.

Hardy Dep. at 19:14-19:16; 21:1-21:4. Mr. Hardy's brokerages are not a member of an MLS outside Michigan. Hardy Dep. at 17:24-21:7.

Mr. Sweeney has no personal knowledge of the real estate market outside southeastern



Michigan. Discussing CX 346, a list of cities and towns in southeastern Michigan printed from his brokerage's website and titled "Areas of Service," Mr. Sweeney offered the following testimony:

- Q. Does this list accurately represent the areas that Weir Manuel agents service?  
A. Fairly accurately. I mean we may do business, a small amount of business, outside these areas, but those would be the principal areas.  
Q. But any business outside of these areas it's going to be minimal?  
A. Yes.  
Q. You'll have to forgive me, I'm not from Michigan, but where would you -- how would you describe your service area? Is it Macomb County, Oakland County.  
A. I would say most of our business, and I don't have a hard statistic, but probably 70 percent, maybe 80 percent of our business is in Oakland County, but for marketing purposes we describe our areas of services as southeastern Michigan. It is concentrated in and around the Oakland County area, however.

Sweeney Dep. at 15:11-16:2. Mr. Sweeney's firm is not a member of an MLS outside of Michigan. Sweeney Dep. at 11:3-11:6.

Mr. Whitehouse has no personal knowledge of the real estate market outside southeastern Michigan. His brokerage has one office, in southeastern Michigan, and derives the majority of its business from just three counties in southeastern Michigan:


- Q. What MLSs is Hannet, Wilson & Whitehouse a member of?  
A. Realcomp and MI Real Source.  
Q. What's the geographic region in which Hannet, Wilson & Whitehouse does its business, how would you describe that?  
A. The best way to describe it is southeast Michigan.  
Q. What counties do you cover?  
A. Primarily I would say the majority of our business is in Oakland, Macomb and Wayne [counties]. We go into other areas, I mean, but not hugely significant.

Whitehouse Dep. at 11:8-11:24. Mr. Whitehouse's firm is not a member of an MLS outside of Michigan. Whitehouse Dep. at 11:15-11:16.

**III. CONCLUSION**

For the foregoing reasons, Complaint Counsel respectfully request that Your Honor grant its Motion *in limine* and enter an Order precluding Messrs. Hardy, Smith, Sweeney, 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 regarding any comparison of the market for residential real estate in southeastern Michigan with any other market or locale.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Christopher Renner", is 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 Comparisons of Southeastern Michigan With Other Locales.
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 Comparisons of Southeastern Michigan With Other Locales 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 excerpts of Douglas Hardy	02/21/07

<b>Tab Number</b>	<b>Document Title</b>	<b>Document Date</b>
Tab 3	Deposition Transcript excerpts of Dale Smith	01/16/07
Tab 4	Deposition Transcript excerpts of Kelly Sweeney	03/01/07
Tab 5	Weir Manuel Areas of Service	03/01/07
Tab 6	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 Douglas Hardy, Dale Smith, Kelly Sweeney, Douglas Whitehouse, and any other Respondent witnesses without personal knowledge of the matters testified to, regarding any comparison of the market for residential real estate in southeastern Michigan with any other market or locale.

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

**ORDERED** that Douglas Hardy, Dale Smith, Kelly Sweeney, 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 comparison of the market for residential real estate in southeastern Michigan with any other market or locale.

**ORDERED:**

Date:

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

**CERTIFICATE OF SERVICE**

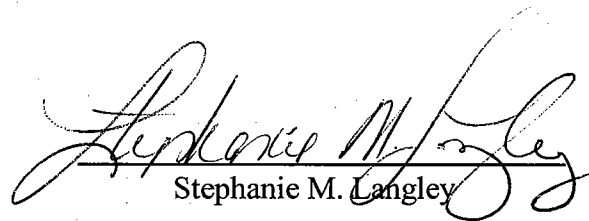
This is to certify that on May 18, 2007, I caused a copy of the attached Complaint Counsel's Motion in Limine to Bar Lay Opinion Testimony Regarding Supposed Comparisons of SouthEastern Michigan with Other Locales, the Memorandum in Support of its Motion *In Limine*, a Declaration of Peggy Bayer Femenella 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.

**20. Craig Mincy**

Realcomp anticipates that, unless called as a witness by the FTC, Mr. Mincy's testimony will be presented by deposition. Mr. Mincy's testimony is expected to be that his listings, both exclusive agent and ERTS, have increased by 30% from 2005 to 2006. Mr. Mincy's testimony is also expected to be that there is no difference in the time that listings stay on the market, whether they be exclusive agent or ERTS. Mr. Mincy's testimony is also expected to be that 80% of the residential real estate properties sell as a result of the MLS and 10% as a result of being in Realtor.com. Mr. Mincy's testimony will also concern the availability of other websites.

**21. Cliff Neirsbach/NAR**

Mr. Neirsbach's testimony is expected to be introduced by deposition. Mr. Neirsbach is expected to explain NAR's Rules relating to the IDX and allowing individual brokers to make decisions of limitations of who they would send IDX feeds. Brokers can do this on an objective basis, including the type of agency and thereby excluding EA listings. Mr. Neirsbach is also expected to offer testimony that NAR made changes in its rules so as to avoid litigation expense. Mr. Neirsbach is also expected to offer testimony about there being competition in the real estate field and that he knows of nothing in Michigan, including Southeastern Michigan, to suggest otherwise. Mr. Neirsbach is also expected to offer testimony that the MLS allows smaller brokers to compete with larger brokers and that is good for consumers.

**22. Robert Greenspan  
c/o Move, Inc.**

Mr. Greenspan's testimony is expected to be offered by deposition. That deposition is expected to be that Realtor.com no longer has a competitive advantage as content is everywhere today. Mr. Greenspan's testimony will also concern RX137 and his agreement with the statements contained therein. Mr. Greenspan's testimony will also concern the rules and operating agreement concerning placing listings on Realtor.com and individual brokers being able to do that under the operating agreement.

**23. Phil Dawley  
c/o Movie, Inc.**

Mr. Dawley's testimony is expected to be offered by deposition. That testimony will concern his description of CX601 showing that Realtor.com feeds from a number of MLSs or other local board in or around Southeastern Michigan and that these are, in addition to Realcomp, are: MiRealSource, Ann Arbor Board of Realtors, Flint Board of Realtors and Shiawassee. Mr. Dawley's testimony will also concern individual brokers submitting their listings directly to Realtor.com. Mr. Dawley is also

expected to offer testimony about Realtor.com experiencing increased competition from large search engines such as Yahoo and Google and smaller startups such as Trulia and Zillo.

**24. Wayne Aronson  
c/o YourIgloo**

Mr. Aronson's testimony is expected to be offered by deposition in the event that he is not called as a witness by the Complainant's Counsel or his transcript is used by Complainant's Counsel. That testimony is expected to concern Mr. Aronson's ranking of the effectiveness of various means of internet sites for residential real estate listings; the availability of Downriver MLS and MiRealSource to place EA listings into Realtor.com and his company's continuing to do business, notwithstanding his denial of the same, as a result of his referring listings to EAs in Michigan such as Gary Moody and Shannon Scott.

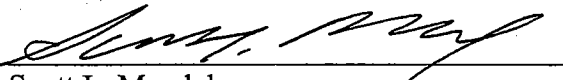
**25. Anita Groggins**

Ms. Groggins' testimony is expected to be by deposition. It is expected that in the event that Complainant's Counsel calls Ms. Groggins as a witness or seeks to introduce portions of her testimony, Realcomp will seek to introduce Ms. Groggins' testimony about how she can easily negotiate Realcomp's search function default to search for all listings and that persons familiar with computers and the Internet can easily negotiate that as it just requires a couple of clicks on "search all" or check in the box for additional listings.

Foster, Swift, Collins & Smith, P.C.  
Attorneys for Respondent

Dated: May 15, 2007

By:

  
Scott L. Mandel  
Steven H. Lasher

**CERTIFICATE OF SERVICE**

This is to certify that on May 15, 2007, I caused a copy of the attached Respondent's Final Proposed Witness List to be served upon the following persons by Electronic Transmission and overnight delivery:

Sean P. Gates, Esq.  
601 New Jersey Ave., N.W.  
Rm. NJ-6219  
Washington, DC 20001

And two courtesy copies of same hand delivered to:

Hon. Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave., NW  
Washington, DC 20580



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Lorri A. Rosier



