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

**DOCKET NO. 9320**

**PUBLIC VERSION**

**IN THE MATTER OF**

**REALCOMP II LTD.**

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I.  
STATEMENT OF THE CASE

A. Introduction

and has a history of traditional brokers taking steps to exclude competition from brokers offering

Through a series of enforcement actions, the Commission addressed this type of rule. An EA listing – unlike the Exclusive Right to Sell (ERTS) listing used by traditional brokers – provides a discount on the broker’s commission if the home is sold to a buyer who is not represented by another broker. By banning the use of EA listings in the MLS, traditional brokers

Policies are plainly anticompetitive. EA listings offer significant savings if the buyer is not represented by a broker – commonly 3% of the sales price (the portion of the commission that would otherwise go to the buyer's broker). De-listing EA listings off of the Internet site and

limiting their exposure within the Realemp database. Realemp's broker members are

pressure on brokerage commissions. Although he found that the Policies were imposed by a combination of competitors with market power and that the Website Policy is by nature anticompetitive, the ALJ concluded that Complaint Counsel had not demonstrated a sufficient

restraint on competition. The ALJ found that EA listings were “sufficiently available” on the

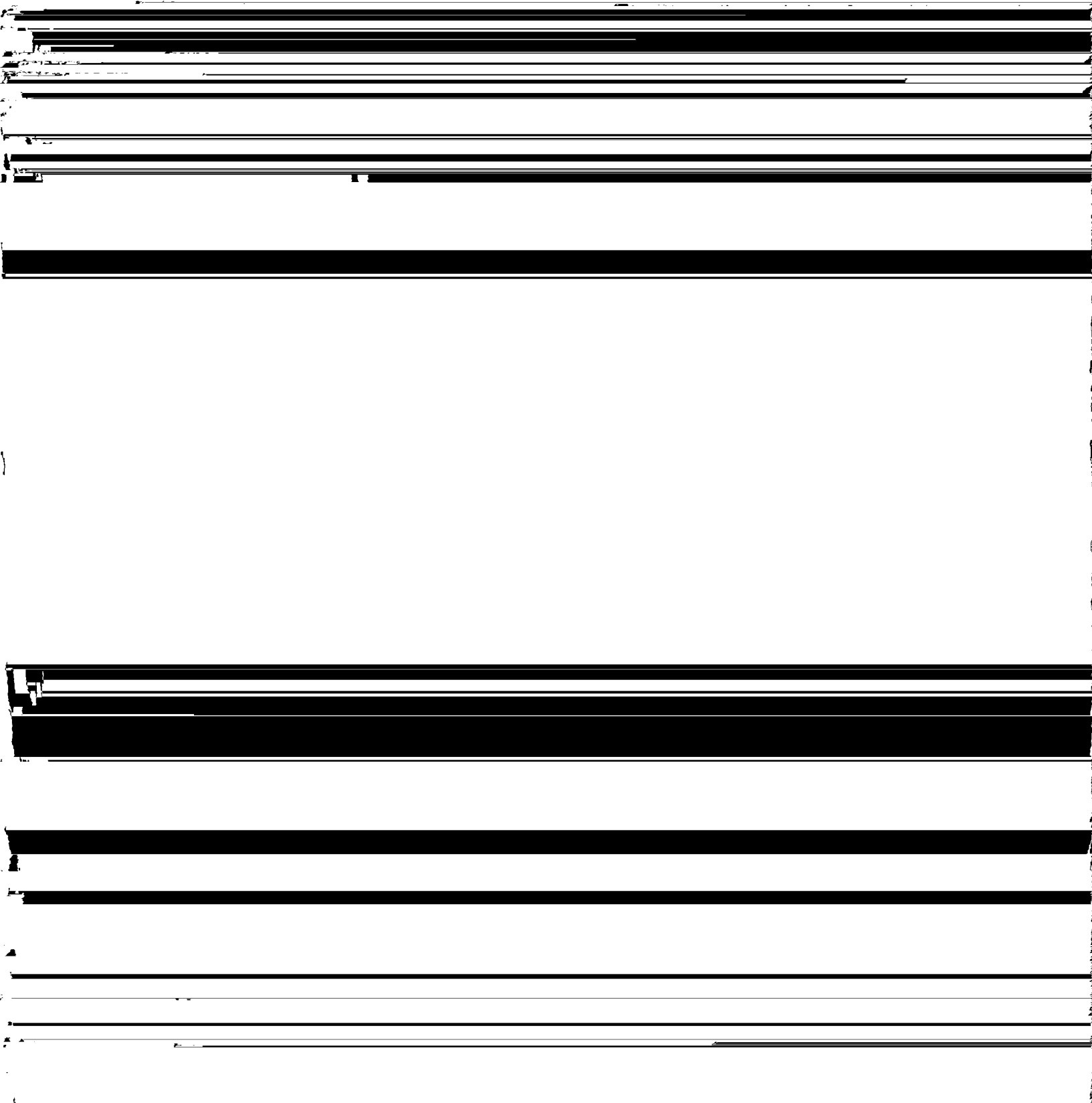
Internet and the Disclosure MIS as “sufficiently available” to offset the Website Policy’s effect on

listings, including market exit, entry deterrence, and substantially changed (and more expensive) business models. The ALJ also ignored the evidence showing that the Search Function Policy substantially reduced the exposure of EA listings within the Realcomp MLS.

The ALJ's focus is also wrong legally because it ignores the reality that, regardless of how accessible EA listings are, Realcomp's Policies still constitute discriminatory treatment of

**C. Statement of Facts<sup>6</sup>**

The vast majority of relevant facts in this case are not in dispute. (See RRPF (reply



box.” (RRPF 158). In addition, cooperating brokers may give advice to the buyer regarding the price to offer, the terms of the offer, responding to counter offers, and may assist in the closing.

(RRPF 158)

Listing brokers seek to market homes to buyers working with cooperating brokers by

making (in agreement with the seller) an “offer of compensation” to pay a portion of the listing

broker's commission to any cooperating brokers. “Section 21-1 (DE 10-10-RRPF

defined ERTS listings as "full service" requiring a minimum bundle of five services. (RRPF 176)

182). Under an ERTS listing agreement, the seller "agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker." (RRPF 176). Thus, even "if the home seller finds the home buyer on his or her own (such as through a relative or a friend at work) rather than through the marketing efforts by the listing broker, the listing broker is still entitled to and will receive the entire negotiated commission." (RRPF 177; IDF 54-55). In short, the seller receives no discount if the buyer is unrepresented. (RRPF 177). It is thus undisputed that the "significant economic factor of an Exclusive Right to Sell listing is that the home seller commits to pay the full amount of the negotiated commission (both the listing commission and the offer of compensation) if the house sells during the contract period,

regardless of whether another agent is involved in the sale." (RRPF 177)



converting broker portions of the commission, thereby allowing for a contingent discount

(CCPF 202-03; IDF 77-78).

**b. Competition Among Full Service and Discount Brokers**

Real estate brokers compete in local markets to obtain listings. (IDF 79-87; RRPf 204-06). Historically, however, there has been very little price competition among brokers. (CCPF 1130-31; *see also* 1983 Report at 54; 2007 Report at 44-45).

17% of all brokered sales (approximately 15% of all sales) in 2006. (IDF 90; CX 373-080; RX 154-A-20).

competitive landscape of residential real estate brokerage" (CX 533-040; IDF 88; CX 403-000

through binding arbitration, making the MLS unique among information sources about homes

for sale by ensuring that cooperating brokers are paid for services provided to the seller. (IDE

(RRPF 369, 405, 407). These are the top four categories of websites most visited by buyers.  
(CCPF 588-600). This dissemination allows listing brokers to achieve wide Internet exposure  
with minimal effort; Realcomp brokers' new listings and any updates are automatically  
forwarded to the Approved Websites (RRPF 600). As Realcomp puts it, through the Realcomp

MLS, listing brokers can reach:

1) Approximately 15,000 Realcomp II Ltd. MLS Subscribing REALTORS.

2) Millions of Internet users shopping for homes on [www.Michigan.com](http://www.Michigan.com)

when no cooperating broker is involved. (*See, e.g.*, Kage, Tr. 1050-52 (Realcomp's CEO explaining "problem" with EA contracts is that "the seller has the option of selling a property

(Whitehouse, Dep. at 151-52)). In fact, after the Commission filed its Complaint, Realcomp issued a "Call to Action" to its members that explained that the Website Policy is intended to protect brokers' "right to receive wages." (CX 89).

#### **4. The Impact of Realcomp's Policies on the Exposure of EA Listings**

There is no dispute that wide exposure is key to selling real estate. (RRPF 454-62, 1185-97; *see also* 1983 Report at 10). There is also no real dispute that the two most critical means of exposing listings are the MLS and the Internet. (RRPF 463-93, 536-98). Realcomp's Policies

It is also undisputed that "Internet marketing is only a competitive advantage to brokers to the extent that a significant number of buyers in the relevant geographic area are actually visiting the relevant site." (RRPF 592). Reliable industry studies consistently identify the same four categories of websites as the ones most visited by buyers: Realtor.com, MLS websites, and broker and agent websites (or "IDX websites"). (RRPF 592-97). Forty to 53% of buyers report

visiting each of these types of websites.

**WEB SITES USED IN HOME SEARCH BY FIRST-TIME AND REPEAT BUYERS**

*(Percent of Respondents Among Buyers Who Used the Internet)*

**All Buyers First-time Buyers Repeat Buyers**

\_\_\_\_\_

The Website Policy, however, excludes EA listings from the Realcomp dissemination to the Approved Websites – the top four categories of websites visited by buyers. (RRPF 268-70)

376-412, 599). EA listings have no means to reach three of these categories: MLS websites (MoveInMichigan.com)<sup>11</sup> and broker and agent sites (Realcomp IDX sites). (RRPF 875-80).

<sup>11</sup> [www.moveinmichigan.com](http://www.moveinmichigan.com)

**5. The Impact of the Realcomp Policies on Competitors and Consumers**

The Realcomp Policies restrict competition. No one disputes that where they are present, discount brokers put price pressure on traditional brokers. (RRPF 221-26; IDF 99-101)

Nationally, discount brokers have grown dramatically from a 2% market share in 2003 to an 8-15% market share in 2006. Discount brokers, however, have gained very little ground in the Realcomp MLS. (IDF 131; *see also* IDF 487 (EA listings account for less than 1% of market)). Realcomp's full-service-broker trial witness could therefore testify that his brokerage is "not in the least as concerned about [limited service brokerage models] . . . because I've seen that it hasn't taken a strong foothold in our marketplace." (Sweeney, Tr. 1352).

**a. Discount Brokers Face Obstacles to Using EA Listings in Realcomp**

The Realcomp Policies impair brokers' ability to offer discounts through EA listings by



1. EA listings are not included in the default search on the Realcomp MLS, thus “you will not be found some of the time when Realtors do searches.”

2. Realcomp will not allow these listings to go to MoveInMichigan.com. “This is ~~huge!~~ This is Realcomms public MI S site where thousands of people search!”

3. Realcomp will not allow these listings on the Realcomp IDX. “Many people these days surf Realtor websites and unless you’re an erts listing, you will not be found.”

4. Realcomp will not allow these listings on the Realcomp IDX.

process)). Discount brokers typically charge an up-front fee for these ERTS listings that is

~~higher than their FA fee by 200% or more, which is a significant cost.~~

broker has managed for the moment to avoid Dealester's fines and having the listing as labeled

represented)). If consumers want to obtain the contingent discount offered by an EA listing, they must settle for inferior exposure. Consumers simply cannot purchase EA listings that have the same or equivalent exposure as full service ERTS listings.

The availability of a "flat fee ERTS" listing from a single broker (or even a handful) does not eliminate the competitive harm. First, the listing is more expensive because of the Realcomp Policies. (IDF 57, 68). Second, this bypass of the Realcomp Policies can easily be shut down at any time; Realcomp has in the past redefined ERTS listings in ways to stem discounting. (CCPF

also CX 523). Second, the conclusion that the Realcomp Policies caused a decrease in EA listings is consistent with a time series analysis of the Boulder MLS data performed by Realcomp's expert. That analysis shows that after a website policy was implemented, the percentage of EA listings decreased by over 50%, from an average of 2.03% to an average of 0.98%. (CCPF 1106-07).

**ii. Benchmark Comparisons**

Benchmark comparisons of Realcomp with nine other MLSs also support the conclusion

that Realcomp's Policies caused a decrease in the usage of EA listings. These show that the Realcomp EA listing share is significantly less than that of each of six MLSs without restrictive

policies, the average share of these six MLSs, and the average share of the combined listings from all six MLSs. (CCPF 1085-88, 1092; DX 7-010; RX 161-28). Two other MLSs with

Comparison of Realcomp With MLSS without Restrictions

Realcomp's expert found consistent results in comparing the EA share in Realcomp with

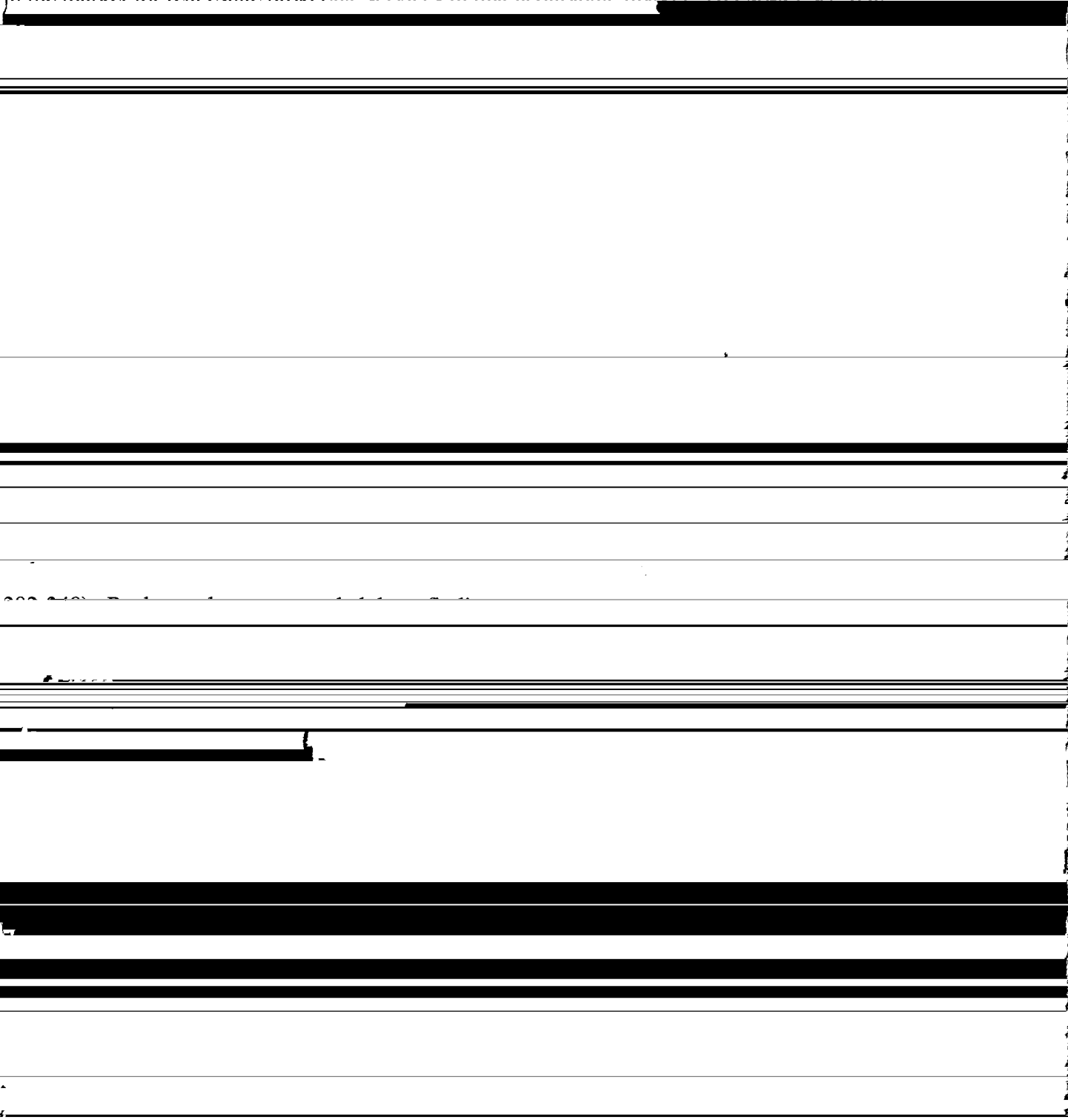
that in the Ann Arbor MLS, an MLS adjacent to Realcomp without restrictive rules. (CCPF 1108-13). This benchmark comparison also supports the conclusion that Realcomp's Policies reduced the usage of EA listings:

respect to searches performed by members in the Realcomp MLS database. In addition, it bars Respondent from requiring members to provide certain minimum services in order for their listings to be treated by the MLS as ERTS listings. (ID 3-4).



**III.  
ARGUMENT**

The ALJ correctly found that the restraints in this case were imposed by a combination of competitors with market power in the market for multiple listing services in Southeastern Michigan (Wayne, Oakland, Livingston, and Macomb counties), which gives it power over price in the market for real estate brokerage services in that geographic market. (ID 80-85, 97; IDE



dominance, it cannot adopt discriminatory rules that restrict competition. *See* 13 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW § 2220 (2006) (“ANTITRUST LAW”).

The ALJ found that the nature of the Website Policy is likely to restrain competition, but

~~has failed to show that the Website Policy is likely to restrain competition.~~

underestimated the pernicious impact of Realcomp’s Policies on competition. (*See* ID 94-95,

128) ~~Realcomp’s Policies restrain competition in two ways. First, the Policies restrict sales~~

not offer a discount if the buyer is unrepresented and included a minimum bundle of services. The Policies therefore reduce the appeal of EA listings to consumers and discourage their use, restraining an important source of price competition.

Courts have specifically recognized that the denial of the “wide exposure” of listings available through an MLS can penalize discounting. *See, e.g., Realty Multi-List*, 629 F.2d at 1370-71; *Marin County Bd. of Realtors, Inc. v. Palsson*, 16 Cal. 3d 920, 935-36 (Cal. 1976) (rule denying multiple listing services “seriously hampers the competitive effectiveness of nonmember licensed brokers”); *Oates v. Eastern Bergen County Multiple Listing Serv., Inc.*, 273 A.2d 795, 800 (N.J. Super. Ch. 1971). The competitive harm in these cases is two-fold. “First, the excluded broker’s listings will not be distributed as widely as possible, resulting in inefficient sales prices. Second, the exclusion reduces the competition among brokers and could result in less competition for brokerage fees.” *Thompson*, 934 F.2d at 1580. As the Fifth Circuit further

explained, the denial of a discount to a buyer who is unrepresented

629 F.2d at 1370-71. The mechanism of harm is the same: competitors agreeing to withhold from certain listings the “wide exposure” provided by the MLS. In the past, wide exposure of listings was obtained only through the dissemination of the MLS database to other brokers.

Currently, MLSs provide critical exposure both through the closed database *and* the

A refusal to compete with respect to the package of services offered to customers,  
no less than a refusal to compete with respect to the price term of an agreement,

~~impair the ability of the market to~~

countervailing procompetitive virtue – such as, for example, the creation of

~~efficiencies in the operation of a market or the provision of goods and services~~

market exposure has particularly deleterious effects in the real estate industry because each home

is different and each buyer has unique preferences. (RRPF 1185-97, *see also* 1983 Report at 10).

Thus, as one Realcomp Governor explained, less exposure:

means less price, more marketing time, more expenses involved, lower price on your home, more days on the market, more carrying costs; in other words, it's more expensive for everybody concerned.

(RRPF 458; CX 38 (Gleason, Dep. at 123-124)). Not surprisingly, sellers demand wide

Realcomp's Policies restrict the exposure of EA listings through the two most critical channels – the MLS and the Internet. (RRPF 463-93 (importance of MLS); RRP 536-98

(importance of Internet)). The Website Policy penalizes discounting because it includes

no survey, no industry report, no testimony – to support this “statistic”; it is a myth.

This myth is in fact contrary to data and studies whose reliability is well established.

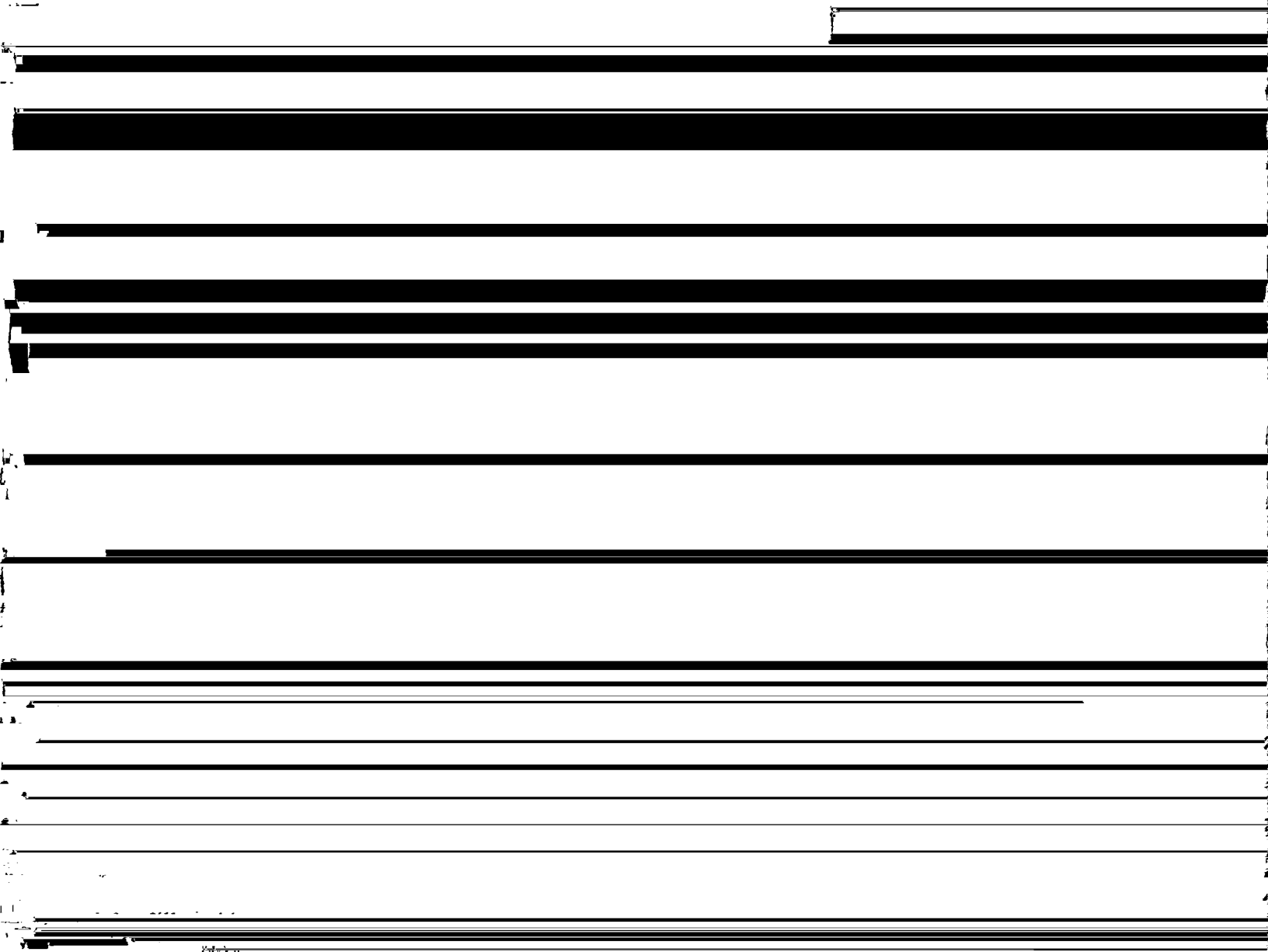
(RRPF 482-84, 549 (reliability of NAR studies and comScore data undisputed)). The notion that

the MFS alone reaches 80% of the buyers both overstates the importance of the MFS and

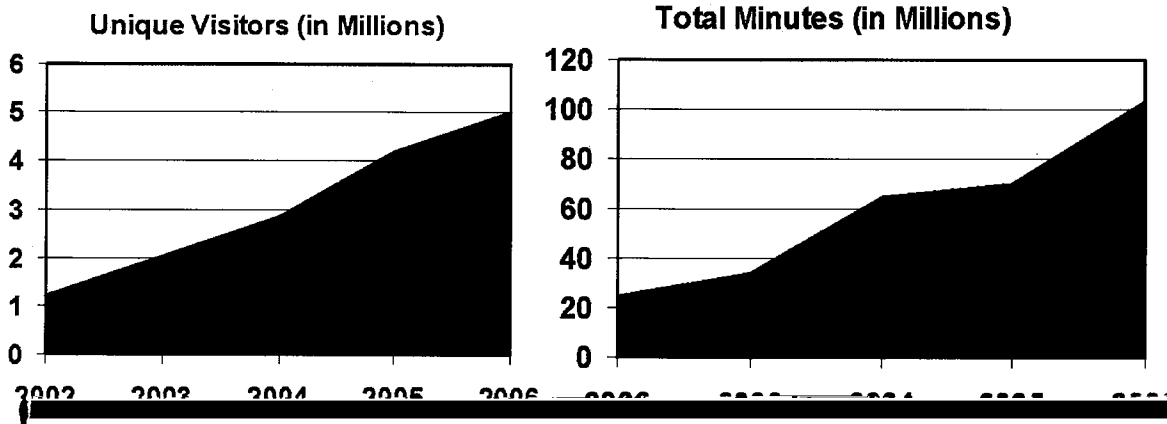
understates the importance of the Internet. For example, reliable industry studies show that 24%

of websites. Realcomp members testified that buyers want to search local websites, like MoveInMichigan.com and the Realcomp broker IDX websites. (RRPF 649-50).

MoveInMichigan.com has become increasingly important. (RRPF 609-36; RRPF 615 (describing MoveInMichigan.com as a “very local version of Realtor.com”)). It receives on average over 700,000 hits a month, a number that Realcomp brokers describe as “large” and “significant.” (RRPF 631-34). Realcomp spends substantial sums promoting the website, and brokers testified that the importance of MoveInMichigan.com is increasing due to these efforts. (RRPF 619-20, 636). In addition, MoveInMichigan.com is the exclusive provider of real estate listings for the number one website in Southeastern Michigan, ClickOnDetroit.com, which







(CCPF 645-46; *see also* CCPF 647 (users of IDX websites far exceed users of Realtor.com)).

In fact, these website statistics underestimate the total usage for IDX websites because they do not include all IDX sites. (RRPF 648, 584 (local broker site receiving 120,000 hits/month)).

**3. The ALJ Failed to Understand That All Other Real Estate Websites Combined Reach Only a Small Fraction of Buyers**

TEL 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

(lack of consumer demand for other websites)).

The ALJ nonetheless credited the admitted speculation of a non-broker that Google may

received calls from other Realcomp brokers who could not find the EA listings through their search on the Realcomp MLS. (CCPF 923-26; RX 67-005; CC PF 933).

986-90). They also uniformly testified about numerous complaints from customers that EA listings “didn’t show up” on the Realcomp MLS. (CCPF 923-26; RX 67-005; CC PF 933).

**5. The ALJ’s Focus on Alternatives Demonstrates a Misunderstanding of the Principal Tendency of the Policies**

The ALJ’s conclusion that Realcomp’s Policies do not degrade the exposure of EA

**C. The ALJ Erred in Finding the Policies Plausibly Justified and Failed to Require Realcomp to Show Procompetitive Effects**

Realcomp to prove that the constraints are justified by \_\_\_\_\_

At trial, DeLoach nonetheless offered three "Harris" witnesses. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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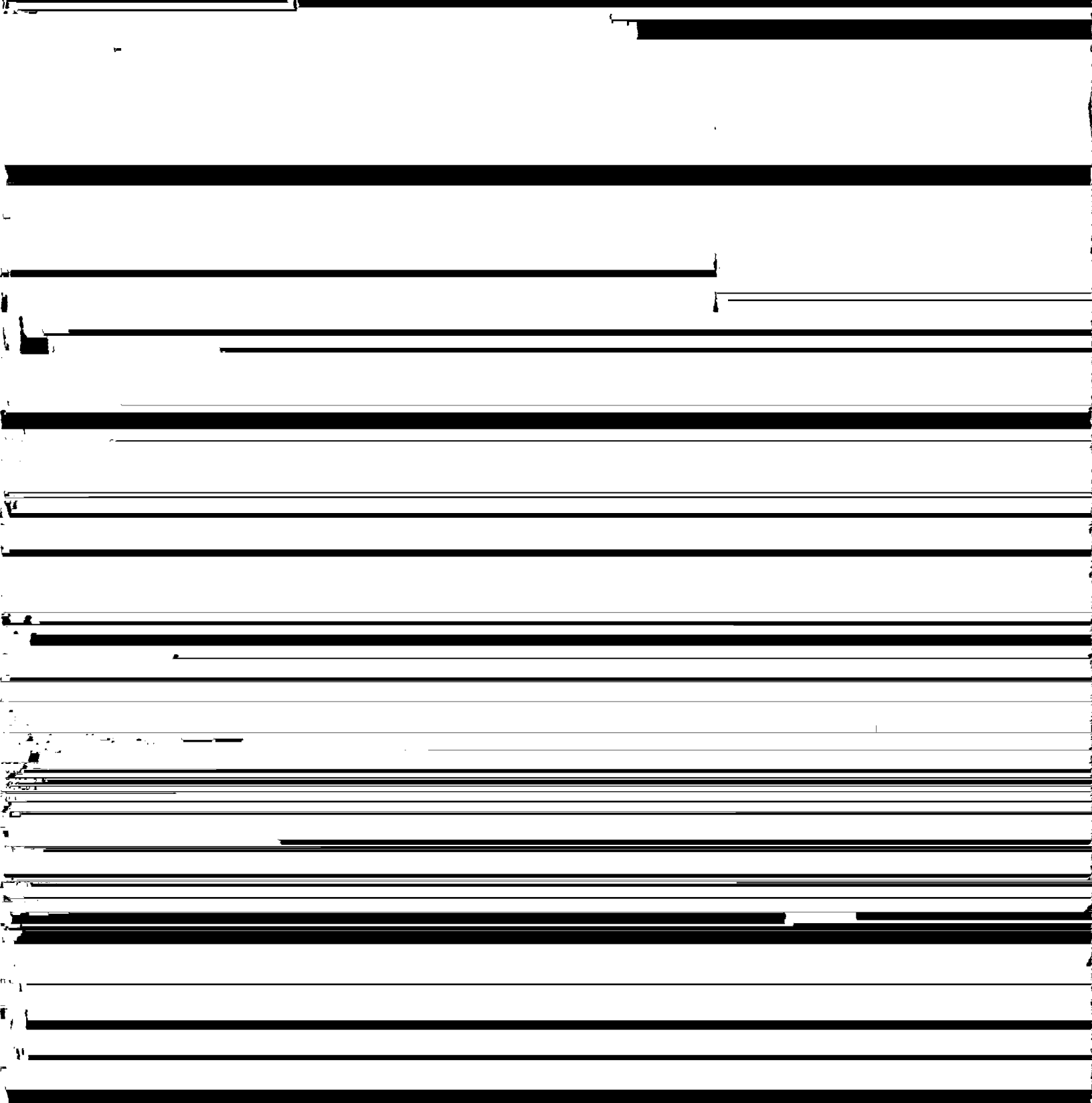
brokerage services that the MLS was created to promote, because a listing broker is always involved in an EA Listing, and the MLS rules . . . already provide

of the Commission's reasoning are present here. (CCPTB 71; *see also* CCPF 1256-65 (demonstrating that sellers using EA listings do not free ride on listing brokers, cooperating brokers, or the MLS)). Yet, without distinguishing the Commission's reasoning in any way, the ALJ rejected it. (ID 122-23).

This was error. The ALJ reasoned that sellers using EA listings may "receive, without

by using an EA listing, a seller does not “compete with Realcomp cooperating brokers for

buyers.” This confuses the roles of listing brokers and cooperating brokers. Listing brokers seek





obtain the property. (IDF 631). Presumably, buyers will then be more inclined to use

unrepresented buyer.

This is not a plausible efficiency justification – it does not create or improve competition. In essence, the ALJ found that it is efficient to reduce the dissemination of information regarding homes for sale, thereby decreasing the number of potential purchasers. Under the Policy, buyers will either fail to find the home or hire a Realcomp cooperating broker that they otherwise do not need. The effect of the Policy is merely to transfer wealth from the home seller to the cooperating broker. (CX 557-A-049 (explaining how theory “stands the competitive process on

established that the Policies tend to restrict competition and Realcomp possesses market power, Realcomp bore the burden to produce evidence of procompetitive effects, not merely proffer a plausible justification. *See Floore v. Christian Hospital NE-NW*, 4 F.3d 687, 688 (8th Cir. 1003).

(defendant must “demonstrate pro-competitive effects.”); *see also VISA*, 344 F.3d at 243

(justifications rejected because of lack of evidence supporting the alleged pro-competitive

protect the right of cooperating brokers to be compensated)). NAR concluded that feeding EA

studies show that buyers who use the Internet are *more* likely to use a cooperating broker.

(RRPF 575-79).

**D. The ALJ's Conclusion That Consumers Are Not Harmed Is Based on a Misunderstanding of the Facts and an Erroneous Legal Standard**



2. **The ALJ Missed Critical Qualitative Evidence That the Policies Harmed**

[REDACTED]

In line with his erroneous legal standard, the ALJ downplayed the qualitative evidence of consumer harm. The impact of Realcomp's Policies decreasing the exposure for EA listings was predictable. EA listings became less effective. Consumers complained that their EA listings did not appear on the IDX Websites and MoveInMichigan.com, and that their listings "didn't show up" on the Realcomp MLS. Discount brokers were forced to explain the limitations imposed by Realcomp's Policies, resulting in lost business. Some discount brokers exited or were deterred from entering. Other tried to reduce the penalty by double listing to get to Dwell.

charging consumers for this service. And discount brokers conformed their business models to that of traditional brokers by offering (more expensive) full service ERTS packages. See Section



on substantially equal terms). The fact that some competitors are able to survive without access to the denied service cannot save a restraint from condemnation. *Associated Press*, 326 U.S. at 17; see also *Wilk v. American Medical Ass'n*, 895 F.2d 352, 364-65 (7th Cir. 1990) (affirming injunctive relief because restriction negatively impacted the demand for plaintiffs' services).

**b. The ALJ Failed to Understand That the Policies Forced Discount Brokers to Change Their Business Models, Reducing Their Competitive Significance**

were not harmed. He thus missed the fact that because the Policies penalize the use of EA

listings of course the seller forfeited the possibility of selling the house at a higher price.

"

(typically 20% of the sale price) if the home was sold to an investor. 11



in the share of EA listings – which were the only type of listing offering unbundled commissions and services – could not demonstrate competitive harm. (ID 61, 114). This is wrong.

A reduction in EA listing share demonstrates harm to consumers. (ID 61, 114)

not be wholly attributed to changed economic conditions. (CCPF 1084). In fact, this conclusion

is consistent with the findings of the ALJ in the 1990s. (CCPF 1084).

on which the ALJ relied, that also showed a 52% decrease after the imposition of a website

1. (CCPF 1084, ID 110, P. 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

(showing that Realcomp had from 55% to 86% fewer EA listings). *Id.* Other MLSs with similar website policies also exhibit low EA listing shares. *Id.* In light of this, Realcomp did not dispute that the “benchmark data unambiguously show that where there are no restrictions on Exclusive Agency listings being fed from the MLS to public websites and IDX sites, the extent to which Exclusive Agency listings are used is greater.” (R.D.D.F. 1007)

The ALJ, however, gave this data “little weight” because he believed that the “selection

comparative MSA is flawed” and that comparing the “weighted average EA percentages

By combining the data (which totals over 1.09 million homes) ...

the "weighted average" generalizes the results and allows for a more confident conclusion from  
the comparison. (CCPE 1001.02) This is the type of comparison you would use. What is the

**iii. Regression Analyses Consistently Show That the Realcomp Policies, Not Economic or Demographic Conditions, Reduced EA Usage**

Numerous multivariate regression analyses – ten in total – also consistently demonstrate that the Realcomp Policies, not some other factor, account for the large difference in the share of EA listings in Realcomp compared to the MLSs without restrictions. (CCPF 1098-1104; CCRF 228-29; CX 557-A-6-14). Complaint Counsel's initial expert report presented three of

these regressions. (CX 408-A-041-043). In response to Defendant's motion to dismiss, Plaintiff

that economic or demographic variables, not the Policies, were responsible for the low share of EA listings, Complaint Counsel's surrebuttal report demonstrated that: (1) the methodology used

expert makes the regression results unreliable because (1) their inclusion is contra-

economic theory because the selected variables were “duplicative,” *i.e.*, the variables captured the same characteristics in two different ways;<sup>20</sup> and (2) the inclusion of several of these makes the regressions unreliable because of “multicollinearity” (which prevents the researcher from distinguishing the effects of one variable from another). The result is that Dependent’s

The unreliability of Respondent's regression analyses is easily demonstrated even without understanding multicollinearity. The only economic or demographic variable for which there is any evidence that it may impact the use of EA listings is changes in the housing market.

[REDACTED]

In fact, Realcomp's number one argument is that the down housing market in Southeastern Michigan, not the Realcomp Policies, reduced the use of EA listings. Respondent's expert was forced to admit, however, that his regression analyses predict the exact opposite – that a down housing market should *increase* the use of EA listings. (CCRF 229). Although the ALJ found that the “buyers market” in Southeastern Michigan is largely responsible for the decline in EA listings in Realcomp, he nonetheless relied on Respondent's expert's regression that showed the opposite.

The ALJ also placed “significant weight” on one of Respondent's regression analyses

**IV.  
CONCLUSION**

Pared down to its essentials, this case is about how a group of full service brokers who

dominated Realcomp responded to an emerging competitive challenge from discount brokers.

Rather than meet the challenge head-on, based on the merits of their individual business practices, the Realcomp Governors – on behalf of all Realcomp members – agreed to change

Realcomp's Policies to deflect the competitive



Decision. (See Attachment 2). Attachment 3 is an alternative Proposed Order embodying the Joint Stipulation, which the Commission should enter in the event that no other relief is granted.

Respectfully submitted,

*Sean Gates / pbf*

Jeffrey Schmidt  
*Director*

Sean Gates  
Peggy Bayer Femenella  
Joel Christie  
Linda Holleran

Kenneth L. Glazer  
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Melanie Sabo  
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Federal Trade Commission  
601 New Jersey Avenue, NW  
Washington, DC 20580  
Phone: (202) 326-3086  
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Patrick Roach  
Geoffrey Green  
*Deputy Assistant Director*

Email: [pbayer@ftc.gov](mailto:pbayer@ftc.gov)

Dated: January 25, 2008

**CERTIFICATE OF SERVICE**

This is to certify that on January 25, 2008, I caused a copy of the attached Appeal Brief

of Counsel Supporting the Complaint, to be served upon the following persons:

by hand delivery to:

The Commissioners  
U.S. Federal Trade Commission  
via Office of the Secretary, Room H-135  
Federal Trade Commission  
600 Pennsylvania Avenue NW

Washington, DC 20580

and by electronic transmission and overnight courier to:

Scott Mandel, Esq.  
Foster, Swift, Collins & Smith P.C.  
313 South Washington Square  
Lansing, MI 48933-2193

ATTACHMENT

1

Attachment 1

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Deborah Platt Majoras, Chairman  
Pamela Jones Harbour  
Jon Leibowitz  
William E. Kovacic  
J. Thomas Rosch

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

Public

COMPLAINT COUNSEL'S PROPOSED ORDER

Upon Consideration of all of the evidence on the record in this matter:

I.

IT IS HEREBY ORDERED THAT

REALTORS and Western-Wayne Oakland County Association of REALTORS at the time of entry of this order.

- C. "Multiple Listing Service" or "MLS" means a cooperative venture by which real estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering cooperation and offering compensation in and facilitating real estate transactions.
- D. "Realcomp MLS" means the Realcomp MLS or any other MLS owned, operated or controlled, in whole or in part, directly or indirectly, by Realcomp, any of its Owners, predecessors, divisions and wholly or partially owned subsidiaries, ~~affiliates and all the directors, officers, employees, agents and representatives of~~

the foregoing.

- E. "Realcomp Member" means any person authorized by Realcomp to use or enjoy the benefits of the Realcomp MLS, including but not limited to Members and Subscribers as those terms are defined in the Realcomp Rules and Regulations.
- F. "IDX" means the internet data exchange process that provides a means of

broker, as an exclusive agent, to offer cooperation and compensation on a blanket unilateral basis, but also reserves to the seller a general right to sell the property on an unlimited or restrictive basis, or any other definition that Realcomp ascribes to the term "Exclusive Agency Listing."

M. "Services of the MLS" means the benefits and services provided by the MLS to assist Realcomp Members in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents

representing home sellers. Services of the MLS shall include, but are not limited to

will not provide any of the following services: (1) Arrange appointments for cooperating brokers to show listed property to potential purchasers; (2) Accept and present to the seller(s) offers to purchase procured by cooperating brokers; (3) Advise the seller(s) as to the merits of offers to purchase; (4) Assist the seller(s) in developing, communicating, or presenting counteroffers; and (5) Participate on the seller(s) behalf in negotiations leading to the sale of the listed property.

II.

IT IS FURTHER ORDERED that Respondent Doalcom, its officers and agents

and its Board of Directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any agent, subsidiary, division, or other instrumentality,

9. \_\_\_\_\_ associates Exclusive Right to Sell Listings with Full Service and/or that

\_\_\_\_\_ does not allow Exclusive Right to Sell/Limited Service Listings and

**Provided, however, that** nothing herein shall prohibit the Respondent from adopting or enforcing any policy, rule, practice or agreement regarding subscription or participation requirements, payment of dues, administrative matters, or any other policy, rule, practice or agreement, that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

**III.**

**IT IS FURTHER ORDERED** that Respondent shall, no later than thirty (30) days after the date this Order becomes final, amend its rules and regulations to conform to the provisions of



and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Order.

**VI.**

**IT IS FURTHER ORDERED** that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

**VII.**

**IT IS FURTHER ORDERED** that this Order shall terminate ten (10) years from the

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By the Commission.

Donald S. Clark  
Secretary

SEAL  
ISSUED: \_\_\_\_\_, 2008

ATTACHMENT

2

Attachment 2

In the Matter of  
**REALCOMP II LTD.,**  
a corporation.

Docket No. 9320

Public

Whereas the Realcomp Board of Governors voted to change the search function in the Realcomp MLS on April 27, 2007, to no longer default to any listing type and to no longer require that Exclusive Right to Sell listings be Full Service listings;

Complaint Counsel and Respondent Realcomp hereby Stipulate as follows:

- A. Complaint Counsel and Realcomp agree to resolve all determinations of relief regarding Realcomp's "Search Function Policy."
- B. Realcomp enters into this Stipulation without admitting liability.
- C. The terms of relief of this Stipulation are contemplated in the relief provisions contained in Paragraph II.5. of the Notice of Contemplated Relief issued by the Commission on October 10, 2006.

or total ownership or control by Realcomp, and is specifically meant to include Realcomp MLS and/or each of the Realcomp Websites.

2. "Owners" means the current and future Boards and Associations of Realtors that are the sole shareholders of Realcomp, which included the Dearborn Board of REALTORS, Detroit Association of REALTORS, Livingston Association of REALTORS, Metropolitan Consolidated Association of REALTORS, North Oakland County Board of REALTORS, Eastern Thumb Association of REALTORS and Western-Wayne Oakland County Association of REALTORS at the time of entry of

this order.

3. "Multiple Listing Service" or "MLS" means a cooperative venture by which real estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering cooperation and offering compensation in and facilitating real estate transactions.
4. "Realcomp MLS" means the Realcomp MLS or any other MLS owned, operated or controlled, in whole or in part, directly or indirectly, by Realcomp, any of its Owners, predecessors, divisions and wholly or partially owned subsidiaries, affiliates, and all the directors, officers, employees, agents, and representatives of the foregoing.
5. "Exclusive Right to Sell Listing" means a listing agreement under which

the merits of offers to purchase; (4) Assist the seller(s) in developing

communicating, or presenting counteroffers; and (5) Participate on the seller(s) behalf in negotiations leading to the sale of the listed property.

8. "Other Lawful Listing" means a listing agreement, other than an Exclusive Right to Sell Listing or Exclusive Agency Listing, which is in compliance

practice or agreement that:

Discrimination against Employees Associations or Other Lawful Activities





**CERTIFICATE OF SERVICE**

This is to certify that on July 30, 2007, I caused a copy of the attached Joint Stipulation Regarding Respondent's Search Function Policy to be served upon the following persons:

1 \_\_\_\_\_

The Honorable Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Avenue, NW  
Washington, DC 20580

and by electronic transmission to:

Scott Mandel, Esq.  
Steven H. Lasher, Esq.  
Foster, Swift, Collins & Smith P.C.  
313 South Washington Square  
Lansing, MI 48933-2193

*Counsel for Respondent Realcomp II, Ltd.*

*Stephanie M. Lasher*

ATTACHMENT

3

Attachment 3

UNITED STATES OF AMERICA  
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Deborah Platt Majoras, Chairman  
Pamela Jones Harbour  
Jon Leibowitz  
William E. Kovacic  
J. Thomas Rosch

In the Matter of

REALCOMP II LTD.,

a corporation.

Docket No. 9320

Public

COMPLAINT COUNSEL'S PROPOSED ORDER EMBODYING  
JOINT STIPULATION REGARDING RESPONDENT'S SEARCH FUNCTION POLICY

Upon Consideration of all of the evidence on the record in this matter:

I.

IT IS HEREBY ORDERED that for purposes of this Order, the following is defined:

Oakland County Board of REALTORS, Eastern Thumb Association of REALTORS and Western-Wayne Oakland County Association of REALTORS at the time of entry of this order.

C "Multiple Listing Service" or "MLS" means a cooperative venture by which real

estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering

cooperating brokers but instead gives cooperating brokers authority to present offers to purchase directly to the seller(s); (3) Advise the seller(s) as to the merits of offers to purchase; (4) Assist the seller(s) in developing, communicating, or presenting counteroffers; and (5) Participate on the seller(s)'s behalf in the

C. Any other change in the Respondent, including, but not limited to, assignment  
~~and the creation or dissolution of subsidiaries if such change is to effect~~

compliance obligations arising out of the Order.

**IV.**

**IT IS FURTHER ORDERED** that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

**V.**

**IT IS FURTHER ORDERED** that this Order shall terminate ten (10) years from the date