NO. 09-4596

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REALCOMP II, LTD.,

***Petitioner*,**

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF A FINAL ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF OF RESPONDENT FEDERAL TRADE COMMISSION

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 6 Cir. R. 34, the Federal Trade Commission agrees with petitioner that the legal issues presented in this petition for review are important. While ultimately without merit, petitioner's arguments regarding the Commission's application of the rule of reason analytical framework may have implications beyond the circumstances here, and may leave the Court with questions in need of further clarification. Accordingly, oral argument may aid in the Court's resolution of this case.

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GLOSSARY

For ease of reference, the following abbreviations and citation forms are used in this brief:

Pet. Br. – Brief of Petitioner Realcomp II, Ltd.

Appx. – Appendix to Petitioner's/Respondent's Briefs

Op. – The Commission's Opinion of October 30, 2009

ALJ – Administrative Law Judge

ID – Initial Decision of the ALJ (Page Number)

IDF – Initial Decision of the ALJ (Factual Finding Number)

CX – Complaint Counsel's Exhibit

JX – Joint Exhibit

RX – Respondent's Exhibit

Tr. – Transcript of Trial Testimony before the Administrative Law Judge

STATEMENT OF JURISDICTION

This is a petition to review a Final Order of the Federal Trade Commission ("FTC" or "Commission"), entered on October 30, 2009, pursuant to Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. This Court has jurisdiction pursuant to 15 U.S.C. § 45(c). The petition of Realcomp II, Ltd. is timely.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Realcomp's policies, which discriminate against unbundled, low-cost real estate listings on Realcomp's multiple listing service ("MLS") and on competitively significant Internet websites, are *prima facie* anticompetitive and, unless adequately justified, constitute unreasonable restraints of trade in violation of the FTC Act.[1]

2. Whether Realcomp's proffered justifications for its anticompetitive policies – that they were enacted to address a "free riding" problem and a "bidding disadvantage" problem – are supported by antitrust law and the record evidence.

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[1] Realcomp's brief focuses on the "Website Policy," and Realcomp appears not to contest the Final Order as to the "Search Function Policy" and the "Minimum Services Requirement" – both of which it repealed after the Commission's complaint had issued. *See* Pet. Br. 61 (seeking vacatur of portions of the Final Order). Nevertheless, because the parts of the Final Order which Realcomp seeks to vacate also relate to those two policies, we address all three.

STATEMENT OF THE CASE

This petition seeks review of a Commission cease and desist order, issued under Section 5 of the FTC Act following administrative trial. The case concerns certain policies of Realcomp, an association of rival real estate brokers operating the largest MLS in Southeastern Michigan. Those policies were designed to (and did) target innovative brokers who challenged the traditional, commission-based model of real estate brokerage by unbundling their services and offering them to consumers at discounted prices. Realcomp's policies placed those offerings at a significant competitive disadvantage by restricting their exposure on Realcomp's MLS and on the most popular real estate websites in Southeastern Michigan.

The Commission issued an administrative complaint against Realcomp in October 2006, charging that its policies were anticompetitive and not justified by any procompetitive considerations. The case was tried before an ALJ, who dismissed the complaint after concluding that, although some of those policies were likely anticompetitive by nature, and although Realcomp possessed substantial power in the relevant markets, there was an insufficient showing of anticompetitive effects. The Commission reversed, concluding that Realcomp's conduct constitutes an unreasonable restraint of trade in violation of Section 5 of the FTC Act, and it issued a cease and desist order.

STATEMENT OF FACTS

Except where explicitly noted below, the following facts, based entirely on the ALJ's initial findings and adopted by the Commission, have *not* been contested by Realcomp. Op. 4-13 (Appx. 10-19).

A. Realcomp and the Traditional Business Model

Realcomp has approximately 14,000 members (almost half of all Michigan realtors), and no other Michigan MLS has a comparable geographic reach or membership size. IDF 134, 157-159 (Appx. 83-84, 86). Realcomp's members are real estate brokers who compete with one another to provide residential brokerage services to home buyers and sellers. Although it allows brokers who offer limited (*i.e.* unbundled and discounted) services to be members, most of Realcomp's members – and its *entire* governing board – are full service brokers. IDF 90-91, 142, 158, 164 (Appx. 78, 84, 86). All members, including those offering limited services, pay the same fees to Realcomp. IDF 176-177 (Appx. 87).

A home sale transaction usually involves a "listing broker," whom the seller retains, and a "cooperating broker," who assists prospective buyers. IDF 18 (Appx. 68). The relationship between listing brokers and home sellers is governed by a "listing agreement," which specifies the contract's term and the compensation to the listing broker, and typically includes an "offer of compensation" to any

cooperating broker who secures a buyer for the property. IDF 24-25 (Appx. 69). Under the traditional Exclusive Right to Sell ("ERTS") listing agreement, a home seller appoints a broker as the exclusive agent for a designated time to sell the property on the seller's stated terms. Brokers offering ERTS listings typically provide a full set of brokerage services (such as helping determine the asking price, devising a marketing strategy, showing the home to interested parties and holding open houses, and evaluating offers). These services are "bundled" in the sense that sellers must buy the entire package; they cannot customize their contracts to pick and choose among the services offered. ERTS listing agreements are commission-based (a percentage of the home's selling price is paid to the broker at closing). The seller pays the ERTS broker's commission whether the sale occurs through the efforts of the listing broker, the seller, or another broker, or even if a buyer independently approaches the seller. *See* IDF 50-53 (Appx. 72-73). ERTS listing brokers in Realcomp's area typically charge a commission rate of approximately 6%. IDF 67 (Appx. 74).

The listing broker ordinarily pays the cooperating broker, by making an offer of compensation upon securing a buyer. IDF 40-46, 193-194 (Appx. 71-72, 89). Under the ERTS model, the listing broker's commission is bundled with the cooperating broker's commission. Thus, if the home sale requires the seller to pay

the usual 6% commission, the listing broker retains 3% and pays the cooperating broker 3%. If no cooperating broker is involved, the listing broker retains the entire 6% commission. IDF 54-55, 77 (Appx. 73, 76). Realcomp requires that all listings on its MLS contain an offer of compensation to cooperating brokers, although it does not require that a cooperating broker be involved in a home sale. IDF 190, 193 (Appx. 89).

Realcomp's primary member benefit is its MLS, the largest in Michigan. IDF 159, 179 (Appx. 86, 88). An MLS is an information sharing service that provides data about homes listed for sale by its members within a geographic area. MLS listings contain details about a property's features, an offer of compensation, and the level of services offered in the listing agreement. IDF 102-110 (Appx. 80-81). By centralizing this information, the MLS makes the marketplace for homes more efficient and orderly. IDF 103, 105 (Appx. 80). As a consequence, it is the most effective marketing tool for residential real estate in Southeastern Michigan. IDF 430 (Appx. 116). Realcomp's MLS is a closed-network database, available only to Realcomp members. IDF 106-108 (Appx. 80).

B. The Significance of the Internet and Realcomp's Approved Websites

Widespread Internet usage has substantially affected the marketing of residential real estate. IDF 218 (Appx. 92); *see* CX 221-001 (Appx. 220)

(Realcomp's CEO noting that "a majority of home buying and selling now begins on the Internet"). Realcomp's system, for example, allows members access to its MLS from any computer with Internet access. IDF 180 (Appx. 88). But the more competitively significant change has been that the Internet makes it possible to market properties *directly* to consumers. MLS operators have sought to capitalize on this new tool by disseminating MLS listings to public Internet websites, where they can be viewed directly by consumers – without first having to retain a broker. IDF 114-118, 218-221 (Appx. 81-82, 92).

Thus, a key benefit of Realcomp's MLS is member access to Internet advertising on Realcomp's "Approved Websites." Those include Realcomp's own "MoveInMichigan.com"; the "Realtor.com" website of the National Association of Realtors ("NAR"); the Realcomp members' participating websites – which, using Internet Data Exchange ("IDX") feeds, display the listing information transmitted by Realcomp; and "ClickOnDetroit.com," a local television station's website which "frames," and takes its data exclusively from, MoveInMichigan.com. IDF 210-212, 227, 231, 237-242 (Appx. 91-94).

The importance of Internet marketing in general, and Realcomp's Approved Websites in particular, is evident in the near unanimity of member participation in its IDX feeds to those public websites. At least 91% of broker websites nationwide

contain searchable property listings obtained via IDX feeds, and at least 82% of Realcomp's members permit their listings to be included in IDX feeds to its Approved Websites. IDF 121, 354 (Appx. 82, 107). It is also evident from the emphasis Realcomp accords its data feeds. IDF 221-222, 232, 234-235 (Appx. 92-93). One Realcomp document, for example, touts how its MLS enables listing brokers to reach millions of Internet users shopping for homes on its Approved Websites. CX 272 (Appx. 221).

Industry experts agree. One expert testified that marketing homes on certain key websites is "significant to a broker's ability to compete effectively" because buyers "are now using the Internet as an integral part of their home search." RX 154-A-005 (Appx. 234); Murray Tr. 210-13 (Appx. 206-09) (those websites are "where the buyers are"). A 2006 NAR paper warned that brokerage firms must "learn to convert internet leads to paying customers in order to compete effectively." CX 380-008 (Appx. 222). Indeed, brokerage firms now derive about 7% of their actual sales from leads generated by their websites – a "big chunk of business" to be derived from one marketing outlet. Murray Tr. 218-19 (Appx. 210-11).

C. Unbundled Brokerage Services and the New Pricing Structure

The increasingly vital role of Internet marketing dramatically changed the competitive landscape in the real estate industry. It brought to the forefront the prospects of "limited service" listing brokers, who provide unbundled services and thus offer consumers a low-cost alternative. IDF 64, 69, 73, 75, 77, 92 (Appx. 74-76, 78). Their offerings often include a menu of services from which home sellers can choose to purchase only those they need. IDF 70; 72 (Appx. 75) ("limited brokerage service model allows home sellers to purchase a subset of the full range brokerage services (such as listing in an MLS), while self-supplying other services"). As a result, these offerings allow home sellers (and, indirectly, home buyers) to reduce the costs of selling (or buying) a home. IDF 75 (Appx. 76).

One type of limited service offering is the Exclusive Agency ("EA") listing agreement, under which the listing broker acts as the seller's exclusive agent, but the seller retains the right to sell the property without further assistance from the broker. IDF 58 (Appx. 73). A typical EA agreement calls for an up-front flat fee of as little as $500 to the listing broker, and a 3% offer of compensation to cooperating brokers. But, although EA listings include offers of compensation identical to those under ERTS listings, the seller need not pay for the services of a cooperating broker when none is used, *i.e.*, when an unrepresented buyer purchases

the property. IDF 59-60 (Appx. 73). Moreover, unlike with ERTS listings, brokers who offer EA contracts often provide an unbundled menu of services from which home sellers may select – and pay only for – what suits their individual needs. IDF 62, 70 (Appx. 74-75).

Those innovative offerings have proven very popular with consumers. In 2003, limited service brokerages were estimated to have only a 2% market share nationwide. By 2005, that market share had ballooned to 15% nationwide. IDF 90 (Appx. 78).

D. The Price Pressure Exerted by Limited Service Brokerages

As would be expected, the market entry of these innovative, lower-cost offerings has exerted increasing competitive pressure on the traditional business model for providing residential brokerage services. IDF 99-101 (Appx. 79-80). Brokers, including Realcomp members, whether offering full or limited service, compete with one another to obtain new home listings. Limited service brokers, who compete not only by unbundling the brokerage services they offer, but also by unbundling the pricing structure itself, allow sellers to save substantially on the price of brokerage services. IDF 69-72, 75-81 (Appx. 75-77).

As a consequence of the new market dynamic, limited service offerings have exerted a downward price pressure on full service brokerage commissions. IDF 99

(Appx. 79). The industry leader, NAR, acknowledged the competitive threat to the traditional business model as early as 2003, noting that "[a] growing percentage of consumers are asking agents to reduce their commissions. This has been sparked by awareness of discounted online and limited-service models, and remains a challenge for full service agents." IDF 100 (Appx. 79). The only testifying industry expert concurred. IDF 101 (Appx. 79) ("Seller awareness of limited service brokers has been growing steadily" and the "'more sellers are aware that there are alternatives that are lower cost, the more sellers are going to at least investigate it and see if that fits them'") (quoting Murray, Tr. 174-175 (Appx. 204-05)).

E. The Realcomp Policies

Realcomp – governed by full service brokers, IDF 142 (Appx. 84) – responded to this competitive threat by adopting a set of policies regarding how limited service listings are treated on its MLS. It first adopted a "Website Policy," in 2001, which prohibited the dissemination of limited service listings to Realcomp's Approved Websites. IDF 349-359 (Appx. 106-107). Once that policy went into effect, consumers searching those public websites for homes in Realcomp's service area were limited to homes offered under ERTS agreements;

consumers could not access *any* limited service offerings that were otherwise included in Realcomp's MLS database.

In 2003, Realcomp adopted the "Search Function Policy," under which the default settings on its MLS searched for only ERTS listings (an "unknown" category of listings was eliminated in a 2004 amendment). IDF 361, 372-373 (Appx. 108-109). When that policy went into effect, a search for homes on the Realcomp MLS brought up, by default, only homes listed under ERTS agreements. To retrieve limited service offerings, Realcomp members needed to affirmatively select those listing types, or choose a "select all listings" option. IDF 363-364 (Appx. 108).

Lastly, to help enforce those policies, Realcomp adopted in 2004 a "Minimum Services Requirement," which compelled member brokers to provide a full (and bundled) package of enumerated brokerage services to qualify their listing as an "ERTS" listing. IDF 66, 372-374 (Appx. 74, 109). Thus, unless the home seller agreed to purchase *all* those services, that listing would not be included in the Realcomp MLS default search results, nor in Realcomp's Internet feed to its Approved Websites.

Realcomp actively enforced those policies, using fines of up to $2,500 for each violation, lengthy suspension from the MLS, and expulsion from Realcomp.

IDF 380-387 (Appx. 110-111). The Search Function Policy remained until April 2007, when Realcomp repealed it, along with the Minimum Services Requirement. IDF 370, 375 (Appx. 109).

The combined effect of those policies was to limit the exposure of EA listings to the brokers searching Realcomp's MLS on behalf of buyers, and, more significantly, to consumers searching the publicly available Approved Websites for homes to purchase.

F. The Relevant Product and Geographic Markets and Realcomp's Market Power

There are two relevant product markets in this case. The first, an output market, is the supply of residential real estate brokerage services, in which Realcomp's members compete. The second, an input market, consists of multiple listing services, in which Realcomp is a participant. IDF 285-315 (Appx. 98-102). The MLS is a vital input into the supply of residential real estate brokerage services. IDF 289, 291, 294, 300, 310, 313 (Appx. 99-101).

The relevant geographic market for both product markets is local, consisting of four Michigan counties: Oakland, Livingston, Macomb, and Wayne. IDF 321, 326-328 (Appx. 102-103).

Realcomp enjoys substantial power in those markets, derived from high market shares and high barriers to entry, and reinforced by the "network effects"

inherent in the cooperative nature of the MLS (where the value of the service to each MLS user rises as the number of users increases). IDF 305-310, 329-348; ID 84-85, 97 (Appx. 100-101, 103-106, 145-146, 158).

G. The Proceedings Below

The Commission issued its administrative complaint on October 10, 2006, charging that Realcomp's adopting and enforcing those policies unlawfully restrained competition in the provision of residential real estate brokerage services in Southeastern Michigan, thus violating Section 5 of the FTC Act. Op. 3-4; ID 1 (Appx. 9-10, 62). The case was tried before an ALJ, who found that the nature of Realcomp's Website Policy and Minimum Services Requirement was likely anticompetitive, and that Realcomp had substantial power in the relevant markets. Op. 13; ID 97, 128 (Appx. 19, 158, 189). Nonetheless, because he concluded that there was an insufficient showing of actual anticompetitive effects, the ALJ dismissed the complaint. *Id*.

The Commission unanimously reversed. It concluded that Realcomp's conduct constitutes an unreasonable restraint of trade under any one of three variations of the rule of reason. It found that the nature of Realcomp's policies was such that they likely have detrimental effects in the relevant markets. Op. 22-28

(Appx. 28-34).[2] It also concluded that Realcomp's market power, when combined with the tendency of its policies to harm competition, provided an independent *prima facie* case against Realcomp. Op. 34-37 (Appx. 40-43). Lastly, contrary to the ALJ's conclusion, the Commission found substantial evidence of actual anticompetitive effects resulting from Realcomp's policies. Op. 43-47 (Appx. 49-53).

The Commission then examined, and rejected, Realcomp's proffered justifications. Op. 29 (Appx. 35). It concluded that no "free riding" exists here, and that the so-called "bidding disadvantage" was not a cognizable justification under the antitrust laws. Op. 29-34 (Appx. 35-40). Thus, the Commission held that Realcomp's policies violated Section 5 of the FTC Act, and issued a cease and desist order.

STANDARD OF REVIEW

"The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c); *In Re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 461 (6th Cir. 1992). This Court reviews Commission findings "on the standard of whether there is substantial evidence in the record to support the

[2] Overruling the ALJ, the Commission concluded that, like its Website Policy, Realcomp's Search Function Policy restricted the exposure of limited service listings, and thus likely had anticompetitive effects. Op. 13, 24-28 (Appx. 19, 30-34).

finding made, not on a preponderance of evidence standard." *Id.*; *see also id.* ("We will 'accept the Commission's *findings of fact* if they are supported by such relevant evidence as a *reasonable* mind might accept as adequate to support a conclusion'.") (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454 (1986); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). Thus, a reviewing court may not "'make its own appraisal of the [evidence], picking and choosing for itself among uncertain and conflicting inferences'." *Indiana Federation*, 476 U.S. at 454 (quoting *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934)).

In various parts of its brief, Realcomp argues that, because the ALJ had reached a contrary conclusion to that of the Commission, the Commission's findings are entitled to less deference by this Court. Pet. Br. 12, 23-24, 31. Realcomp's argument not only misconstrues the proper legal standard, but is particularly inapt in this case, where the Commission's conclusions were in fact based almost entirely on the ALJ's findings. Realcomp cites, for example, to a portion of this Court's decision in *Detroit Auto Dealers* that concerns the reasons for the Court's remand on a narrow issue of statutory exemption. 955 F.2d at 468-69. This Court explained that, because the Commission "made no adequate analysis of the ALJ factfinding and conclusions in this regard, nor did it state

whether or why the ALJ findings were not supported by evidence in the record," it was necessary to remand the case "for further Commission consideration on this particular question." *Id*. at 468. This is not the case here. As detailed above, the Commission's decision was based almost entirely on the ALJ's own, *undisputed* findings. *See, supra*, at 3-14. Where the Commission disagreed with the ALJ's inferences or conclusions drawn from factual findings, moreover, it addressed those disagreements directly and provided a detailed explanation of its reasoning. *See, e.g.*, Op. 4-5 n.4, 10-11, 13-14, 21-22 n.16, 24-28 (Appx. 10-11, 16-17, 19-20, 27-28, 30-34) (discussing the anticompetitive nature of Realcomp's Search Function Policy).

Furthermore, applicable law mandates deference to the *Commission's* findings. The Supreme Court has made clear that the substantial evidence standard "is not modified in any way when the [agency] and its [ALJ] disagree." *Universal Camera*, 340 U.S. at 496. The issue on a petition for review is *not* whether a reviewing court would appraise that evidence differently or draw different inferences from it, *id*., and even if two reasonable interpretations of the record existed, one by the Commission and the other by the ALJ, the reviewing court must in those circumstances accept the agency's conclusions. *See Arkansas v. Oklahoma*, 503 U.S. 91, 113 (1992). The Commission indisputably has *de novo*

review responsibility over the ALJ decisions, *see* 16 C.F.R. § 3.54(a) (on review of ALJ initial decision, the Commission "will, to the extent necessary or desirable, exercise all the powers which it could have exercised if it had made the initial decision"), and it is the agency's decision that is entitled to deference, *not* that of the ALJ. *E.g., Varnadore v. Sec'y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998); *Zoltanski v. FAA*, 372 F.3d 1195, 1200 (10th Cir. 2004); *Swan Creek Comms., Inc. v. FCC*, 39 F.3d 1217, 1221 (D.C. Cir. 1994).

Finally, to the extent an ALJ may have any advantage in evaluating the evidence – such as when observing live testimony *that turns on* a witness's demeanor and truthfulness (*e.g.*, whether a traffic light was red or green when an accident took place) – the ALJ made no such findings here. The facts in this case are essentially undisputed; it is their competitive *import* that the parties dispute. As we show below, the Commission provided ample support for its disagreement with the ALJ's conclusions, and therefore, its findings "are determinative." *Detroit Auto Dealers*, 955 F.2d at 461.

Review of the Commission's legal analysis is *de novo*, "although even in considering such issues the courts are to give some deference to the Commission's informed judgment." *Indiana Federation*, 476 U.S. at 454; *accord Detroit Auto Dealers*, 955 F.2d at 461.

SUMMARY OF ARGUMENT

Realcomp (an organization of competitors) adopted and enforced policies that penalize members who offer discount brokerage services; it sent full service listings, *but not* discounted listings, to important public websites, and it excluded those discounted listings from its MLS default searches. Not only did those policies facially make it more difficult for discount brokers to compete for listings, but Realcomp's substantial market power ensured that the harm to competition (and consumers) is even more likely. This consumer harm was further corroborated by qualitative and quantitative evidence of actual detrimental effects. The Commission, accordingly, concluded that, under any variation of the rule of reason, Realcomp's policies are anticompetitive, and are not justified by procompetitive considerations.

First, the Commission had ample basis to conclude that Realcomp's practices are "inherently suspect," and thus require justification regardless of any showing of market power or actual effects. Its policies penalized the offering of innovative, low-cost alternatives to the traditional model, by restricting the dissemination of information about those offerings to consumers. By limiting the exposure of EA listings on the most important venues for selling and buying homes, Realcomp's policies impair consumers' ability to evaluate rival offerings

by making the information about EA listings more difficult and costly to obtain. The courts have consistently condemned comparable restraints, even when imposed by otherwise-procompetitive joint ventures. The Commission correctly concluded that the anticompetitive tendency of such restraints is sufficient, on their face, to require procompetitive justification.

But even if they were not sufficiently naked restraints to warrant requiring justification under the inherently suspect framework, Realcomp's policies must still be deemed *prima facie* anticompetitive when viewed in light of Realcomp's substantial market power. Realcomp does not challenge the Commission's market power finding. Nor does it challenge the fact that its policies *tend* to harm competition. Under these circumstances, the Commission's conclusion that Realcomp's policies are *prima facie* anticompetitive is reasonable, and is supported by a long line of precedents that permit such an inference of anticompetitiveness.

The record evidence of actual marketplace effects also corroborates the Commission's conclusion. Complaint counsel's economic expert conducted three types of econometric analyses to determine the effects of Realcomp's policies on the number of EA listings on its MLS. He concluded that each one points to the policies having caused a significant reduction in output. Realcomp does not challenge the first of those studies, a time-series analysis. Its arguments against the

other two (a benchmark study and numerous regression analyses), which focus on purported methodological flaws, not only ignore basic tenets of economic theory, but indeed lead to some curious outcomes. For example, its expert's regression analysis shows that the Realcomp policies actually *increase* the number of EA listings on its MLS (*i.e.*, that suppressing marketing exposure for the more flexible and lower cost EA listings would somehow lead consumers to choose them more often).

Finally, the Commission properly rejected Realcomp's proffered justifications. The purported "free-riding" problem, which Realcomp's policies were supposed to address, does not exist here. And although a "bidding disadvantage" may result from a consumer's choosing an EA contract, that is the natural (and, indeed, desirable) consequence of a competitive market. Realcomp's efforts to preclude such competition are not cognizable under the antitrust laws.

ARGUMENT

I. REALCOMP'S CONDUCT – WHICH IMPEDES LOW-COST, UNBUNDLED BROKERAGE SERVICES – IS ANTICOMPETITIVE UNDER ANY VARIATION OF THE RULE OF REASON

By adopting and enforcing its Website Policy and, until April 2007, its Search Default Policy and Minimum Services Requirement, Realcomp has restricted the advertising exposure of non-ERTS listings, with the effect of

reducing their use on its MLS and thus alleviating the price pressure they exert on the traditional, commission-based business model used by most of its members. Such conduct, which penalizes the discounting behavior of limited service brokers by restricting the dissemination of information about their offerings on Realcomp's MLS and Approved Websites, is anticompetitive under any variation of the rule of reason.

A. Realcomp's Conduct Should Be Evaluated Under A Flexible Rule of Reason Framework

There is no dispute here that Realcomp's conduct should be evaluated under the rule of reason. As the Supreme Court's teachings and court of appeals decisions make clear, however, the application of that analytical framework is far more flexible than Realcomp's brief implies. *See* Op. 16-20 (Appx. 22-26); Pet. Br. 14-16. There can be little doubt, for example, that antitrust jurisprudence has evolved "away from any reliance upon fixed categories and toward a continuum." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 35 (D.C. Cir. 2005). *See California Dental Ass'n v. FTC*, 526 U.S. 756, 779 (1999) ("The truth is that our categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear"). Significantly, the "essential inquiry" of any rule of reason analysis remains the same: whether "the circumstances, details, and logic of a restraint" support "a confident conclusion

about the principal tendency" of that restraint to harm competition and consumers. *Id.* at 780, 781; *see also Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Oklahoma*, 468 U.S. 85, 104 (1984) ("*NCAA*") (key inquiry is "whether or not the challenged restraint enhances competition"). But, as the Commission explained, answering that inquiry may be accomplished in a number of ways under the rubric of the rule of reason. Op. 17-20 (Appx. 23-26).

In *Indiana Federation*, the Supreme Court made it abundantly clear that a *prima facie* case of anticompetitive conduct can be established in a number of ways. 476 U.S. at 459-60. For example, the character of the restraint may, by its very nature, be sufficient to require justification – even in the absence of a showing of market power or anticompetitive effects. *Id.* The conduct challenged by the Commission in *Indiana Federation* – "a horizontal agreement among [rivals] to withhold from their customers a particular service that they desire," *id.* at 459 – was an example of just such a type of restraint. In such circumstances, "'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement'." *Id.* (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 692 (1978)). Other examples of this type of restraint are the practices condemned in the Commission's two most recent applications of this "inherently suspect" framework, both upheld by reviewing courts of appeals. *See*

North Texas Specialty Physicians, 140 F.T.C. 715 (2005), *aff'd, North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008), *cert. denied*, 129 S. Ct. 1313 (2009) (physicians organization's practice of polling its members regarding minimum rate each would accept and using results in negotiating rates in payor agreements); *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd*, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005) (agreement of co-joint-venturer producers of "Three-Tenors" music album to restrict advertising and discounting of their individually produced Three-Tenors albums during promotional period). As the D.C. Circuit emphasized in the latter case, the condemnation of trade restraints as unreasonable, without inquiry into either market power or actual effects, is most appropriate when the restraints bear a "close family resemblance [to] another practice that already stands convicted in the court of consumer welfare." *Id*. at 37.

The more conventional way of applying the rule of reason – which, in addition to the nature of the restraint, inquires into the market definition and market power – was preserved in *Indiana Federation*, although the Court did not have occasion to apply it under the circumstances of that case. The Court observed that "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on

competition," and market power can, thus, be viewed as "'a surrogate for detrimental effects'." 476 U.S. at 461 (quoting VII Phillip E. Areeda, ANTITRUST LAW ¶1511, p. 429 (1986)). As the Commission reasoned in the present case, and as numerous courts of appeals have confirmed, the Court's description of market power as a valid proxy for detrimental effects compels the conclusion that, "if the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition." Op. 18 (Appx. 24) (citing, *e.g., United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993); *Flegel v. Christian Hospital, NE-NW*, 4 F.3d 682, 688 (8th Cir. 1993); *Gordon v. Lewiston Hospital*, 423 F.3d 184, 210 (3d Cir. 2005); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019 (10th Cir. 1998); *Toys "R" Us, Inc. v. FTC*, 221 F.3d 928, 937 (7th Cir. 2000)).

Lastly, the *Indiana Federation* Court held that, because market power is "but a surrogate for detrimental effects," "proof of actual detrimental effects, such as a reduction of output, can obviate the need for an inquiry into market power." 476 U.S. at 460-61 (internal quotation marks and citation omitted).[3] Indeed, the evidence that the Court accepted in that case as sufficient proof of anticompetitive

[3] This was, in essence, an alternative holding, in that the Court indicated that this showing of actual effects would suffice "even if the restriction imposed" did not (contrary to what the Court had already concluded) qualify as a "naked" restraint. 476 U.S. at 460.

effects did not involve any elaborate econometric analysis, but simply that in two localities, over a period of years, consumers were actually denied the services in question. *Id.*

The lesson from those authorities is clear: evidence regarding the nature of the restraint, the defendant's market power, and any actual harm to consumers, should be considered with the one ultimate goal of determining whether that evidence, as a whole, infuses the tribunal with sufficient confidence about the restraint's anticompetitive impact to justify requiring the defendant to come forth with countervailing procompetitive justifications. The evidence in this case more than meets this standard.

B. Realcomp's Policies, by Their Nature, Harm Competition to the Traditional Business Model from Unbundled and Discounted Offerings

The Commission carefully considered the "circumstances, details, and logic" of Realcomp's policies, and concluded (correctly) that, by their very nature, they likely harm competition. Realcomp's policies singled out an innovative and low-cost form of service for unfavorable treatment, by limiting the exposure of non-ERTS listings to consumers, both via the MLS and on the most popular real estate websites in the Realcomp region. Such advertising restrictions can reasonably be expected to result in a contraction of consumer choice and alleviation of the price

pressure on the traditional business model. Accordingly, there is ample support, in the record and in the case law, for the Commission's conclusion that the nature of those policies alone renders them *prima facie* anticompetitive, thus necessitating countervailing procompetitive justification by Realcomp.

As explained above, the entire point of Realcomp's three related policies was to selectively disfavor the dissemination of information about non-ERTS listings, by barring such listings from websites that many consumers use as a vital starting point for their home searches, and by making it more difficult even for Realcomp members to gain access to such listings. The advent of non-ERTS services offered consumers a new, low-cost option by unbundling the traditionally packaged brokerage services and allowing consumers to select only those services they needed. An increasing number of consumers found this option attractive. Realcomp's policies diminished the value of those services, making them less attractive to consumers – who were forced, in order to secure full exposure for their listings, to purchase services they did not desire. Consequently, non-ERTS listings were rendered less of a competitive threat to the traditional brokerage model.

Realcomp's policies thus constitute an agreement among rival brokers to restrict the availability of competitively relevant information. Moreover, the

policies targeted only the low-cost, limited-service listings, thus alleviating the downward pricing pressure those innovative offerings exert on the commission-based pricing model. As such, they bear a "close family resemblance" to conduct deemed anticompetitive by the courts without a showing of market power or actual detrimental effects. *Polygram v. FTC*, 416 F.3d at 37.

Restrictions on information necessary for consumers to evaluate competitive offerings were, for example, at the heart of the Commission's case in *Indiana Federation*. The dentists' agreement there against providing x-rays to insurance companies, which needed them to evaluate the dental services provided, was deemed by the Supreme Court "likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices or * * * the purchase of higher priced services." 476 U.S. at 459-64.[4] *See also Professional Engineers*, 435 U.S. at 692-93 (condemning, "[o]n its face," rivals' agreement to restrict availability of engineering services cost information as "imped[ing] the ordinary give and take of the market place").

Particularly when such restrictions single out discounters or innovative rivals offering more efficient products or services, the courts have been quick to

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[4] Notably, there was no showing of market power in that case.

strike them down without the need to establish market power or detrimental effects. In *Denny's Marina, Inc. v. Renfro Productions, Inc.*, for example, the Seventh Circuit deemed "naked" an alleged agreement of marine dealers to exclude from popular trade shows a rival who advertised a "meet or beat" pricing policy. 8 F.3d 1217, 1219-21 (7th Cir. 1993) ("Concerted action by dealers to protect themselves from price competition by discounters," may be condemned as "horizontal price-fixing" without any further market inquiry). *See also Radiant Burners, Inc. v. Peoples Gas Light and Coke Co.*, 364 U.S. 656, 658-60 (1961) (*per curiam*) ("conspiratorial refusal" of gas utilities to supply plaintiff's "safer and more efficient" radiant burners "because they are not approved by" gas association of plaintiff's rivals "clearly has, by its nature and character, a monopolistic tendency," and is "hence forbidden.") (citations and internal quotation marks omitted).

Finally, in *Detroit Auto Dealers,* this Court upheld the Commission's ruling that car dealers' agreement to limit their showrooms' hours of operation was anticompetitive, despite absence of proof of increased prices or reduced output, or proof of market power. 955 F.2d at 469-72.[5] The Commission had found that the

[5] The panel majority in *Detroit Auto Dealers*, while affirming the decision, expressed reservations about the Commission's "inherently suspect" framework, because it perceived that analysis to "arise[] from a *per se* approach." 955 F.2d at 470-71. But, as Judge Ryan reasoned, "[u]nder a *per se* analysis, the agreement would

dealers' agreement – like Realcomp's conduct here – "raises the opportunity cost to consumers" and impairs their ability to "compar[e] prices, features, and service, and thereby reduces pressure on dealers to provide the prices, features and services consumers desire." *Detroit Auto Dealers Ass'n*, 111 F.T.C. 417, 495 (1989). This Court agreed that showroom hours of operations are "a means of competition," and their unjustified limitations, therefore, "an unreasonable restraint of trade." 955 F.2d at 472.

Under these circumstances, the Commission's conclusion that Realcomp's policies were sufficiently anticompetitive in nature to require countervailing procompetitive justification was proper, and amply supported by precedent. Realcomp's contrary arguments do not withstand scrutiny.

First, Realcomp urges the Court to scrutinize closely the Commission's reliance on the character of the restraint because of the ALJ's contrary conclusion on this issue. Pet. Br. 12. This argument is supported by neither the law (*see, supra*, at 14-17), nor the record. The Commission's conclusion that Realcomp's policies were *prima facie* anticompetitive was based on the ALJ's findings, for example, that Realcomp sent ERTS but not EA listings to its Approved Websites,

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have been invalid without any consideration of its procompetitive effects. The FTC, however, did consider the efficiency justifications offered by the respondents before concluding that the agreement had an anticompetitive effect"). *Id*. at 475 (Ryan, J., concurring in part and dissenting in part).

IDF 349-360, 380-387 (Appx. 106-108, 110-111); that Realcomp excluded EA listings from the MLS default search results, IDF 361-371 (Appx. 108-109); that Realcomp's policies, thus, discriminated against offerings that exert "price pressure" on traditional offerings, IDF 99-100 (Appx. 79); and that Realcomp's Website Policy, by its nature, tended to harm competition. ID 97 (Appx. 158).[6]

Second, Realcomp's argument that its policies cannot be held inherently suspect because the MLS is an efficient joint venture is equally without merit. As the Commission explained, the propriety of the formation and existence of Realcomp's MLS is not at issue in this case. Op. 22 (Appx. 28). Realcomp is an association of horizontal rivals, however, and, as such, remains subject to all modes of antitrust scrutiny to ensure that it does not use its legitimate collaborative structure as a cloak to restrain competition. In *NCAA*, for example, the Court readily acknowledged the efficiencies of the association of rival schools, 468 U.S. at 101-02, but nonetheless held that the NCAA cannot adopt policies restricting members "from competing against each other on the basis of price," because such policies "create[] a horizontal restraint–an agreement among competitors on the way in which they will compete with one another." *Id.* at 99. Similarly, the

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[6] The Commission did overrule the ALJ's *conclusion* (but not his findings) regarding the Search Function Policy, but that ruling is not contested here by Realcomp, and, in any case, the Commission fully explained its reasons for that ruling. *See, supra*, at 15-17 & 13 n.2.

Professional Engineers Court noted the social benefits of self-regulating professional societies, 435 U.S. at 686-87, 696, but still held that the society's ethical canon barring competitive bidding, by prohibiting members from discussing cost of services with customers until after the initial selection of an engineer, is unlawful, and "[w]hile * * * not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id*. at 692-93, 696. Indeed, then-judge Sotomayor confirmed that, although joint ventures are "typically evaluated as a whole under the rule of reason," that does not necessarily apply to every joint venture restraint: "a *per se* or quick-look approach" may well apply "when a challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing purposes" of the joint venture, in which case "a challenged restraint must have a reasonable procompetitive justification, related to the efficiency-enhancing purposes of the joint venture." *Major League Baseball Properties, Inc. v. Salvino, Inc.*, 542 F.3d 290, 338-40 (2d Cir. 2008) (Sotomayor, J., concurring).

Realcomp contends that its policies "do not restrict any competitors from advertising and disseminating information about their offerings; nor have members agreed to limit their advertising of EA listings," Pet. Br. 16, but the record, including the ALJ findings discussed above, irrefutably shows otherwise.

Realcomp's policies, which were adopted ultimately on the basis of its members' votes (IDF 140, 146-148, 355-356, 361, 372 (Appx. 84-85, 107-109)), restricted the advertising of, and the dissemination of vital information about, limited service offerings such as EA listings, on both the MLS and Realcomp's Approved Websites, greatly diminishing their exposure to consumers.[7] Realcomp contends that it "merely does not facilitate such advertising and dissemination," Pet. Br. 16, but *the facilitation of advertising and dissemination of information about real estate listings is at heart of why Realcomp was created*; that is the very source of its efficiency-enhancing status. That Realcomp so readily admits that its policies are contrary to its *raison d'etre* is alone sufficient to treat those policies independently from the Realcomp joint venture itself, and to insist that they be justified by countervailing procompetitive reasons that are "related to the efficiency-enhancing purposes of the joint venture." *Salvino*, 542 F.3d at 339 (Sotomayor, J., concurring); *see also* Federal Trade Commission and U.S. Dep't of

[7] The Supreme Court has treated horizontal restrictions on advertising in ordinary markets, such as Realcomp's, as posing serious dangers to competition, and as having a great capacity to affect prices. *E.g., Morales v. Trans World Airlines*, 504 U.S. 374, 388 (1992); *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977).

Justice, *Antitrust Guidelines for Collaborations Among Competitors* (hereinafter "*Collaboration Guidelines*"), § 3.36(b) (April 2000).[8]

Realcomp also argues that its policies constitute "internal" rules of operation for a legitimate joint venture and thus cannot be inherently suspect. Pet. Br. 18-19. This is an incorrect understanding of the law governing agreements among joint venture participants. As a threshold matter, when faced with an agreement among joint venture participants, "[a] court must distinguish between 'naked' restraints, those in which the restriction on competition is unaccompanied by new production or products, and 'ancillary' restraints, those that are part of a larger endeavor whose success they promote." *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185, 188-89 (7th Cir. 1985). Thus, a defendant must provide "a reasonable procompetitive justification, *related to* the efficiency-enhancing purposes of the

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[8] Citing *United States v. Visa USA Inc.*, 344 F.3d 229 (2d Cir. 2003), Realcomp argues that because its MLS is a two-sided market with network effects, its policies cannot be analyzed under the inherently suspect framework, but it fails to explain why that fact alters the legal analysis. To the extent Realcomp is arguing that its policies somehow increase the efficiency of its two-sided market, it is proffering a *justification*, which is not precluded by the inherently suspect framework. In any event, Realcomp's policies diminish, rather than enhance, the efficiency of its two-sided market because they likely result in fewer listings on its MLS. *See* Op. 14 n.10 (Appx. 20) (upholding ALJ's rejection of same argument). *See also* IDF 74 (Appx. 76) (policies likely result in fewer MLS listings because limited service brokers "cater to cost-conscious home sellers who might otherwise have sold their properties as [For Sale By Owner]"); 289 (Appx. 99) (FSBO properties not listed in MLS).

joint venture, *before that restraint will be analyzed as part of the venture*." *Salvino*, 542 F.3d at 339 (Sotomayor, J., concurring) (emphasis added).

Here, Realcomp fails to provide a nexus between its policies and the procompetitive goals of an MLS – matching buyers and sellers. Rather, Realcomp attempts to evade this inquiry, by merely asserting that its policies are the "by-product of the joint venture MLS." Pet. Br. 19. What this assertion glosses over, however, is the fact that Realcomp's policies are agreements among competitors to limit the brokerage options available to consumers, not restraints that are reasonably necessary to match buyers and sellers. Accordingly, Realcomp's policies are to be evaluated "independent of the joint venture, because [their] competitive effects are irrelevant to the joint venture and vice versa." *Salvino*, 542 F.3d at 339 n.7 (Sotomayor, J., concurring).

Realcomp's attempts to distinguish on that basis some of the cases the Commission relied on are likewise unconvincing. The courts' "quick-look" condemnation of the conduct involved in those cases did not turn on whether the challenged policy was internal or external in nature. Indeed, contrary to Realcomp's assertions, some of those cases dealt with so-called "internal" rules. *Denny's Marina*, for example, summarily condemned a restraint analogous to one at issue here – restrictions on discounters' access to a trade show, which was an

important, venture-controlled medium for communicating to consumers. *See* 8 F.3d at 1220. Likewise, *NCAA* condemned, *inter alia*, an agreement as to the price of television rights that is *internal* to the joint venture. *See* 468 U.S. at 99-100 ("the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, thereby constituting horizontal price fixing"). Moreover, to the extent it matters that a restraint is an internal rule for the operation of the joint venture, it is because such a rule may have some procompetitive virtue. But consideration of such justifications *is* part of the inherently suspect framework. The relevant inquiry in analyzing joint venture rules, therefore, is not whether they are internal or external in nature, but whether they reasonably serve the efficiency-enhancing purposes of the venture. *Salvino*, 542 F.3d at 339 (Sotomayor, J., concurring). Realcomp's policies plainly do not.

Lastly, Realcomp parades a number of cases that purportedly advise "caution" in applying an abbreviated rule of reason analysis, drawing from them the spurious conclusion that "[t]he Commission's application of its 'inherently suspect' test accordingly was erroneous as a matter of law." Pet. Br. 19-22. But those cases mandate no such thing. Not only are those cases readily distin-

guishable (*see* Op. 21-22 n.16, 26-27 & nn.18-20) (Appx. 27-28, 32-33),[9] but indeed their analyses are not contrary to the Commission's. All that those cases stand for is the noncontroversial proposition that application of the rule of reason is *contextual*, hence the Supreme Court's guidance of "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," in order to reach "a confident conclusion about the principal tendency of a restriction." *California Dental*, 526 U.S. at 781. That is exactly what the Commission did here. That other tribunals concluded that the inherently suspect framework was not appropriate under the circumstances of those cases says nothing about the propriety of that mode of analysis here.

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[9] The cases cited by Realcomp but not addressed by the Commission are also inapposite. *See Expert Masonry, Inc. v. Boone County, Kentucky*, 440 F.3d 336 (6th Cir. 2006) (bidder's allegations of a *vertical* restraint against winning rival and government agency); *Madison Square Garden, L.P. v. Nat'l Hockey League*, 270 Fed. Appx. 56 (2d Cir. 2008) (denial of preliminary injunction under abbreviated and fuller rule of reason because of legitimate justifications); *Craftsman Limousine, Inc. v. Ford Motor Co.*, 491 F.3d 380 (8th Cir. 2007) (restraint based on non-compliance with safety certification requirements of industry standards-setting body).

C. Realcomp's Undisputed Market Power and the Tendency of Its Policies to Harm Competition Establish a *Prima Facie* Case of Unreasonable Restraint of Trade

The Commission could have terminated its *prima facie* analysis with its conclusion that Realcomp's policies are sufficiently anticompetitive, by their very nature, to warrant procompetitive justification. But it did not. It proceeded instead to conduct a more searching rule of reason analysis – one that asks of the antitrust plaintiff "the more challenging course of proving detrimental effects on competition by making 'an inquiry into market power and market structure'," *Craftsmen Limousine*, 491 F.3d at 388 (quoting *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984)) – and it reached the same conclusion. Op. 35-43 (Appx. 41-49).

In conducting a market structure-based analysis, the Commission applied the well established rule, supported by a long line of precedents, that permits an inference of anticompetitive effects from the existence of market power combined with the tendency of the restraint to impair competition. *See, e.g.*, *Craftsmen Limousine*, 491 F.3d at 388 ("plaintiff may satisfy the 'detrimental effects' element * * * by making 'an inquiry into market power and market structure designed to assess the [restraint]'s actual effect") (citations omitted); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff may prove

detrimental effects "indirectly by establishing * * * sufficient market power to cause an adverse effect on competition"); *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996) (same); *Law v. NCAA*, 134 F.3d at 1019 (applying quick-look analysis but acknowledging that "plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market"); *Brown Univ.*, 5 F.3d at 668-69 (same); *see also* ABA Section of Antitrust Law, 1 ANTITRUST LAW DEVELOPMENTS, at 65 (6th ed. 2007); ABA Section of Antitrust Law, MONOGRAPH NO. 23, THE RULE OF REASON, at 161-63 (1999). The logic of this rule is sound yet simple: because an entity with market power has the ability, by definition, to unilaterally affect consumer welfare, and not be deterred in doing so by competitive forces, conduct by that entity that has the tendency to harm competition can be expected to do so. Thus, when an MLS has market power, its enforcing policies that disfavor particular types of listings likely will result in placing those listings at a significant competitive disadvantage, denying consumers the benefits of fair competition. This principle has been applied routinely in the context of MLS rules that impair competition. *E.g.*, *Thompson v. Metropolitan MultiList, Inc.*, 934 F.2d 1566 (11th Cir. 1991); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980); *Cantor v. Multiple Listing Serv. Of Dutchess*

County, Inc., 568 F. Supp. 424 (S.D.N.Y. 1983); *Marin County Bd. of Realtors v. Palsson*, 549 P.2d 833 (Cal. 1976).

Realcomp glosses over this part of the Commission's rule of reason analysis, arguing that this mode of analysis is "simply a restatement of the truncated rule of reason," and that "market power alone is not a standard of liability." Pet. Br. 24-26. Although this stratagem is understandable – given that Realcomp disputes none of the Commission's underlying findings – it distorts both the Commission's analysis and controlling law. In this portion of the Commission's rule of reason analysis, it neither confined its inquiry to the nature of the restraints, nor used market power alone as a standard of liability. Rather, in keeping with the authorities cited above, it plainly stated that "a demonstration of defendant's market power" must be "*combined with* the anticompetitive nature of the restraints, [to] provide the necessary confidence to predict the likelihood of anticompetitive effects." Op. 34 (Appx. 40) (emphasis added). In assessing the anticompetitive tendency of the restraints in this part of its analysis, the Commission naturally relied on the characteristics it had already identified in connection with its analysis under the "inherently suspect" rubric, but also went on to analyze in greater detail the mechanisms by which Realcomp's policies are likely to harm competition. *See* Op. 22-28, 37-41 (Appx. 28-34, 43-47).

Although there is thus overlap in the considerations taken into account in both modes of analysis, the "inherently suspect" approach applies where the anticompetitive nature of conduct is facially evident because it bears a "close family resemblance" to conduct already condemned by the courts. *Polygram v. FTC*, 416 F.3d at 37; *see* Op. 25-27 (Appx. 31-33). Where conduct falls short of that standard but nevertheless poses competitive threats, the presence of market power takes on great significance because it denotes the ability of the defendant effectively to exclude competition.

This is precisely the analysis the Commission undertook in the pertinent part of its ruling (Op. 35-43) (Appx. 41-49). On reviewing the extensive record evidence of market power, the Commission adopted the ALJ's findings regarding the definitions of the relevant product and geographic markets, IDF 282-328 (Appx. 98-103); the existence of network effects and high entry barriers, IDF 329-338 (Appx. 103-104); and Realcomp's shares in those markets, IDF 339-348 (Appx. 105-106). *See* Op. 12 (Appx. 18). It also agreed with the ALJ's conclusion that Realcomp possessed substantial power in two relevant markets in Southeastern Michigan: the market for residential real estate brokerage services, and the market for multiple listing services, the latter being a vital input into the former. Op. 36-37; ID 80-85 (Appx. 42-43, 141-146). Realcomp does not dispute any of those

findings and conclusions. *See* Oral Argument Tr. 72-73 (Appx. 238-39) (Realcomp's counsel conceding Realcomp's substantial market power).

As to the test's second requirement – anticompetitive tendency – the Commission correctly began by observing that the facially restrictive nature of Realcomp's policies that it had already discussed should suffice to condemn its conduct by an entity with such market power. Op. 37 (Appx. 43). The Commission went further, however, and examined the record with respect to the various mechanisms by which those policies were likely to harm competition. For example, although the ALJ had dismissed the significance of the Search Function Policy because agents could theoretically override its restrictions, the Commission examined the extensive evidence of "what brokers actually do," and concluded that the policy had the effect of dramatically lowering the number of times that EA listings were viewed by brokers and e-mailed to customers, in comparison with ERTS listings. Op. 38 (Appx. 44). That evidence – including Realcomp's own statistics and broker testimony about complaints concerning the unavailability of information about EA listings – showed that this policy indeed kept many consumers in the dark about EA listings that they might otherwise have been interested in pursuing. Op. 38-39 (Appx. 44-45).[10]

[10] Realcomp characterizes the Commission's conclusions regarding competitive effects as findings, and argues that they must be given closer scrutiny

Similarly, the Commission examined evidence about the Website policy, which even more directly deprived consumers of access to information about EA listings, in the medium that has become the starting point of many consumers' home searches – *i.e.*, public websites. Op. 40 (Appx. 46). The impact of that restriction is exacerbated by Realcomp's failure to inform consumers of its policy, so that they are not even aware of the incompleteness of the listings they view. *Id*. The Commission further recognized that any means by which brokers with EA listings might try to evade the restrictions would put them at a competitive disadvantage by raising their costs. Op. 40-41 (Appx. 46-47).

In sum, the impact of Realcomp's restrictive policies has been "to narrow consumer choice or hinder the competitive process," by systematically putting EA listings at a competitive disadvantage. Op. 42 (Appx. 48). In other words, Realcomp – an entity with admitted market power and controlled by full service brokers – adopted policies whose only apparent goal was to hobble an emerging

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because they are contrary to those of the ALJ. Pet. Br. 23-24. But both the law (*see, supra*, at 14-17), and the record here mandate otherwise. The only factual conclusion on which the Commission overruled the ALJ here was the competitive nature of Realcomp's Search Function Policy. *See, supra*, note 2. This is not an issue where the ALJ may have had any particular advantage from observing live testimony; rather, it is about the economic effects of that particular conduct – an area subject to the deferential review standard, *see Olin Corp. v. FTC*, 986 F.2d 1295, 1297 (9th Cir. 1993); *Hospital Corp. of Am. v. FTC*, 807 F.2d 1381, 1385 (7th Cir. 1986), and one that the Commission has both the ability and authority to decide *de novo*. *See* 16 C.F.R. § 3.54(a).

and generally lower-cost service offering. The Commission reasonably concluded that such restrictions are likely to entrench Realcomp's market power, and protect its full service brokers from competitive pricing pressure. *Id*. Under the controlling authority discussed above, this showing was more than enough to make out a *prima facie* case of unlawful restraint of trade, requiring Realcomp to come forward with legitimate justifications.

D. The Record Contains Substantial Econometric Evidence of Anticompetitive Effects Flowing from Realcomp's Policies

Even apart from the findings and conclusions discussed above, the Commission considered direct econometric evidence presented by both sides' experts, and concluded that, on the whole, it corroborates the other record evidence showing substantial consumer harm. Complaint counsel's economic expert, Dr. Darrell Williams, conducted three types of econometric analyses to determine if Realcomp's policies affected competition in the relevant markets. He concluded that each of those analyses shows significant reduction of output flowing from Realcomp's policies.

1. Time Series Analysis

Dr. Williams first conducted a time-series analysis, which compared the share of EA listings in the Realcomp MLS before and after the policies went into effect. He found that the monthly average share of EA listings fell from about 1.5

percent of total MLS listings before the policies took effect to about 0.75 percent afterward. IDF 487 (Appx. 122). Realcomp's expert, Dr. Eisenstadt, concurred, finding that the percentage drop in the share of new EA listings in the Realcomp MLS was approximately 0.75 percentage point. IDF 488 (Appx. 123). Using the monthly average share of new EA listings, explained Dr. Williams, insulated the analysis from any market flux "because the percentage ratio of EA to ERTS listings should not change even if total listings decline." IDF 489 (Appx. 123). The ALJ characterized that drop as "not significant," ID 61, 106 (Appx. 122, 167), reasoning that "Realcomp's Policies' effect on non-ERTS listings was found at most to account for a 1% decrease in the percentage of non-ERTS listings." ID 106 (Appx. 167). The Commission correctly overruled this conclusion, noting that the ALJ had confused the reduction in absolute percentage points with the change in market share, which showed that EA listings had lost *half* their toehold in Realcomp's market. Op. 45 (Appx. 51). Indeed, even a 1% decrease can preclude significant consumer savings – in the millions of dollars annually in Realcomp's area. *See* IDF 61 (Appx. 74); Eisenstadt, Tr. 1520-21 (Appx. 200-01); *see also* CX 133-063; RX 161-035 (Appx. 219, 236) (Eisenstadt reporting sale of over 71,000 homes in Realcomp's area in 2004-2006, at an average price of over $200,000 – leading to potential consumer losses of over $4 million, assuming, conservatively,

that EA listings save only half the typical 6% commission). Moreover, particularly when dealing, as here, with emerging competition to an incumbent with market power, the relevant question is not whether the new entrant would necessarily have developed into a viable substitute for the dominant product, but whether "the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power." *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001); *see also Radiant Burners*, 364 U.S. at 660 (practice which "has, by its nature and character, a monopolistic tendency * * * is not to be tolerated merely because the victim * * * is so small that his destruction makes little difference to the economy") (citations and internal quotation marks omitted).

Realcomp does not challenge this evidence in its petition for review.

2. Benchmark Study

Dr. Williams also conducted a benchmark (or cross-section) study, which compared the share of EA listings in Realcomp's MLS and in the local MLSs of nine Metropolitan Statistical Areas (MSAs), six without restrictions similar to Realcomp's Website Policy ("Control MSAs"), and three with such restrictions ("Restriction MSAs"). IDF 490 (Appx. 123). The selection of the MSAs was based on a number of economic and demographic characteristics deemed relevant

to the seller's choice of EA or ERTS listing agreement. IDF 491-496 (Appx. 123). Dr. Williams found that the average share of EA listings (weighted according to the total listings in each MSA) is higher in the Control MSAs than in Restriction MSAs, IDF 514 (Appx. 126), and concluded that Realcomp's MLS has a significantly smaller share of EA listings than MLSs without similar restrictions. IDF 509 (Appx. 125).

The ALJ faulted Dr. Williams's selection criteria, reasoning that, if he had correctly identified the factors that determine the share of EA listings, "one would expect the EA shares of the Control MSAs to be very similar." IDF 526 (Appx. 127). The Commission properly rejected this reasoning, noting that, even if the variables representing the selection criteria were perfect predictors of the share of EA listings, this would not mean that the EA share figures in each MSA would be the same because the *values* of those variables are not equal for each MSA. Op. 45 (Appx. 51).

In its brief, Realcomp renews the ALJ's criticism, implying that this Court should somehow adopt the ALJ's conclusions rather than the Commission's. Pet. Br. 27-29. First, the Commission's disagreement with the ALJ does not affect the level of deference this Court must accord the Commission's findings. *See, supra*, at 15-17. As discussed above, Dr. Williams's benchmark study findings are not

the kind for which the ALJ possesses any personal observation advantage over the reviewing Commission. *See, supra*, at 38-39. Contrary to Realcomp's assertion, the ALJ's criticism was not borne out of his "unique ability to assess the credibility and demeanor of witnesses who testified at trial." Pet. Br. 27. The ALJ did not find that Dr. Williams had *lied on the stand*. His criticisms instead were based on the selection methodology, which has nothing to do with Dr. Williams's "credibility and demeanor," and is a subject which the Commission is fully entitled to review *de novo*. *See* 16 C.F.R. § 3.54.

Moreover, Realcomp's reasoning is equally faulty as that of the ALJ. As the Commission reasoned, that the same variables were utilized in selecting the Control MSAs does not mean that the *values* of those variables are identical for each MSA. Op. 45 (Appx. 51). Realcomp's own expert, Dr. Eisenstadt, acknowledged that the values of the seven variables used as selection criteria varied across the MLSs in the control sample. RX 161-08, ¶13 (Appx. 235). It is reasonable to expect, then, that as the values of those variables change, so do the EA shares in the corresponding MSAs. Indeed, the observations of Realcomp's expert (which formed the basis for the ALJ criticism) lend support to *the Commission's* conclusion: that the Restriction MSAs *all* had very low shares of EA listings, *despite different demographics*, supports the inference that the restrictive

policies are likely the cause of the reduction in EA shares. As the Commission noted, "[i]f these MSAs had few common characteristics other than restrictive multiple listing policies, yet all had low EA shares, it would be logical to conclude that the restrictive policies caused the lower shares." Op. 45 (Appx. 51).

3. Regression Analysis

Lastly, Dr. Williams conducted several regression analyses to determine the relationship between Realcomp's policies and the share of EA listings in its MLS, and reached a similar conclusion to those from his time-series and benchmark studies: that the share of the EA listings in the Realcomp MLS would be higher, and the use of the ERTS listings would be lower, in the absence of the Realcomp policies. IDF 552 (Appx. 130). In his regression analyses, "Dr. Williams control[led] for a wide range of economic and demographic variables, including those that Dr. Eisenstadt claimed should be included." IDF 550 (Appx. 130). In the end, Dr. Williams "controlled for twenty-five variables." IDF 550 (Appx. 130).

The ALJ faulted Dr. Williams's methodology because his regression analyses, while incorporating most of the factors suggested by Realcomp's expert, did not include some variables deemed relevant by Dr. Eisenstadt, such as "MSA-level" data. The ALJ concluded that Dr. Williams's econometric evidence was,

therefore, "instructive, though not conclusive." ID 110 (Appx. 171). The Commission noted that the purportedly missing but relevant information was in fact captured with the "county-level" data included in Dr. Williams's regressions, which renders those additional variables ("MSA-level" data), albeit relevant, *not independent*. Indeed, because county-level data is measured in a smaller geographic area than MSA-level data, it is more varied and arguably provides more detailed information about population and housing characteristics. Controlling for the same variables at MSA-level, therefore, would simply have introduced inefficiencies in the regression model (by reducing the reliability of the model without gaining any more helpful information), thus leading to inaccurate and meaningless results. Op. 44 (Appx. 50).

Realcomp challenges Dr. Williams's regression results, raising a number of arguments none of which withstands scrutiny. Pet. Br. 29-41.

First, Realcomp asserts that the Commission, "having not itself heard the testimony, was in an inferior position to make an assessment" of this economic evidence. Pet. Br. 31. But, as discussed above, economic analysis is not the kind of evidence for which the ALJ might enjoy any observational advantage over the

Commission. *See, supra*, at 38-39. Realcomp's assertion is, therefore, patently false.[11]

Second, Realcomp repackages its flawed criticism of Dr. Williams's benchmark study criteria in the context of his regression analysis, arguing that "the different values of these variables across different metropolitan areas precisely formed the basis for Dr. Eisenstadt's rationale that each should be included as a separate independent variable in measuring the effect of MLS restrictions." Pet. Br. 32. But the choice of variables in a regression analysis is based not only on the relevance of those variables (as the case was with the benchmark study), but also on their relative *independence*, which has nothing to do *per se* with the values of those variables for any particular MSA. A set of relevant variables could form appropriate criteria for purposes of a benchmark study (a comparison of different MSAs), yet be poor candidates for a regression analysis because of their interdependence. As Dr. Williams explained: "If the relationship between

[11] Realcomp also points to its expert's regression analysis, which concluded that had Realcomp *not* had its policies in effect, the share of EA listings in its MLS would have been *lower*. Pet. Br. 30. In other words, Realcomp's policies – which significantly and indisputably restricted the exposure of EA listings on Realcomp's MLS and Approved Websites – was somehow *increasing* the share of those offerings (that *less* marketing exposure to consumers would lead to a *higher* market share). This curious result should cast serious doubt on the reliability of Dr. Eisenstadt's regression model. Realcomp, however, not only fails to recognize the incongruous result, it argues that it is sufficient to undermine all of Dr. Williams's analyses pointing in the other direction.

economic variables is strong (either positive or negative) such that the correlation is high, the regression technique is unable to separate the effects of the correlated independent variables." CX 560 (Dr. Williams's Surrebuttal Report), at 9 (Appx. 223) (citing Peter Kennedy, A GUIDE TO ECONOMETRICS, 177 (3d ed. 1992)). This statistical problem of high correlation between the independent variables is termed "multicollinearity." *Id*. Thus, Realcomp is simply confusing the relevance of those variables to the share of EA listings in the MLS with their independence from each other.[12]

Realcomp also criticizes Dr. Williams's Surrebuttal Report, in which he re-ran his regression analysis to include most (but not all) of the variables suggested by Realcomp's expert, and explained why such inclusion does not alter his conclusion that Realcomp's policies caused a significant reduction in the number of EA listings on the Realcomp MLS. CX 560, at 11-14 (Appx. 225-28).

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[12] That confusion also underlies Realcomp's criticism that Dr. Williams's regressions did not use certain variables that he had deemed relevant to the share of EA listings. Pet. Br. 32-33. That some variables are relevant does not necessarily make them appropriate for regression analysis, because they could be heavily correlated (or "collinear") to other variables already in the model. An example of this would be including "MSA-level" or "zip code-level" population and housing data, when such data had been captured at the "county-level." *See* ID 111-112 (Appx. 172-173). Although all three variables are relevant, they are interdependent (*i.e.* they have substantial collinearity to each other). The inclusion of all three in the regression model, therefore, would lessen the accuracy and reliability of the analysis because it would be harder to measure the effect of *each* variable *separately*. *See* CX 560 (Dr. Williams's Surrebuttal Report), at 9-14 (Appx. 223-28).

Realcomp faults Dr. Williams for not including *all* the factors its expert had demanded, arguing that they were "appropriate" variables because they were "pertinent to a home seller's decision to use an EA or ERTS listing contract." Pet. Br. 33, 34. Realcomp again confuses the relevance (or "pertinence") of a variable with its independence. Dr. Williams excluded those variables not because he judged them not "pertinent," but in order to avoid the multicollinearity problem. Dr. Eisenstadt himself acknowledged that multicollinearity is a valid basis for the selection of variables in a regression analysis. *See* Eisenstadt, Tr. 1569-70 (Appx. 202-03) (acknowledging exclusion of population density and population on multicollinearity grounds). Realcomp now argues that those excluded variables were *not* highly collinear, but the basis for its argument appears to be that including them engenders different regression results (ones that better suit Realcomp's denial of anticompetitive effects). *See* Pet. Br. 35-36 n.11 ("the fact that Dr. Eisenstadt's regression results showed statistical significance for 'redundant' variables indicates that inclusion of the variables at two levels was, statistically, appropriate"). But statistical significance is not a proper criterion for selecting regression variables. Realcomp mischaracterizes Dr. Williams's testimony on this issue. *Id.* Dr. Williams testified that the inclusion of highly collinear variables may lead to unreliable results, because it would be difficult to

"disentangle the effects" of each of those variables. Williams, Tr. 1669-72 (Appx. 212-15). *Neither* economic expert testified to the proposition Realcomp now asserts – that a statistically significant outcome means that the measured variable is sufficiently independent to *not* cause multicollinearity. Realcomp does not provide any citation for this assertion. Nor could it. The judgment regarding a variable's inclusion in a regression analysis is based on sound economic theory and reasoning, not on whether the outcome is statistically significant. Including those collinear variables may well yield different regression results (including statistically significant ones), but that is not the same thing as having reliable results.[13]

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[13] Realcomp attacks Dr. Williams's credibility because one of the exhibits in his Surrebuttal Report was mislabeled. Pet. Br. 36-41. The exhibit purported to measure the correlation between the Rule variable (whether the Realcomp policies are in effect or not) and the variables demanded by Realcomp's expert, and it showed high collinearity for the variables measuring MSA-level data. CX 560, Exhibit 1 (Appx. 229-30). That was the basis for Dr. Williams's exclusion of those variables from his Surrebuttal regressions. At trial, it became clear that the exhibit was mislabeled, and that it in fact measured the correlations among the variables' "coefficient estimates," not the variables themselves. Although variables and their coefficient estimates are related, the threshold Dr. Williams had used to determine high collinearity related to the former. Significantly, after noting the error and re-examining the data and software used to produce the exhibit, Dr. Williams testified that his conclusion remained the same: that the MSA-based variables were too highly collinear to include, given that duplicate information was incorporated already. *See* Williams, Tr. 1756-1758 (Appx. 216-18).

In sum, given the substantial record evidence of the policies' restrictive nature, Realcomp's undisputed market power, and the direct evidence of anticompetitive effects, the Commission's conclusion that the Realcomp policies are *prima facie* anticompetitive is entirely reasonable, and should be upheld by this Court.[14]

II. REALCOMP'S PURPORTED JUSTIFICATIONS ARE INSUFFICIENT AS A MATTER OF ANTITRUST LAW

An antitrust defendant can avoid liability for a practice that has been shown to have a deleterious effect on consumers by demonstrating that the practice has "some countervailing procompetitive virtue – such as, for example, the creation of efficiencies in the operation of a market or the provision of goods and services."

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[14] Realcomp's other arguments also fail. That its policies do not *completely* exclude EA listings, Pet. Br. 41-47, is beside the point. Complete exclusion is not the standard of liability here. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 295 n.6 (1985) ("Northwest's activity is a concerted refusal to deal with Pacific on substantially equal terms. Such activity might justify *per se* invalidation if it placed a competing firm at a severe competitive disadvantage."); *see also, e.g., Palsson*, 549 P.2d at 842-43 (MLS rules exclusionary because they operated to "narrow[]" "consumer choice" and to "hamper" non-members from competing "effectively"); *Thompson*, 934 F.2d at 1580 (MLS rule anticompetitive because it prevented the excluded listings from being "distributed as widely as possible"). Likewise, Realcomp's argument regarding lack of evidence of a price increase, Pet. Br. 48-49, is inconsequential, given the ample evidence of output reduction (*i.e.* decreased share of EA listings in the Realcomp MLS). *See Indiana Federation*, 476 U.S. at 460.

Indiana Federation, 476 U.S. at 459.[15] Where, as here, there has been a detailed showing of competitive effects, the burden shifts to the defendant to show "that the restraint in fact is necessary to enhance competition and does indeed have a pro-competitive effect." *Graphic Prods. Distribs., Inc. v. ITEK Corp.*, 717 F.2d 1560, 1576 (11th Cir. 1983); *accord Flegel*, 4 F.3d at 688 (defendant must "demonstrate pro-competitive effects"); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir. 1991) ("defendant must offer evidence of pro-competitive effects"); *see* VII Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶1504b, p. 358 (2d ed. 2003) ("burden shifts to the defendant to show that the restraint in fact serves a legitimate objective").[16] A proffered justification must also be cognizable, in the sense that the purported justification is compatible, as a matter of law, with the

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[15] At the "inherently suspect" stage of the analysis, a defendant can also respond by showing "why practices that are competitively suspect as a general matter may not be expected to have adverse consequences in the context of the particular market in question." *Polygram*, 136 F.T.C. at 345; *cf. California Dental*, 526 U.S. at 773 (professional context of advertising restrictions there may ameliorate their presumptively anticompetitive nature, "'normally' found in the commercial world"). Realcomp has made no argument, however, that the real estate brokerage market is not a normal commercial market in such a way as to bring this principle into application.

[16] The Commission principally analyzed Realcomp's asserted justifications in connection with the "inherently suspect" portion of its analysis, at which point a defendant need only show that its restraints "plausibly" serve a legitimate, procompetitive purpose – and found them without merit even under that more generous standard. *See* Op. 28-34 (Appx. 34-40). Accordingly, the Commission recognized that those asserted justifications necessarily failed under a fuller rule of reason analysis. *Id*. at 47 (Appx. 53).

purposes of the antitrust laws. *See Professional Engineers*, 435 U.S. at 696 (rejecting ethical or safety considerations as justifications for total ban on competition; "we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition"); *Indiana Federation*, 476 U.S. at 463 (rejecting as incompatible with antitrust law argument that withholding x-rays from insurers protects consumers from making inadequate treatment choices). *See Collaboration Guidelines*, § 3.36(a) (efficiencies must be verifiable and potentially pro-competitive).

The Commission properly rejected Realcomp's proffered justifications. While preventing "free-riding" has been recognized as an efficiency-enhancing goal, the circumstances of this case do not give rise to this competitive concern. Realcomp's goal of eliminating a purported "bidding disadvantage," on the other hand, seeks to *preclude* the reduction of prices through competition and, as such, is "nothing less than a frontal assault on the basic policy of the Sherman Act." *Professional Engineers*, 435 U.S. at 695.

A. Realcomp's "Free Riding" Justification Is Inapt Because No Free-Riding Exists Under the Circumstances of This Case

Although efforts to prevent free-riding are properly recognized as cognizable justifications, *see, e.g., Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977); *Business Electronics, Inc. v. Sharp Electronics, Inc.*, 485 U.S. 717, 731 (1988), there simply is no free-riding problem to be addressed here. *See Graphic Prods.*, 717 F.2d at 1576 (defendant must show "restraint in fact is necessary"). As the Commission noted, "[f]or free riding to occur, there must be a product or service that is consumed by an individual or entity who does not pay for that product or service." Op. 29 (Appx. 35). Realcomp's own arguments illustrate this fact. It argues that a home seller who uses an EA listing contract, and then finds an unrepresented buyer, is "free-riding on dues-paying Realcomp cooperating agents rather than listing agents," because "Realcomp receives no payment for any services it provides to the EA home seller" in that case. Pet. Br. 51-52. Realcomp's argument appears to involve two separate free-riding claims, neither of which is supported by the record. First, to the extent Realcomp is claiming that cooperating brokers are providing services to the EA home seller, for which they are not getting benefit, this is explicitly contradicted by the record. Under EA contracts, when a cooperating broker secures a buyer, the cooperating broker is paid for his efforts, at the same compensation level as under an ERTS contract.

IDF 200-201, 204 (Appx. 90). When a cooperating broker does not bring in the buyer, he is *not* providing *any* service to the EA seller, and thus is not entitled to any compensation. Second, the record is also clear that Realcomp provides no free services to the EA seller, so the latter does not free-ride on Realcomp itself. The EA seller can only make use of Realcomp's MLS by retaining (and paying a fee to) a listing broker who in turn is a dues-paying Realcomp member. JX 1-04, 07 (Joint Stipulations of Fact Nos. 19, 55) (Appx. 231, 233). Realcomp charges identical dues and fees to all of its members, regardless of whether they offer their clients EA or ERTS listings. JX 1-05 (Joint Stipulations of Fact No. 36) (Appx. 232).

Moreover, Realcomp's membership fees are paid on a quarterly basis, *not* on a transaction-basis, IDF 176-177 (Appx. 87); *see also* Pet. Br. 60 (Realcomp acknowledging same), so Realcomp cannot claim any loss of revenue when a seller secures an unrepresented buyer (whether under an EA *or* ERTS contract). Its statement that EA sellers "pay a smaller share of the cost of providing MLS services" than ERTS sellers or EA sellers who secure a buyer through a cooperating broker, Pet. Br. 53, is likewise not true. A listing agent who enters an ERTS contract but secures an unrepresented buyer gets to keep the entire 6% commission, but his contribution to Realcomp's MLS services (*i.e.* his quarterly

membership fee) remains exactly the same as under an EA contract. The same is true in the case of an EA contract with a cooperating broker. That cooperating broker's contribution to Realcomp's MLS services is his quarterly membership fee, which is paid regardless of the form of contract under which the cooperating broker receives compensation.

Similarly, Realcomp's argument that its cooperating brokers should not be forced to pay for the cost of distributing information to buyers who do not want to use their services, Pet. Br. 55-56, is beside the point. Realcomp members who act as cooperating brokers may be paying for those services while sometimes receiving no benefit (when an unrepresented buyer is selected), but this is the case *regardless* of the type of listing contract. Under either an EA or ERTS contract, when an unrepresented buyer is selected, there is no benefit to any cooperating brokers. Realcomp's argument, therefore, does not justify the particular policies at issue, which discriminate against discount listings but allows such "free" benefits when the entire 6% commission goes to the listing broker under the ERTS contract.

Finally, Realcomp's argument that, because its Internet feed is a voluntary service of its MLS, its Website Policy should be viewed as output enhancing is contrary to basic antitrust principles. Pet. Br. 53-54. That Realcomp can decide to terminate its Internet feed service without violating the antitrust laws does not

mean that it can provide it selectively, by denying it to those low-cost entrants who offer unbundled and discounted services – even though they continue to pay an identical membership fee to Realcomp. As the Commission noted, courts have consistently rejected efforts to dress up as a free-riding justification what is in fact "an effort to protect a less-demanded, higher-priced product from competition by a lower-priced product that consumers may prefer more strongly." Op. 31 (Appx. 37); *see NCAA*, 468 U.S. at 116-17; *see also Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 370 (7th Cir. 1987) ("A group of firms trying to extract a supracompetitive price therefore hardly can turn around and try to squelch lower prices – as the [defendants] may have done – by branding the lower prices 'free riding'!").

B. Realcomp's "Bidding Disadvantage" Justification Is Not Cognizable Because It Contravenes the Purposes of Antitrust Law

Realcomp's other purported justification is equally without merit, albeit for a different reason. Although Realcomp's policies may in fact help reduce a so-called "bidding disadvantage" between a buyer who retains a cooperating broker, and a buyer who opts to go it alone, relying only on those methods of searching available to the public (the Internet, yard signs, open houses, newspaper ads, etc.), such efforts at guarding against reducing the cost of buying a home are *not* protected by the antitrust laws. That a buyer without a cooperating broker may have a cost

advantage over a represented buyer does not make the competition itself unfair. "[T]he antitrust laws," the Supreme Court emphasized repeatedly, "were enacted for 'the protection of *competition*, not *competitors*'." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)) (emphasis added). Indeed, reducing the cost of selling (or buying) a home – even at the expense of intermediaries like real estate brokers – is a market efficiency to be protected, not condemned, by the antitrust laws. *See, e.g.*, *C.B. Trucking, Inc. v. Waste Mgmt.,Inc.*, 137 F.3d 41, 45 (1st Cir. 1998); *Tri-State Rubbish, Inc. v. Waste Mgmt., Inc.*, 998 F.2d 1073, 1080 (1st Cir. 1993).

Realcomp argues that the Commission's conclusions on this issue "lack support in the record." Pet. Br. 56. But the Commission's rejection of Realcomp's "bidding disadvantage" argument was made as a matter of law, and thus *independent* of the record. *See* Op. 32 (Appx. 38) ("This argument is not a cognizable justification under the antitrust laws, and we accordingly reject it."). Realcomp's misapprehension of the Commission's rationale is also clear from its arguments against the "implausibility" discussion of the "bidding disadvantage" supposedly made by the Commission. Pet. Br. 56-59. The citations in Realcomp's brief – and the discussion of "implausibility" in the Commission's opinion – relate

to the Commission's treatment of free-riding, not "bidding disadvantage," and, more specifically, to the ALJ's views about cooperating brokers' incentives under EA contracts. Op. 30-31 (Appx. 36-37). Moreover, the Commission's reasoning for rejecting the ALJ's views on cooperating brokers' incentives with regard to free-riding applies with equal force to Realcomp's argument now that it is "the bidding disadvantage faced by cooperating brokers when they show EA-listed properties" that "reduce[s] incentives to show those properties." Pet. Br. 59. In other words, to the extent that the bidding disadvantage is about the brokers, not the buyers (as Realcomp *now* claims, *see* Oral Argument Tr. 64 (Appx. 237)), then it is not only not cognizable – as the Commission correctly concluded – but also implausible, for the same reasons the Commission noted in connection with free riding. Op. 30-31 (Appx. 36-37).

Accordingly, Realcomp's purported justification of its conduct fails, and its policies must be struck down as unreasonable restraints of trade.

CONCLUSION

For the foregoing reasons, the petition for review should be denied and the Commission's Order affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B), and with 6 Cir. R. 32(a), because it contains 14,029 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

Dated: April 19, 2010

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CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2010, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit using the CM/ECF system. I certify that all participants in the case are CM/ECF users and that service will be, therefore, accomplished by the CM/ECF system.

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