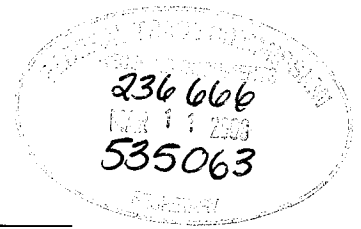


ORIGINAL



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

DOCKET NO. 9320

PUBLIC VERSION

**IN THE MATTER OF
REALCOMP II LTD.**

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I. INTRODUCTION

Complaint Counsel detailed in their opening brief the key facts. EA listings offer consumers a contingent discount on brokerage commissions. ERTS listings, by contrast, do not. They require sellers to pay the full commission regardless of whether a cooperating broker is involved. To be effective and valuable to consumers, listings must obtain exposure on key websites and through the MLS. Realcomp, a combination of competitors with market power, imposed Policies (the Website and Search Function Policies) that limit the exposure of EA listings. The Policies exclude these listings from three of the top four categories of real estate websites. They also discriminate against these listings within the MLS. These competitors imposed the Policies because EA listings offer a contingent discount. The Policies therefore penalize the use of EA listings and the discounting they represent. They also withhold from consumers a product they desire: EA listings with full exposure through the Realcomp MLS.

Realcomp nonetheless claims that it should be free to continue these practices. According to Realcomp, concerted action by competing brokers with market power that penalizes discounting and withholds from the market a product that consumers desire is not enough to show a violation of Section 5. Realcomp claims that the Commission may only condemn these practices if it employs a “full-blown” rule of reason analysis and finds direct evidence of actual anticompetitive effects. Realcomp’s argument that Complaint Counsel failed to meet their burden is wrong on the facts and wrong on the law.

Realcomp is wrong on the facts. There is ample direct evidence of anticompetitive effects. Realcomp just misses it. The evidence shows that the Policies caused consumers to

switch to ERTS listings. Realcomp admits this, but fails to grasp the significance. Realcomp believes that because brokers can offer discounts on ERTS listings, these listings are a full substitute for EA listings. But that is not true. Only EA listings offer the ability to avoid paying the offer of compensation (typically 3%). Realcomp required consumers to purchase a set of minimum services with all ERTS listings. And even Realcomp admits that ERTS listings are more expensive. The switch therefore shows actual anticompetitive effects. All of Realcomp's arguments about data, statistics, and regression analyses therefore miss the big picture – the Policies reduce the effectiveness and use of EA listings and thereby restrain important forms of competition.

Realcomp is also wrong on the law. The point of the rule of reason is to determine the principal tendency of a restraint. Direct proof of actual effects is one means of showing this. But indirect evidence is also sufficient, *viz.*, a showing that defendants possess market power and that the character of the restraint tends to restrict competition. Realcomp simply cannot dodge the impact of the indirect evidence. A rule of reason analysis – whether “full,” “traditional,” “abbreviated,” or any other label – demonstrates that Realcomp's Policies are anticompetitive. They are not justified, and the Commission should enjoin Realcomp from denying consumers the benefits of competition.

II. ARGUMENT

Realcomp invokes *Chicago Board of Trade* to insist that the Commission put on blinders and focus only on direct evidence of actual effects. But that case makes it clear that the rule of reason requires consideration of the complete picture – “the facts peculiar to the business to

which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint; and its effect actual or probable.” (RAB at 55 (quoting *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238-39 (1918)).¹ That is precisely the analysis Complaint Counsel present here.

The complete picture shows that the principal tendency of the Policies is to restrict, not enhance, competition. The facts peculiar to the business – the context – show that EA listings represent important forms of competition. EA listings deliver discounting and unbundled services. Before the Policies were imposed, EA listings and ERTS listings both enjoyed full exposure through the Realcomp MLS. Through the concerted action of competing real estate brokers, however, Realcomp denies to EA listings the full value and range of MLS services.

Realcomp’s market power and the anticompetitive nature of the Policies demonstrate probable anticompetitive effects. This is especially important because the Commission is concerned with the restraint’s likely effects going forward. It is also sufficient under the rule of reason. Nevertheless, this inference is confirmed by abundant evidence of actual effects.

A. Realcomp Fails to Rebut the Anticompetitive Character of the Policies

Realcomp concedes that the Policies were implemented by a combination of competitors with market power, but insists that this is of little consequence. According to Realcomp, market

¹ The following abbreviations are used throughout:

ID	Initial Decision
IDF	Initial Decision Finding
CAB	Complaint Counsel’s Appeal Brief
CCPF	Complaint Counsel’s Proposed Findings
CCRF	Complaint Counsel’s Response to Realcomp’s Proposed Findings
RAB	Respondents Answering Brief (on appeal)
RPF	Respondent’s Proposed Findings
RRPF	Respondent’s Reply to Complaint Counsel’s Proposed Findings

power has no bearing on the question of whether there are anticompetitive effects: “the requirement for proof of market power can be obviated by evidence of actual anticompetitive effects, not the other way around.” (RAB at 53). This is flat wrong. It is black letter law that market power combined with the nature of the restraint shows anticompetitive effects. *See, e.g.,* ABA ANTITRUST SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 65 (6th ed. 2007); ABA ANTITRUST SECTION OF ANTITRUST LAW, MONOGRAPH NO. 23, THE RULE OF REASON 161-63 (1999) (even if there is “no observable effect of a restraint on competition,” proof of market power and nature of restraint is enough to show anticompetitive effects under the rule of reason). The cases stating this proposition are legion.² Realcomp cannot sidestep the significance of its concession. The issue then is whether the nature of the Policies is anticompetitive.

1. Realcomp Fails to Rebut the Fact That By Punishing Discounting, the Policies Come Close to a Form of Price-Fixing

The anticompetitive tendency of the Policies is apparent. Realcomp never denies that EA listings offer a contingent discount, *i.e.*, reducing the listing broker’s commission if no cooperating broker is used in the transaction. Nor does it deny that the Policies target EA listings because of this form of discounting. (RRPF 771; CX 89; RAB at 56-59). It does not dispute that

² *See, e.g., FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (market power is a “surrogate” for competitive effects); *Brookins v. Intern. Motor Contest Assn.*, 219 F.3d 849, 852 (8th Cir. 2000) (“Injury to competition requires proof either of market power in a relevant market, or of an actual adverse effect on competition.”); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (antitrust plaintiff has “two independent means by which to satisfy the adverse-effect requirement,” namely, direct proof of “actual adverse effect on competition” or indirect proof of “sufficient market power to cause an adverse effect on competition”); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (“plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects”); *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993).

the Policies penalize the use of EA listings (only the severity of this penalty). In fact, Realcomp explicitly recognizes that the Policies make EA listings less valuable to consumers. (RAB at 57-59 (Policies are designed to reduce incidence of contingent discount)). Nor can Realcomp deny that the Policies withhold from consumers a particular product – EA listings that are fully disseminated through the Realcomp MLS. That is simply a fact.

a. Punishing Discounting is Anticompetitive, No Matter Who Offers the Discount

Instead of dealing with these facts, Realcomp claims that this case is “not about competition between full service and discount brokers,” because its expert supposedly found that traditional brokers “account for as much as 60% of EA listings on the Realcomp MLS.” (RAB at 6, 20). This statement is false. Realcomp’s expert only found that eight “non-traditional brokerages who operate statewide” account for “approximately 40 percent of the limited service property listings in Realcomp.” (CX 133-014 & n.31 (cited in RPPF 190)). He did not, however, make any finding regarding the remaining 60%. There is no evidence in the record that any traditional broker uses EA listings. To the contrary, every traditional, full service broker that testified acknowledged using only ERTS listings. (RPPF 189; *see also* CX 40 (Elya, Dep. at 57 (only uses ERTS)); CX 43 (Hardy, Dep. at 58) (Century 21 brokerage uses only ERTS); CX 38 (Gleason, Dep. at 37) (SKBK brokerage uses only ERTS); CX 39 (Taylor, Dep. at 18 (only uses ERTS; EA use not in business model)).

More important, it misses the point. EA listings are an important form of competition regardless of who offers them. If traditional brokers offer EA listings, that is discounting too. This case is not about discount brokers *per se*, though the evidence shows discount brokers use

EA listings and put price pressure on traditional broker commissions. (RRPF 221-26; IDF 99-101). It is about the ability of consumers to obtain the competitive benefits of EA listings. Realcomp's boast that "[a]ll participants in the Realcomp MLS are equally subject to the Realcomp Policies" therefore confirms the anticompetitive effect of the Policies; they impact all of the nearly 14,000 Realcomp members. The fact that the Policies are an "equal opportunity," market-wide punishment for discounting makes them more, not less, anticompetitive.

b. Realcomp's Efforts to Distinguish the Case Law is Unavailing

Realcomp misunderstands the significance of the case law cited by Complaint Counsel. For instance, Realcomp distinguishes *Denny's Marina* as a "secondary boycott held to constitute *per se* unlawful price-fixing." (RAB at 47). But the point of the case is that conduct punishing discounting (in that case denial of access to two trade shows) is anticompetitive. *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1221 (7th Cir. 1993). The Realcomp Policies have the same character; they punish a form of discounting. *See also United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961) (punishing discounting by picketing and withholding supplies anticompetitive).³ The fact that the Policies are implemented by a potentially procompetitive collaboration – an MLS – may save them from *per se* condemnation, but it does not change the character of the restraint.

Similarly, Realcomp attempts to distinguish *Indiana Federation of Dentists (IFD)* because of the "naked character of the restraint" that did not involve a potentially procompetitive collaboration. (RAB at 7 n.4). But this distinction makes no difference. The Court in *IFD* held

³ Realcomp's attempt to distinguish *Gasoline Retailers* because Realcomp did not enforce its agreement through these means is unavailing. Realcomp enforced its Policies; the method of enforcement is irrelevant to the issues in this case.

that an agreement among rivals to withhold a product consumers desire is anticompetitive, “absent a countervailing procompetitive virtue.” *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459 (1986). The Court therefore allowed for legitimate justifications. But Realcomp’s Policies are not simply “different rules for different types of real estate listing ‘products.’” (RAB at 1). By withholding the desired product, EA listings with full exposure, the Policies adversely impact competition among Realcomp members. The Court’s rationale in *IFD* is fully applicable;⁴ the Policies limit consumer choice. *See also Glen Holly Entertainment Inc. v. Tektronix Inc.*, 352 F.3d 367 (9th Cir. 2003) (recognizing competitive harm from horizontal agreement to remove product from market); *Sullivan v. NFL*, 34 F.3d 1091, 1101 (1st Cir. 1994) (condemning horizontal agreement to eliminate a certain type of ownership interest in NFL teams because it makes market “plainly unresponsive to consumer demand”); *Toys “R” Us*, 126 F.T.C. 415, 610 (1996) (finding actual anticompetitive effects because agreement to sell toys to discount warehouse clubs only in “combo pack” meant that consumers either had to buy “their second-choice goods . . . at their first-choice stores” or “first-choice goods . . . at their second-choice stores”).

At bottom, Realcomp’s Policies restrict forms of competition among brokers – providing contingent discounts, providing unbundled services, and offering these with full exposure. That type of agreement tends to restrict competition. *See, e.g., United States v. VISA U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003) (condemning joint venture rule that prohibited members from competing “in a manner which the consortium considers harmful to its combined interest”);

⁴ Realcomp also attempts to distinguish *IFD* by asserting that there was no expert testimony to establish that EA listings with full exposure represent a separate product market. This, of course, is unnecessary. *See IFD*, 476 U.S. at 460-63 (discussing market for dental services, not provision of x-rays).

Detroit Auto Dealers Ass'n v. FTC, 955 F.2d 457, 472 (6th Cir. 1992) (agreement limiting auto dealer showroom hours was anticompetitive because it limited an important form of competition). The fact that Realcomp's Policies do not eliminate *all* forms of price competition does not save its Policies.

Realcomp's "this is not a price-fixing case" refrain therefore rings hollow. No matter how it is done, punishing discounting comes close to a form of price-fixing. While Realcomp repeatedly claims (without citation) that Complaint Counsel stipulated that the Realcomp Policies are non-price restraints (RAB at 48), this is not true. There is nothing of this sort in the parties' stipulations. (JX-1). Moreover, Complaint Counsel has always contended that the Realcomp Policies affected the price of brokerage services. (CCPF 1207-43). Neither does the fact that Complaint Counsel did not bring a *per se* charge distinguish these cases (RAB 47-48); not all price-fixing is a *per se* violation.

2. Realcomp Fails to Rebut the Evidence That the Policies are an Effective Penalty on Discounting and Limit a Means of Competition

Realcomp's Policies limit competition by reducing the exposure of EA listings. The Policies exclude these listings from three of the top four categories of real estate websites and inhibit their dissemination within the MLS. Realcomp does not deny the importance of exposure in selling real estate, that consumers want full exposure for EA listings, or that brokers compete based on how much exposure (particularly Internet exposure) they offer to consumers. (RRPF 454-62, 536-91, 870, 1164-73). Instead, Realcomp argues that consumers can substitute "flat fee ERTS" listings for EA listings and that there are sufficient alternatives to obtain exposure for EA listings. These assertions are unsupported.

a. “Flat Fee” ERTS Listings are Not a Substitute for EA Listings

Realcomp is simply wrong in insisting that the Policies do not harm competition because discount brokers offer what Realcomp calls “flat fee” ERTS listings. (RAB 8-9, 40-41). These are no substitute for EA listings. Under Realcomp’s rules, consumers were required to purchase the minimum services to obtain these ERTS listings.⁵ (CCPF 636, 1034, 1053). But more important, an ERTS listing – whether offered by a traditional broker or a discount broker – does not provide a discount contingent on the sale to an unrepresented buyer. (CCPF 1012, 1032-34; D. Moody, Tr. 489-90). Though consumers may pay an up-front “flat fee” for these listings (which Realcomp admits is at least \$200 more costly than EA listings), consumers still pay the entire agreed-to commission – which includes the offer of compensation – regardless of whether a cooperating broker is involved. (*See, e.g.*, D. Moody, Tr. 489-90; Mincy, Tr. 371, 373-74). These listings therefore do not break the offer of compensation “price floor” created by the structure of ERTS listings. (*See* CX 498A-043-045 (describing how use of ERTS contracts effectively creates a price floor at the prevailing offer of compensation (3%)).

The difference to consumers between EA and these “flat fee ERTS” listings is substantial. Comparing the EA listing from Greater Michigan Realty with its flat fee ERTS listing (CCPF 1033-34) for a \$300,000 home, for instance:

⁵ Just before trial Realcomp removed the minimum services requirement for ERTS listings. But as Realcomp’s counsel admitted, absent a Commission order, a future Realcomp Board of Governors may reimpose this requirement. (Pre-Trial Hearing, Tr. 12).

	Cooperating Broker	No Cooperating Broker
“Flat Fee” ERTS	Fee to listing broker \$599 + offer of compensation (3%) to cooperating broker (<i>Total: \$9,599</i>)	Fee to listing broker \$599 + 3% (<i>Total: \$9,599</i>)
EA	Fee to listing broker (\$299) + offer of compensation (3%) to cooperating broker (<i>Total: \$9,299</i>)	Fee to listing broker (\$299); <i>No offer of compensation paid (Total: \$299)</i>

Realcomp glosses over these facts and lumps together two very different types of listings to give the impression that “flat fee ERTS” listings offer the contingent discount. (RAB at 41). Realcomp specifically labels the ERTS offerings of all discount brokers as “flat fee ERTS” listings though these offer no contingent discount.⁶ But Realcomp also puts under this label the so-called “flat fee ERTS” offered by one broker – AmeriSell Realty – that is nothing more than an EA listing mislabeled as an ERTS. (RAB at 41; CAB at 18-19). Thus, Realcomp claims that consumers are able to obtain “the full benefit of the Realcomp public website distribution” without “payment of an offer of compensation to a cooperating broker when no such broker participates in the transaction.” (RAB at 41).

This is sleight of hand. Realcomp knows full well that the so-called “flat fee ERTS” from AmeriSell Realty is a mislabeled EA listing. As discussed in Complaint Counsel’s opening brief, AmeriSell Realty labels these listings “ERTS” to get around Realcomp’s rules. (CAB at 18-19). Realcomp now attempts to rely on this breach of its Policies to muddy the waters. But the ability to avoid paying the offer of compensation if the buyer is unrepresented is what distinguishes an EA from an ERTS listing. Realcomp has repeatedly admitted this and the entirety of its efficiency defense rests on this distinction:

⁶ This is based on Realcomp’s expert (RAB at 8; RPF 115 (citing CX 133-30-31)), who labeled any ERTS offering by a discount broker to be a “flat fee ERTS.” (CX 133-30 n. 84 (labeling ERTS offering from Greater Michigan Realty and MichiganListing.com as “flat-fee ERTS” listings); D. Moody, Tr. 489-90 (Greater Michigan ERTS offering has no contingent discount); Mincy, Tr. 371, 373-74 (MichiganListing.com ERTS offering has no contingent discount)).

- *In its answer*, Realcomp admitted that an ERTS listing requires payment of a commission no matter who sells the property, but an EA listing “reserves to the seller a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid *a reduced or no commission* when the property is sold.” (CX 32-004 (emphasis added)).
- *In the post-trial findings*, it is undisputed that “Exclusive Agency contracts allow sellers to save the cost of an offer of compensation to a cooperating broker – money that under an Exclusive Right to Sell listing would be paid to the listing broker – if the seller sells the property to an unrepresented buyer themselves.” (RRPF 184). Nor is there any dispute that the “significant economic factor of an Exclusive Right to Sell listing is that the home seller commits to pay the full amount of the negotiated commission (both the listing commission and the offer of compensation) if the house sells during the contract period, regardless of whether or not a cooperating broker is involved in the transaction.” (RRPF 1144).
- *In its expert report*, Realcomp rested its efficiency defense on the fact that under an EA listing, “the property owner pays no [cooperating broker] commission unless the buyer is procured by a cooperating agent.” (CX 133-032). “In contrast, a seller with an ERTS contract pays a [cooperating broker’s] commission whether or not the buyer is represented by a [cooperating broker].” (CX 133-033).
- *In its appellate brief*, Realcomp justifies banning EA listings from its dissemination to public websites on the grounds that “home sellers who sign EA listing agreements (by definition) do not pay a cooperating broker commission if they find their own buyer.” (RAB 56-58).⁷

Absent a Commission order, Realcomp will be free to slam the door on any listing that offers a contingent discount, no matter how labeled. There is no reason to doubt that Realcomp will do just that; its justification for the Website Policy is entirely based on the supposed “harm” caused by the contingent discount. (RAB at 56-62).

b. Realcomp Only Points to Alternatives Offering Inferior Exposure

Realcomp’s assertion that there are adequate alternatives to obtain exposure for EA

⁷ See also CX 175, 285, 329 (form ERTS contracts); DENNIS S. TOSH, JR., HANDBOOK OF REAL ESTATE TERMS 194-195 (1992) (defining EA and ERTS listings); HENRY S. HARRISON, ILLUSTRATED DICTIONARY OF REAL ESTATE AND APPRAISAL 99 (1983) (same).

listings is also wrong. There is no serious dispute about the significance of Internet marketing generally or the significance of Internet marketing on the Approved Websites specifically. (RRPF 536-87 (importance of Internet marketing); RRPf 588-676 (importance of Approved Websites)). Numerous industry studies, consumer survey responses from buyers in Southeastern Michigan, industry expert opinion, and Realcomp member testimony confirm that the Approved Websites are the most important websites for marketing listings. (RRPF 588-676).

Realcomp cannot deny any of these key facts and so it simply ignores them. In fact, Realcomp pretends that the IDX and MoveInMichigan.com – key websites foreclosed to EA listings by the Realcomp Policies – simply do not exist. (RAB at 9-13 (nowhere discussing the Realcomp IDX or MoveInMichigan.com)). But the number of consumer visits to MoveInMichigan.com is “large” and “significant” (RRPF 631-34), and the competitive significance of marketing on IDX websites is “large and growing.” (CCPF 645). They represent three of the top four categories of real estate websites. (CCPF 592-99; CX 373-046).

Instead of confronting these facts, Realcomp relies on one “statistic” regarding the ability of brokers to reach consumers through the MLS and Realtor.com. Complaint Counsel demonstrated that this “statistic” is unsupported, contradicted by reliable industry studies, and inconsistent with valid website statistics. (CAB at 30-31). Yet Realcomp completely ignores all this.⁸ Further, the only way EA listings reach Realtor.com is “double listing,” which is insufficient for two reasons. First, consumers must pay more money for this option (in order to

⁸ Although Realcomp points out that this claim – that brokers can reach 80% of buyers through the MLS and, in conjunction with Realtor.com, reach 90% of buyers – was on the websites of two brokers called by Complaint Counsel at trial, Realcomp does not provide any foundation for the statistic nor does it even argue that the statistic is somehow *not* against the overwhelming weight of evidence.

compensate brokers for the increased costs associated with double listing)⁹ and their listings still do not reach the IDX or MoveInMichigan.com and therefore still receive inferior exposure. As Realcomp's own economist stated, IDX websites "are more important sources of internet exposure" than Realtor.com. (RRPF 898). Second, this alternative presumes that other MLSs will not adopt a similar website policy, a proposition that is questionable if the ALJ's decision is allowed to stand. In this regard, it is especially ironic that Realcomp relies on the ability of brokers to place EA listings on MiRealSource, an adjacent MLS that only allows those listings because of a Commission consent order.

Finally, Realcomp points out that there are thousands of real estate websites other than the Approved Websites. But these simply are not effective alternatives in terms of cost or in the amount of exposure to potential buyers. (CCPF 899-907). Realcomp (and the ALJ) rely on the contrary opinion of Realcomp's economist, who has no background in real estate. (IDF 446; RPF 119). But he ignored the industry studies and other evidence confirming the importance of the Approved Websites, instead relying on the existence of such websites as Owner.com (a website that specializes in posting listings for sellers who do not use brokers), Realtytrac.com (a website that specializes in foreclosures), and Loopnet.com (a commercial real estate website). (CX 133-018, -115; CX 140, 161, 162). Moreover, brokers could post their listings on *all* of the thousands of "other" real estate websites – including Google and Trulia – and still reach only a

⁹ Realcomp's assertion by its economist that double listing represents only a nominal cost to brokers is contrary to the weight of evidence. The industry expert, Realcomp Governors and Realcomp's own witness at trial all testified that brokers avoid belonging to two MLSs and "double listing" because of the "significant cost" and "administrative burden." (RRPF 494-501; CX 443-01 (double listing cost discount broker 10.97 man-weeks per year)). The fact that discount brokers can pass these costs on to consumers only demonstrates consumer harm.

fraction of the buyers reached by the Approved Websites. (RRPF 592-97).

c. Realcomp Ignores the Evidence Showing That the Policies Reduce the Efficacy and Desirability of EA Listings

The market participants affected by Realcomp's Policies testified to the exact effects one would expect – their EA listings were rendered less effective. Denied exposure on three of the top four categories of websites and segregated into an inferior status within the MLS search function, brokers found their EA listings to be less successful than in other Michigan MLSs and less successful than their ERTS listings in Realcomp. (CCPF 1037, 1041, 1055, 1057; Mincy, Tr. 419 (EA listings outside of Realcomp area get more activity), 316 (ERTS listings more successful); D. Moody, Tr. 535-37 (EA listings far more successful in other MLSs than in Realcomp), 532-33 (EA listings in Realcomp get less activity than ERTS, not the case in other MLSs)). Realcomp does not address this evidence or offer any explanation why this would be the case.

Nor does Realcomp deal with the evidence that discount brokers uniformly received complaints from customers that their EA listings were not found on the MLS or the Approved Websites – complaints these brokers did not receive in other MLSs. (RRPF 964-65, 988-91, 1044-45, 1061). For instance, one discount broker customer wrote:

I've called 2 separate real estate agents just to see if they could locate my listing on the MLS. In both of their searches my listing did not come up. The only way it was found was by entering the MLS number. Can you tell me why this is happening??? What good is it to have it on the MLS if it doesn't come up in a search??

(RX 67-006; CCPF 933). Another customer disputed a discount broker's credit card charge, complaining about the EA listing:

- a. It did not appear in the regular MLS search for a house with my property's characteristics. That was the whole idea of the service.
 - i. Agents could not find it in the MLS database.
 - ii. Property was hidden in the MLS database, unlike a regular listing
- b. MLS Listing did not automatically appear on Yahoo, as regular listing in Michigan does appear on Yahoo.

(RX 40-002; CCPF 988). Yet another wrote that he asked "different real estate offices" to find his EA listing on the MLS, "Guess how many of them found it? ZERO IT DID NOT COME UP FOR ANY OF THEM." (RX 45-002).

Realcomp posits that the data showing that Realcomp brokers viewed and emailed EA listings only a fraction as often as ERTS listings simply reflects broker members steering their clients away from EA listings. (RAB at 20-21). But this does not explain why EA listing customers discovered that brokers could not find their listings. Nor does it explain the fact that discount brokers receive calls every week from Realcomp members (including Realcomp Governors) unable to find EA listings in searches on the Realcomp MLS. (RRPF 932-36). Moreover, even if the reduction were due to steering, Realcomp's Website Policy facilitates this anticompetitive result. *See Competition in the Real Estate Brokerage Industry*, A Report by the Fed. Trade Comm'n and U.S. Dep't of Justice, 69-70 (April 2007) ("2007 Report") (dissemination of discount broker listings to public websites reduces ability of brokers to steer).

These impacts reduced consumer demand for EA listings. Consumers demand low cost brokerage services in a down economy such as Southeast Michigan. (See CCPF 216-18 (expert and broker testimony as well as NAR study that poor housing market increases demand for EA listings)). But once aware of the limitations imposed by Realcomp's Policies, many consumers

switched to more expensive alternatives. (RRPF 992 (lost sales because listings will not go to Approved Websites); 1025-29 (lost customers or customers choosing ERTS over EA listings)).

B. Realcomp Fails to Rebut the Direct Evidence of Anticompetitive Effects

The reduction in consumer demand for EA listings is direct evidence of anticompetitive effects. EA listings offer consumers contingent discounts and unbundled services. By curtailing the use of EA listings, the Policies restrict these important forms of competition.

1. Realcomp Fails to Understand the Import of the Evidence Showing That the Policies Impact How Brokers Compete

Realcomp claims that its Policies do not harm competition because discount brokers offer ERTS listings. Realcomp actually touts the fact that “[i]n 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.” (RAB at 5). But Realcomp draws the wrong conclusion from this evidence.

a. That the Policies Caused Consumers to Switch to ERTS Listings Is Direct Evidence of Harm

Contrary to Realcomp’s position, the diversion of sales from EA listings to ERTS listings is direct evidence of actual anticompetitive effects. This shows that the Realcomp Policies reduced the use of EA listings. The MLS in “nearby Washtenaw County” (the Ann Arbor MLS) does not have any policies that restrict the dissemination of EA listings. (RRPF 1108). A comparison of the use of EA and ERTS listings by discount brokers who operate in both Realcomp and Ann Arbor shows that they use ERTS listings to a much greater extent in Realcomp. (CX 133-030). In other words, the Policies cause the very same broker to compete differently in these two adjacent MLSs; absent the Policies, consumers in Southeast Michigan are

far more likely to choose EA listings.

The reduced use of EA listings hurts consumers in two ways. (CCPF 1123-43). EA listings represent the provision of unbundled services. By reducing their use, Realcomp's Policies restrained this form of competition. (CCPF 1228-33). EA listings also represent an important form of price competition, which ERTS listings (discounted or otherwise) cannot replace. (CCPF 1207-27; CX 498-A-043-047).

The use of EA listings is especially important given the lack of price competition in the real estate brokerage industry.¹⁰ The evidence from Southeast Michigan shows that traditional brokers using ERTS listings typically charge a 6% commission. (CCPF 190). In fact, the president of a large Century 21 franchise bragged that his brokerage was able to obtain a 6% commission in 98.5% of its transactions. (CX 413 (Kersten, Dep. at 31)). He explained that his firm is able to "neutralize" discounting by other traditional brokers through retaliatory price cuts, and "now they don't offer the discount." (*Id.* at 31-32). By offering EA listings with low up-front fees and contingent discounts, discount brokers put price pressure on traditional broker commissions. (IDF 99-100).

The use of ERTS listings, which require the consumer to pay the offer of compensation no matter what, sets a price floor for brokerage services at the prevailing offer of compensation. (CCPF 1212-18). EA listings break that price floor because consumers pay the offer of compensation only if the buyer is represented. (CCPF 1219-23). By reducing the use of EA listings, the Policies protect the price floor. (CCPF 1124-27). This is why penalizing the use of

¹⁰ See, e.g., FTC Staff Report, *The Residential Real Estate Brokerage Industry*, at 11-13, 64 (Dec. 1983); 2007 Report at 45; CCPF 1130-31.

