

ORIGINAL

PUBLIC

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



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

Docket No. 9320

ANSWERING BRIEF OF RESPONDENT

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

Introduction

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

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

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

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

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

Factual Background

A. Respondent and Its Environment.

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

B. The Realcomp Policies

1. The Website Policy

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

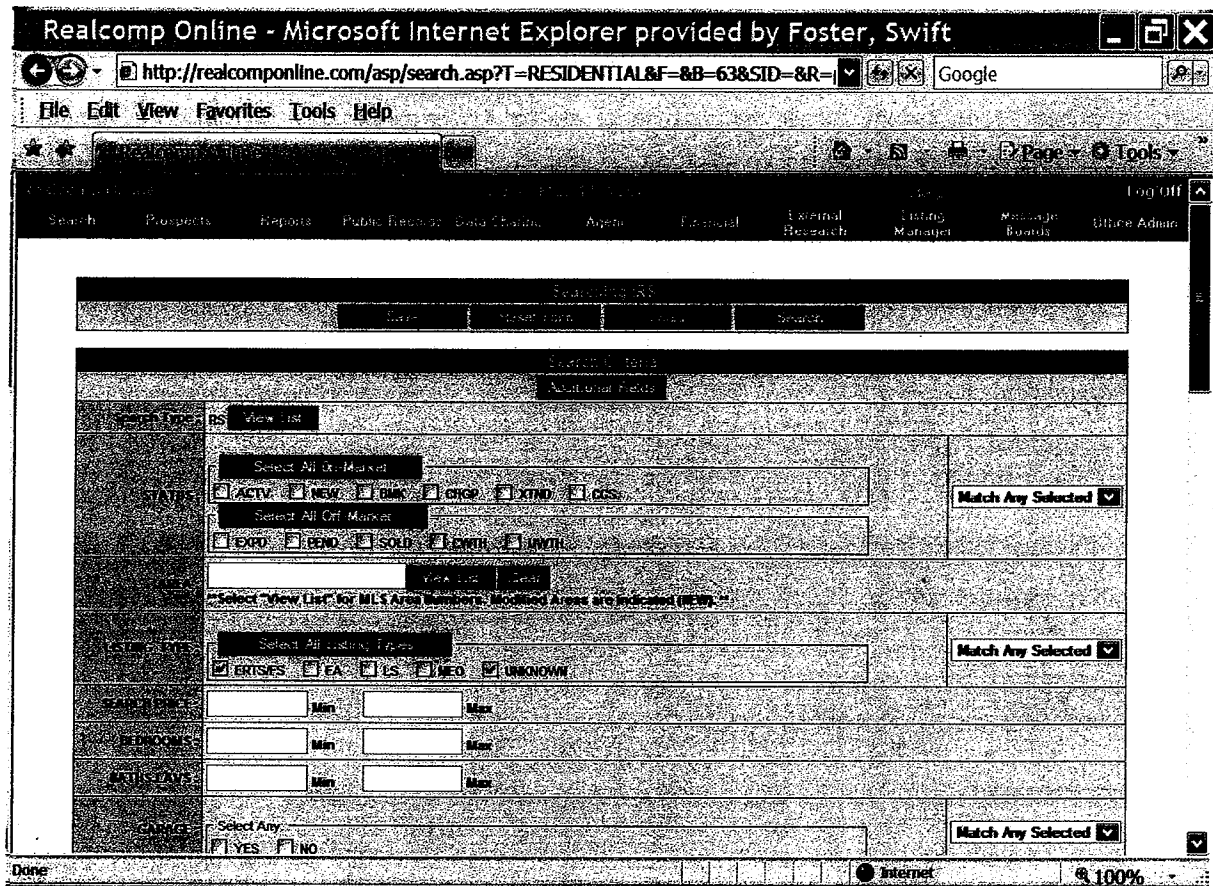
Realcomp also feeds listings to the individual websites of its member brokers. To receive those listing feeds, a broker must agree to permit his or her own listings to be transmitted to other member-broker websites. (RPF ¶89). This is referred to as the Internet Data Exchange ("IDX"). (Kage, Tr. 947-48).

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

2. The Search Function Policy

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

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



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

Argument

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

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

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

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

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

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

"Discount" brokers in Southeast Michigan offer discounted (flat fee) ERTS listings (in addition to EA listings). (RPF ¶114). Flat fee ERTS listings appear as ERTS listings on the Realcomp MLS. (RPF ¶114). In the Realcomp service area, discount brokers use ERTS listing contracts with great frequency, and on average at twice the rate of EA contracts. This ratio is about four times higher than in nearby Washtenaw County. (RCCPF ¶190).

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

1. The Realcomp Policies have not eliminated consumer choice.

Complaint Counsel argues that the Realcomp Policies prevent brokers from providing a product that consumers want (defined as a bundle of an EA listing with "full exposure") and restrict competition by reducing the package of services available in the market, and further argues that this fact renders the Realcomp Policies anticompetitive on their face. (CCBr. at 26, 28-29). This asserted basis for labeling the Realcomp Policies facially anticompetitive is not supported by the facts or law.⁴ First, there is no expert testimony in this case to support a finding that a bundle of services consisting of EA listings plus "exposure" is a product distinct from its components. Complaint Counsel's economic expert, Darrell Williams, Ph.D., testified to an input product market consisting (broadly) of multiple listings services provided to real estate brokers, but he did not testify that some or any of those services only had value to either brokers or consumers as a package, or that they had more value as a full package.

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

⁴ Complaint Counsel reads *FTC v. Indiana Federation of Dentists*, 476 U.S. 459 as facially condemning any agreement to withhold a service that consumers desire. (CCBr. at 28-29, 35). *Indiana Federation* is a well-known exposition of the truncated rule of reason, but it provides an extremely poor analogy to the facts of this case. Central to every element of *Indiana Federation* was the naked character of the restraint. The Indiana Federation of Dentists had no other purpose than to organize and enforce the boycott of dental insurance companies. See 476 U.S. at 449-51, 454. In contrast, multiple listing services like Realcomp are joint ventures that are considered procompetitive, e.g., *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1356 (5th Cir. 1980), and may impose restrictions related to the efficient functioning of the venture, e.g., *Reifert v. South Central Wisconsin MLS*, 450 F.3d 312, 321 (7th Cir. 2006).

Moreover, as the ALJ observed (ID 96) even if one were to assume that this "package" of services is distinctive and valued by consumers, there is substantial evidence in this case that consumers are able to acquire the package if they choose to do so. Specifically:

- Brokers can, and do, sell services "a la carte." (RPF ¶114).
- Brokers obtain "exposure" for their clients on significant Internet sites by dual-listing and unbundling publication to major websites. (RPF ¶106).
- Brokers can obtain "exposure" for their clients by joining Realcomp's data sharing partners. (RPF ¶¶102, 119-120).
- Discount brokers in the Realcomp service area sell fixed fee ERTS listings that provide all of the benefits (including "exposure") of traditional, more expensive, ERTS listings for as little as \$200 additional to the cost of purchasing an EA listing. (RPF ¶¶114(a), 115).

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

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

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

Flat fee ERTS listings are available in the Realcomp Service Area. (RCCPF ¶1242) and in fact appear to be more prevalent in the Realcomp Service Area than elsewhere (RPF ¶115). A flat fee ERTS listing requires an additional payment of as little as \$200 to the listing broker over and above the price of an EA listing purchased from the same discount broker. ((RPF ¶114; RCCPF ¶¶613, 1146, 1200, 1228). For example, Mr. Kermath, a discount broker

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

Further, Realcomp has eliminated its "minimum service requirement" for ERTS listings. (RCCPF ¶¶36, 829, 836). As a result, brokers can offer limited service ERTS listings and receive all the promotional benefits of full-service ERTS listings on the Realcomp MLS. (*Id.*).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

