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PUBLIC

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


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

# REPLY BRIEF OF RESPONDENT

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## INTRODUCTION:
## This Case Is Not About Competition Between "Traditional" Brokers and "Discount" Brokers

This case presents a straightforward question: Can Respondent Realcomp establish different rules for different "products" (i.e., types of real estate listings) when its members have differing preferences for the different products? That is all this case is about.

Nonetheless, the premise and pervasive theme of Complaint Counsel's opening brief is that the Realcomp Policies[1] impair competition between "traditional" and "non-traditional" (*i.e.*, "discount" or "limited service") brokers. Complaint Counsel paints a picture in which "traditional" brokers conspired to raise their rival discount brokers' costs by disfavoring the listings of discount brokers on the MLS. This picture, however, fails to accurately portray the record, obscuring the nature of the Realcomp Policies and the difficulty that Complaint Counsel faces in constructing a causal link between those Policies and the alleged injury to competition.

The Realcomp Policies concern the marketing of Exclusive Agency ("EA") listings. They apply to EA listings offered by "traditional" brokers and to EA listings offered by "discount" brokers. Realcomp has never drawn distinctions in the enforcement of the Web Site Policy or the Search Function Policy based on the identity or business model of the listing broker, and Complaint Counsel has not maintained otherwise.

The picture Complaint Counsel seeks to draw is obliterated by the facts:

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[1] References to the "Realcomp Policies" mean, collectively, the Web Site Policy and Search Function Policy as defined by stipulation in this case.

- "Discount" brokers in Southeast Michigan offer discounted (flat fee) Exclusive Right to Sell ("ERTS") listings (in addition to EA listings). (RPF ¶ 114).[2] These ERTS listings appear as ERTS listings on the Realcomp MLS. (RPF ¶ 114).

- In the Realcomp service area, discount brokers use ERTS listing contracts with great frequency, and on average at twice the rate of EA contracts. This ratio is about four times higher than in nearby Washtenaw County. (RCCPF ¶ 190).[3]

- "Traditional" brokers in Southeast Michigan offer EA Listings In addition to ERTS listings). These EA listings appear as EA listings on the Realcomp MLS. (RCCPF ¶ 190).

- On the Realcomp MLS, "traditional" brokers account for a significant proportion (as much as 60%) of the EA listings. (RCCPF ¶ 190).

And so, Complaint Counsel's picture ignores the fact that listing type does not really define the metes and bounds of competition between brokers with different business models. Likewise, Complaint Counsel is just wrong in arguing that putative reductions in the prevalence of EA listings are the same thing as reductions in the market share of discount brokers, a proposition for which no evidence exists in this record. (*See* Section II.C.5, *infra.*) The prevalence of flat-fee ERTS contracts and other business innovations by discount brokers is wholly consistent with Complaint Counsel's praise of "unbundled" brokerage services and wholly inconsistent with Complaint Counsel's theory of consumer harm. (*See* Section II.C.2, *infra.*) Indeed, the picture that finally emerges in this case is one of prosperity and growth for the discount brokers who testified on behalf of Complaint Counsel, even in a period of poor prospects for the Southeast Michigan real estate market. (*See* Section II.B.4, *infra.*)

Complaint Counsel has not met its burden, and this case should be dismissed.

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[2] Citations to "RPF" refer to Respondent Realcomp II, Ltd.'s Proposed Findings of Fact and Conclusions of Law (July 31, 2007)

[3] Citations to "RCCPF" refer to Respondent Realcomp II, Ltd.'s Reply to Complaint Counsel's Proposed Findings of Fact (August 17, 2007)

## II.
## ARGUMENT IN REPLY TO COMPLAINT COUNSEL'S OPENING BRIEF

### A. The Evidence Does Not Support Complaint Counsel's Assertions That The Realcomp Policies Have Impaired Competition Between "Traditional" and "Discount" Brokers

#### 1. No Anticompetitive Motives May be Attributed to the Adoption of the Realcomp Policies

In its opening brief, Complaint Counsel attempts to draw adverse inferences regarding the motives underlying the adoption of the Realcomp Policies from the history of those Policies. Complaint Counsel's Post-Trial Brief at 23-25. However, it bears noting that there is nothing whatsoever in the evidence cited by Complaint Counsel that directly states any such motive, and all of such evidence in fact can be understood to be entirely consistent with the evidence in this case regarding the free-riding problem attendant to publication of EA listings.[4]

As the Executive Director of Realcomp, Karen Kage, testified, Realcomp's Web Site Policy was adopted by its Board out of concern that homeowners using EA listings have an incentive to sell their homes without the assistance of a cooperating broker and avoid paying a commission; while Realtors®, in turn, were paying for the sites. (RPF ¶ 137). The Board felt that it was not in the best interests of its members, the Realtors®, to provide free advertising for home sellers who were negotiating their own deals. (RPF ¶ 137). Realcomp's Search Function Policy was designed to make its MLS easier for Realcomp users and improve efficiency. (RPF ¶ 138). Because 98% to 99% of listings on the Realcomp MLS were for ERTS, the default was set by the Search Function Policy to reflect the majority of listings. (RPF ¶ 138(a)). The Search

[4] Ironically, Complaint Counsel has no problem inferring laudatory motives to the policies of other MLSs that did not differentiate between EA and ERTS listings during the relevant time (other MLSs have "no problem" sending EA listings to public websites). Complaint Counsel's Post-Trial Brief at 26. Of course, this ignores the active and well-publicized activity of the FTC during that time to investigate and challenge MLSs (such as Realcomp and its competitor, MiRealSource) which had differentiating policies, which may have influenced the decisions of other MLSs not to enact or continue differentiating policies.

Function Policy made it so that there was one less "click" of the mouse for the majority of users searching only for ERTS listings. (RPF ¶ 138(b)).

The efficiency-enhancing objectives of the Realcomp Policies are to minimize free riding by EA home sellers on cooperating brokers, to provide an incentive for cooperating brokers to show EA properties, and to attenuate the bidding disadvantage that home buyers who prefer to be represented by a broker have in attempting to acquire EA-listed properties. (RPF ¶ 139).

**2. The Realcomp Policies Have Not Eliminated Consumer Choice**

Complaint Counsel argues that the Realcomp Policies restricted the choices available to home sellers. Complaint Counsel's Post-Trial Brief at 26-27. But the evidence shows that consumers in the Realcomp Service Area indeed have many choices when it comes to brokerage services. The Southeastern Michigan real estate market is very competitive, (RPF ¶ 84), and is known nationally as being unique and extremely competitive. (RPF ¶ 85).

Complaint Counsel is incorrect to suggest that a buyer and seller cannot avoid paying a percentage commission to the listing agent under an Exclusive Right to Sell contract or that consumers in the Realcomp Service Area are required to purchase full service listings. Rather, flat fee ERTS listings are available in the Realcomp Service Area. (RCCPF ¶ 1242).

A flat fee ERTS listing requires an additional payment of as little as $200 to the listing broker over and above the price of an EA listing purchased from the same discount broker. ((RPF ¶ 114; RCCPF ¶¶ 613, 1146, 1200, 1228). For example, Jeff Kermath, who owns AmeriSell, is an non-traditional (discount) broker who testified at trial for Complaint Counsel. Mr. Kermath's marketing materials demonstrate that for a flat-fee of $699, a seller can have an

ERTS listing which reaches the Approved Web Sites at issue here: the IDX, Realtor.com and MoveInMichigan.com. (RCCPF ¶ 1146).

Indeed, flat-fee ERTS contracts appear to be more prevalent in the Realcomp Service Area, evidencing that the allegation of reduced availability of alternative brokerage arrangements in Realcomp's Service Area is untrue. (RPF ¶ 115).

In addition, Realcomp has eliminated what was referred to as the "minimum service requirement" for ERTS listings. (RCCPF ¶¶ 36, 829, 836). As a result, brokers can offer limited service ERTS listings and receive all the promotional benefits of full-service ERTS listings on the Realcomp MLS. (*Id.*). In any event, as described above, flat-fee ERTS listings, which do embody those additional services under Realcomp's prior definition of an ERTS listing, are available in the Realcomp Service Area for as little as $200 more than EA Listings (RCCPF ¶¶ 613, 1200, 1228).

### 3. The Realcomp Policies Have Not Excluded EA Listings from Public Exposure

A significant theme of Complaint Counsel's case is the concept of "exposure" for residential real estate listings, and Complaint Counsel maintains that the Realcomp Web Site Policy limits the "exposure" of EA listings. Complaint Counsel's Post-Trial Brief at 27-29. However, with respect to the exposure of EA Listings in the Realcomp Service Area, the record demonstrates that there has been no restriction on the form of Internet exposure deemed to be the most important and no practical restriction on the exposure to the second most important Internet site.

The discount brokers who testified in this matter agree that the MLS is the most important form of Internet exposure. (RPF ¶ 98). Realcomp has never restricted Exclusive Agents from being listed on its MLS. (RPF ¶ 99). They ranked Realtor.com as being the second most important source of Internet exposure. (RPF ¶ 100).

Brokers in the Realcomp Service Area can have their EA listings placed onto Realtor.com through several readily available means. First, EA listings can be placed on the Realcomp MLS and published to Realtor.com simply by listing the property in the first place on another MLS, with which Realcomp has a data sharing agreement. (RPF ¶ 102). Realcomp has data sharing arrangements with seven MLSs in Southeastern Michigan. (RPF ¶ 103). Second, an Exclusive Agency property can be listed on Realtor.com by listing the property on another MLS that downloads Exclusive Agency Listings to Realtor.com. (RPF ¶ 105). Discount brokers have availed themselves of this means for having their EA listings placed on Realtor.com. (RPF ¶¶ 105, 106). The Record shows that limited service/discount brokers called by Complaint Counsel used the Ann Arbor, Shiawassee and Flint MLSs to list their EA listings on Realtor.com. (RPF ¶ 107). Discount brokers also can now have their listings sent to Realtor.com by placing them in MiRealSource in light of its Consent Decree with the FTC. (RPF ¶ 108). The costs associated with this type of dual-listing are nominal. (RPF ¶ 109). Those charges, as an example, are $55 per month to be a member of the Ann Arbor MLS. (RPF ¶ 109(a)).

While some of the Exclusive Agents contended that there was a "time cost" associated with listing on more than one MLS (*i.e.*, to by-pass Realcomp), those costs are also nominal as it is estimated that the time associated with this dual entry can take from 40 minutes to 2 hours over the life of a listing and discount brokers pay anywhere from $7 to $20 per hour for data

entry. (RPF ¶ 110(a) and (b)). Additionally, Realcomp will enter listing data without charge to its members. (RPF ¶ 110(c)).

Exclusive Agents can avoid those costs altogether through the data sharing agreements as persons can have their listings sent to Realcomp without even joining Realcomp, and therefore without incurring the cost of joining more than one MLS. (RPF ¶ 111). Moreover, some Exclusive Agents charge customers nominal additional fees ($50 to $100) to cover the dual listing cost. (RPF ¶ 113).

By placing their EA listings into the MLS, limited service brokers reach 80% of all buyers. (RPF ¶ 101). If one combines that with also placing those EA Listings onto Realtor.com, the combination reaches 90% of all buyers. (RPF ¶ 101). Against that backdrop, it is not surprising that Mr. Kermath represents to the public that while he has better success with ERTS listings, he has "great success" with limited service listings. (RCCPF ¶ 636).

Additionally, public web sites (*i.e.*, other than the "Approved Web Sites") are numerous, and listings reach those web sites without regard to Realcomp's Policies. (RPF ¶ 119). In light of their growing popularity, these other web sites are an economically viable and effective channel for reaching prospective buyers. (RPF ¶ 119). These other publicly-available web sites that are available for Exclusive Agents, include Google and Trulia, each of which is gaining momentum. (RPF ¶ 121). Complaint Counsel's witness Gary Moody, the owner of the Exclusive Agency, Greater Michigan Realty, believes Google Base will be more important than the IDX in the near future. (RPF ¶ 121(d)).

To the extent that Realcomp's Policies are perceived as adversely affecting the exposure of EA Listings, consumers can avoid those effects altogether by paying slightly more ($100) to

agents offering Exclusive Agency Listings to have their listings sent to Realtor.com or, alternatively, have an Exclusive Right to Sell Listing for a flat fee that is only nominally more expensive ($200) than an EA Listing. (RPF ¶ 114; RCCPF ¶¶ 1146, 1200 and 1228).

### 4. The Realcomp Policies Have Not Impeded the Ability of Discount Brokers to Compete

Complaint Counsel maintains that limited service brokers "uniformly testified" that their ability to compete has been affected by the Realcomp Policies. Complaint Counsel specifically asserts that the Realcomp Policies forced discount brokers from the market, deterred the market entry of other discount brokers, and hampered the remaining competition. Complaint Counsel's Post-Trial Brief at 30-34. This is not so.

#### a. *There Is No Credible Evidence That the Realcomp Policies Forced Any Broker to Exit the Market*

No agents offering Exclusive Agency Listings in Southeastern Michigan suggested that they left Michigan because of Realcomp's Policies, except YourIgloo.com, on which Complaint Counsel relies. But YourIgloo's story is highly questionable as this discount broker has not actually abandoned Michigan, and continues to do a substantial referral business. (RPF ¶ 166). Further, the evidence showed that YourIgloo left Michigan for multiple reasons, specifically: (1) YourIgloo faced new competition in Michigan in 2003 and 2004; (2) YourIgloo's associate broker based in Michigan, Anita Groggins, was let go in 2004 because business was tough, she was not a morning person, and she had difficulty keeping the hours required; and (3) YourIgloo represented to MiRealSource that it was leaving the state because it did not care for MiRealSource's procedures and membership fees. (RPF ¶ 166(e)). (Indeed, YourIgloo also encountered problems in New Jersey and Pennsylvania during the same period and and withdrew from those states.) (RPF ¶ 166(e)(1)). After ostensibly leaving Michigan in 2004, YourIgloo

has sent between 50 and 100 referrals to discount brokers operating on YourIgloo's behalf in the State of Michigan. (RPF ¶ 166(e)(6)).

### b. *There Is No Credible Evidence That the Realcomp Policies Have Deterred Market Entry*

The only Exclusive Agent claiming to have been deterred from entering Southeastern Michigan due to Realcomp's Policies, and the only witness so cited by Complaint Counsel, was Albert Hepp. (CCPF ¶ 972). Yet, Mr. Hepp in fact has done business in Southeast Michigan since 2004 and acknowledges that his Exclusive Agency business in that area has grown 10% to 35% since 2004. (RPF ¶ 163(a)).

### c. *The Evidence Shows That Discount Brokers Compete Successfully*

#### (1) *The Discount Brokers Who Testified Admitted That Their Businesses Are Successful and Growing*

The record demonstrates that despite Michigan's economic downturn, brokers offering Exclusive Agency Listings are thriving in Southeastern Michigan. (RPF ¶ 163). The discount brokers called by Complaint Counsel all testified that their EA businesses have been growing and that they have done very well. (RPF ¶ 163 (a-d)). It is implausible that the Realcomp Policies are impeding alternative business models when those business models are growing by leaps and bounds. (RPF ¶ 164).

#### (2) *No Discount Broker Performed an Empirical Study of the Effects of the Realcomp Policies*

None of the discount brokers on whose testimony Complaint Counsel relies performed any study or analysis to support Complaint Counsel's claim that their business or any home seller has been adversely affected by Realcomp's Policies. Craig Mincy of MichiganListing.com acknowledged that he did no study or analysis concerning the number of Exclusive Agency

Listings that he has allegedly "lost," yet he also acknowledged that his business was growing substantially. (RCCPF ¶ 1028). Likewise, Albert Hepp (Hepp, Tr. 712-715); Denise Moody (D. Moody, Tr. 563); and Jeff Kermath (Kermath, Tr. 741), performed no studies or analyses on relevant issues, including days on the market statistics or the effect of the Realcomp Policies on sale prices of homes. (RCCPF ¶ 1028).

## B. A Truncated Rule of Reason ("Quick Look") Analysis Is Not Appropriate For This Case

Complaint Counsel asserts that this matter should be resolved through a truncated rule of reason analysis. Neither the law nor the facts support this view. The nature of the Realcomp Policies and the circumstances of this case, as discussed more fully in Respondent's opening brief, require Complaint Counsel to prove that the challenged practices " cause[] or [are] likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition" – *i.e.*, that the Policies are "injurious in [their] net effects." 15 U.S.C. § 45; *Policy Statement on Unfairness* (FTC, Dec. 17, 1980). This determination necessitates a full rule of reason inquiry. *California. Dental Assn. v. FTC*, 526 U.S. 756, 770 (1999); *United States v. Brown University*, 5 F.3d 658, 668-69 (3rd Cir. 1993)

### 1. Taking Heed of *California Dental*, Recent Court of Appeals Decisions Affirm That The "Quick Look" Approach Is To Be Applied Cautiously

In *California Dental*, the Supreme Court rejected the Commission's "quick look" analysis of advertising restrictions adopted by a professional association. There, the members of a dental association made an agreement that effectively ended all advertising on the basis of quality or cost in order to protect consumers from misleading advertisements. Bans on price advertising are generally condemned as anticompetitive because such advertising is closely linked to the

furtherance or encouragement of price competition. The Commission had condemned the restrictions in a truncated analysis that rejected the proffered justifications for the restrictions without inquiry into their competitive effects, and the Ninth Circuit affirmed.

In reversing, the Supreme Court held that the threat of a misled consumer could be a valid justification for the advertising restrictions because consumers may lack the expertise required to assess dentists' professional services and dental advertising claims. The Court emphasized that differences in fact patterns must be taken into account when determining antitrust liability. The Court criticized the Ninth Circuit for not distinguishing the restrictions on professional advertising at issue from more common bans on price advertising and for not recognizing that the Dental Association's policies could affect competition differently than similar policies in other markets. 526 U.S. at 773-74. The Court stressed that courts must have a solid theoretical foundation for concluding that challenged practices have anticompetitive consequences under a "quick look" analysis. 526 U.S. at 775 n.12 (when the facts and circumstances "are somewhat complex, assumption alone will not do"). Significantly, the Court also held that, provided that the defendant proffers a "plausible" efficiency justification for a restraint, the plaintiff retains the burden to prove by empirical evidence that the restraint is anticompetitive. 526 U.S. at 774-776.

#### a. *Three Circuits Subsequently Have Followed the Supreme Court's Cautionary Approach In Applying the Truncated Rule of Reason*

Since *California Dental,* four Circuits have specifically considered the applicability of a truncated rule of reason analysis to cases involving unique market circumstances. Complaint Counsel relies on one of those – the roundly criticized *PolyGram Holding* decision – as support

for its argument in favor of a quick look here. But the holdings of other Circuits reflect the more cautious view articulated by the Supreme Court.

Thus, in *Brookins v. Inernational Motor Contest Assn.*, 219 F.3d 849, 854 (8th Cir. 2000), the Eighth Circuit held that rules imposed by an auto racing governing body allegedly aimed at precluding the use of a transmission made by plaintiff were "not the kind of 'naked restraint' on competition that justify foregoing the market analysis normally required in Section 1 rule-of-reason cases." Similarly, *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004), ruled that an "abbreviated or 'quick-look' analysis may only be employed where the contours of the market and, where relevant, submarket, are sufficiently well-known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition . . . where, as here, the precise product market is neither obvious nor undisputed, the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice." Finally, *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 512 (4th Cir. 2002), rejected the quick look approach in a case challenging carry-on luggage size restrictions, finding that the lower court erred in not considering the unique architecture of the airport, and that the procompetitive justifications offered by the defendant were plausible.

These analyses are consistent with the views of Areeda and Hovenkamp that the "quick look" approach is reserved for circumstances in which the restraint is sufficiently threatening **to place it presumptively in the *per se* category**, but for a lack of judicial experience that requires at least some consideration of proffered defenses or justifications. P. Areeda & H. Hovenkamp, *Antitrust Law* at ¶ 1911a (emphasis added).

The Realcomp Policies are not a naked restraint that might otherwise call for *per se* treatment. As described in Respondent's Opening Brief, there is no price-related restraint at issue here. Further, the Realcomp Policies do not directly or indirectly allocate geographic markets among the Realcomp members, or between traditional brokers and non-traditional ("discount") brokers. Additionally, the Realcomp Policies involve no concerted refusal to deal with disfavored suppliers or customers. Finally, this case does not involve the type of complete and naked exclusion from an essential element of competition held to implicate *per se* liability by longstanding judicial precedent. *See* Post-Trial Brief of Respondent at 9-12.

### b. *The Decision in* PolyGram Holding *Is Not Consistent With* California Dental *or the Decisions of the Fourth, Sixth, and Eight Circuits.*

Complaint Counsel pins its hopes of avoiding the need to prove anticompetitive effects principally on one case – *PolyGram Holding, Inc. v. FTC*, 416 F.3d 329 (D.C. Cir. 2005). *PolyGram* is, to say the least, a curious decision, and one that has been the subject of disapproving commentary throughout its short history.

The case involved a joint venture agreement between two recording companies to market the third in a series of recordings by the "Three Tenors" (José Carreras, Placido Domingo, and Luciano Pavarotti). Each of the joint venture parties owned the distribution rights to one of the preceding two recordings. The decision to joint venture was based on a determination that greater risk attended the third recording than had been the case with the other two. As part of the joint venture agreement, the parties agreed to a "moratorium" under which neither would advertise or discount the prior two recordings during a ten-week period surrounding the release of the third recording.

The FTC held that the moratorium agreement violated Section 5 of the FTC Act, reviving and applying the Commission's own "quick look" standard articulated in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988).[5] That standard, unique to the FTC, asks, first, whether the restraint is "inherently suspect." If it is, the burden shifts to the respondent to proffer a justification that is both "cognizable under the antitrust laws" and "facially plausible." Finally, if such a justification is proffered, a full rule of reason analysis may still be avoided if the plaintiff can make "a more detailed showing that the restraints at issue are indeed likely, in the particular context, to harm competition." 110 F.T.C. at 604. The Commission has never explained, however, how this last determination can be made without a rule of reason analysis.

The Commission ruled that the moratorium in *Polygram* was "inherently suspect" based on the admitted fact that the restraint eliminated price competition between the third recording and its two closest substitutes (*i.e.*, the prior two recordings) for the ten-week period of the moratorium. It then ruled that the proffered justification—to avoid free-riding by the first two recordings that could undermine promotion of the third was "not cognizable under the antitrust laws" because the moratorium restrained products outside the joint venture and was entered into after the venture was formed.

The Court of Appeals affirmed this decision, accepting both the Commission's *Massachusetts Board* framework and, without detailed analysis, the Commission's assertion that the *Massachusetts Board* framework is not inconsistent with the Supreme Court's more recent explication of the quick look rule of reason in *California Dental.* 516 F.3d at 35-37.

The fundamental deficiency of the *PolyGram* decision and the underlying *Massachusetts Board* framework has been succinctly articulated by William Kolasky, a former Assistant

[5] Complaint Counsel also relies on *Massachusetts Board* here. Complaint Counsel's Post-Trial Brief at 42.

Attorney General in the Antitrust Division of the Department of Justice. Framing the question as whether the FTC can require the parties to an alleged restraint to justify a restraint before the FTC proves that the restraint harmed or is likely to harm competition in a way that would harm consumer welfare by raising price or restricting output, he states:

> We had thought this debate was decisively resolved by the Supreme Court in *California Dental*, but current and former FTC officials continue to wage a rearguard action, seeking to limit that decision's analytical framework to the professional advertising context in which it arose. *California Dental* will bear no such limitation. In it, the Supreme Court held that so long as the defendant proffers a "plausible" efficiency justification for a restraint, the plaintiff must show with empirical evidence that the restraint is anticompetitive before the burden shifts to the defendant to prove the justification for it. ...
>
> By seeking to use a subjective label ("inherently suspect") as a substitute for empirical evidence of market power and harm to competition, the *Massachusetts Board* framework runs a great risk of leading agencies and courts to commit the kind of Type I (false positive) error the Commission committed in *Three Tenors*. Nothing in the Supreme Court's decisions in *BMI*, *NCAA*, or *California Dental* sanctions such an approach. The ease with which lower courts now apply the traditional three-step rule of reason framework shows that whatever gain in administrability the authors of *Massachusetts Board* hoped to achieve can no longer justify the increased risk of error.

W. Kolasky and R. Elliott, "The Federal Trade Commission's *Three Tenors* Decision: *'Qual due fiori a un solo stello'* [6]" 19 *Antitrust* 50, 54 (Spring, 2004) (citations omitted). *See also* D. Meyer and D. Ludwin, "Three Tenors and the Section 1 Analytical Framework," 20 *Antitrust* 63, 67 (Fall 2005) (arguing that *PolyGram Holding* supplants *California Dental* with a regime in which the FTC presumes to "know obviously conduct when they see it"); J. Keyte and N. Stoll, "Markets? We Don't Need No Stinking Markets! The FTC and Market Definition" 49 *Antitrust*

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[6] "Like two flowers on a single stem." The quote, taken from Donizetti's opera *Lucrezia Borgia* refers to the Commission's failure (by adopting the "inherently suspect" label) to acknowledge the unity of interests attendant to a covenant not to compete between partners in a common business enterprise. *Cf. United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), aff'd,175 U.S. 211 (1899) (benchmark explanation of why and how the antitrust laws countenance non-competition agreements in joint ventures).

*Bull.* 593, 611 (Fall 2004) (arguing that in light of *PolyGram Holding*, the FTC's construction of the "quick look" begins to look more like an expanded *per se* rule).

But even holding aside the criticisms of *PolyGram Holding*, that decision provides poor guidance for the present case. The "inherently suspect" conduct at issue in *PolyGram* (as the Commission itself determined) was an express agreement by the parties to cease price competition outside of the joint venture. Here, the Realcomp Policies are stipulated to be non-price conduct, and the alleged effects of those policies on competition are inferential and strongly disputed. Attempting to label the Realcomp Policies as suspect

### c. *Complaint Counsel's Other Authorities Do Not Have Weight Here*

Complaint Counsel further argues that the use of a quick look analysis is permissible here by analogy to *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) and *Thompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566 (11th Cir. 1991). Beyond the fact that both of these cases pre-date *California Dental*, they are factually inapposite to the question of whether the Realcomp Policies merit truncated analysis. Both cases involved restrictive membership requirements (characterized by the plaintiffs as group boycotts and, in the case of *Thompson*, also as an unlawful tying arrangement) that impeded the ability of brokers to become members of the subject multiple listing service. The market effects of these restrictions were not subtle (an excluded member had no access to an MLS) nor (apparently) were the effects disputed. Thus, the disposition of the boycott claims in these cases turned solely on market power and the rationale for the membership requirements.

The Realcomp Policies effect no exclusion from membership. The effects of the Policies are pointedly disputed by the parties, Complaint Counsel's own witnesses have testified inconsistently as to the effect of the Policies on their businesses, and Respondent has raised