

FEDERAL TRADE COMMISSION

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UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION

IN THE MATTER OF:)
REALCOMP, II, LTD.) Docket No. 9320
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ORAL ARGUMENT
PUBLIC RECORD
TUESDAY, APRIL 1, 2008
2:00 P.M.

BEFORE THE FEDERAL TRADE COMMISSION
CHAIRMAN WILLIAM E. KOVACIC
COMMISSIONER PAMELA JONES HARBOUR
COMMISSIONER JON LEIBOWITZ
COMMISSIONER J. THOMAS ROSCH

Reported by: Sally Jo Bowling

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1 P R O C E E D I N G S

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3 CHAIRMAN KOVACIC: Good afternoon. We meet
4 today in open session to hear the oral argument in the
5 matter of Realcomp, II, Limited, Docket Number 9320, on
6 the appeal of counsel supporting the complaint from the
7 initial decision issued by the Administrative Law Judge.

8 Mr. Scott L. Mandel represents the respondent
9 and Mr. Sean Gates represents counsel supporting the
10 complaint.

11 During this proceeding, each side will have 45
12 minutes to present its arguments. Counsel supporting
13 the complaint are the appellants and will speak first
14 and will be permitted to reserve up to ten minutes for
15 rebuttal. Counsel for the respondent will then make his
16 presentation, and counsel supporting the complaint will
17 conclude the argument with his rebuttal presentation.

18 Mr. Gates, would you like to reserve some time?

19 MR. GATES: Yes, Chairman Kovacic, five minutes,
20 if you would.

21 CHAIRMAN KOVACIC: That's great. You may begin,
22 please.

23 MR. GATES: Thank you.

24 If it please the Commission, this really is a
25 straightforward case. We have a combination of

1 competitors, with market power, who have set rules that,
2 in effect, penalize discounting and withhold from
3 consumers products they desire. EA listings are the
4 primary vehicle that brokers use to provide discounted
5 services, and the policies that Realcomp implemented
6 discriminate against those, resulting in reduced price
7 competition and less choice for consumers.

8 Now, the ALJ made three critical errors that I
9 would like to touch on. First off, he misunderstood the
10 significance of the indirect effects evidence. Market
11 power and the nature of the restraint are sufficient to
12 show anticompetitive effects under a rule of reason
13 analysis. That mistake is dispositive, once corrected.

14 Second, the ALJ failed to recognize that an
15 import of the direct evidence of effects, because he
16 failed to recognize that the policies changed the way
17 brokers compete. You may not exclude "discount brokers"
18 all together, but it changed the way they compete within
19 the MLS.

20 Third, on efficiencies, on justifications, the
21 ALJ incorrectly found that there were plausible
22 justifications, but more importantly, even if there were
23 implausible justifications, there is no evidence that
24 there are any efficiency gains from these policies
25 whatsoever.

1 Let me start out on the first point.

2 COMMISSIONER ROSCH: Before you get there,
3 Mr. Gates?

4 MR. GATES: Yes, Commissioner Rosch?

5 COMMISSIONER ROSCH: Let me just ask you a very
6 simple question: What do you think is the appropriate
7 legal analysis in this case? Is it full-blown rule of
8 reason, which I take it is what the ALJ applied; is it a
9 truncated rule of reason analysis that was described in
10 Three Tenors; or is it something different than that?

11 MR. GATES: To answer that straightforward, it's
12 a rule of reason analysis, and I don't put any label on
13 it. It is not a quick look. Complaint counsel has
14 never advocated that this is a quick look analysis, in
15 which case you would not have to show market power. We
16 have shown -- we have defined the markets, we have shown
17 market power, the market power is significant, that's
18 not contested. That, combined with the nature of the
19 policies -- the question under the rule of reason is
20 what is the tendency of the restraint. That's what the
21 Supreme Court told us in Cal Dental. Okay, do we have
22 sufficient evidence to come to a competent conclusion
23 that these restrained competition or enhanced
24 competition.

25 We can do that with the indirect evidence, which

1 is market power, and the fact that these limit the
2 exposure of EA listings, and EA listings represent forms
3 of competition.

4 COMMISSIONER ROSCH: Let me just understand
5 this, then. With respect to actual anticompetitive
6 effects, is it your position, then, that complaint
7 counsel did not need to show any actual impact on
8 competition or competitors, and by that I mean any
9 actual diminution in the number or strength of the
10 brokers using EA listings? Is that your position?

11 MR. GATES: I think the -- the -- our position
12 is that there are two ways to show anticompetitive
13 effects: One is indirect, that's market power nature of
14 the effect, nature of the restraint; and the second one
15 is actual effects. And the courts are clear that you
16 don't need to show actual effects. Why? Because it
17 recognized that it's difficult to parse out effects and
18 causation in the real world, and that, if the
19 statistical evidence in this case shows anything, it
20 shows that it's hard to do that.

21 And, so, in order to avoid false negatives, in
22 order to falsely acquit conduct that when combined with
23 market power is plainly going to result in
24 anticompetitive effects, maybe we just can't show it
25 because of the data problems, or something like that,

1 that indirect evidence is sufficient.

2 COMMISSIONER ROSCH: Well, now, just let me
3 understand you there. Your position is that complaint
4 counsel did not need to show any impact on competition,
5 they didn't need to show any impact on price, that is to
6 say on the commission structure, they didn't need to
7 show even any impact on output, that is to say on the
8 number of homes that were sold or even with respect to
9 the time on the market. They didn't need to show any of
10 those things. Is that your position?

11 MR. GATES: We show them through the indirect
12 evidence. What we don't have to show under the case law
13 is that there were actual effects, actual
14 anticompetitive effects, actual changes in price. Now,
15 we did. I think that the effects evidence is clear --

16 COMMISSIONER ROSCH: Well, if you're talking
17 about the economics evidence or are you talking about
18 something other than that?

19 MR. GATES: I think both, the economic evidence,
20 the qualitative evidence, the testimony from the brokers
21 who told us that within the Realcomp area, there are
22 clear differences in how their EAs are treated. There
23 are clear differences of how effective their EAs are.
24 They get complaints, they get calls, they don't get as
25 much activity as they do in other MLSes that don't have

1 the restrictive rule.

2 So, we have the qualitative evidence.

3 COMMISSIONER ROSCH: Anecdotal to be sure, but
4 if you say that's qualitative.

5 MR. GATES: And then we have the quantitative
6 evidence as well. And let's look at one piece of
7 quantitative evidence that nobody's disputing, and it
8 actually comes from Realcomp's own economist. What
9 Realcomp's own economist showed is that discount brokers
10 who participate in the Realcomp MLS and the next door,
11 the neighboring Ann Arbor MLS, that does not have any
12 restrictive policies, they are far more likely to use
13 ERTS listings in Realcomp than EA listings as opposed to
14 where they are where there are no restrictions.

15 COMMISSIONER LEIBOWITZ: Mr. Gates, before you
16 get too far into the nature of the evidence, I want to
17 come back to the analysis for a second. Did you say
18 it's not appropriate to use a truncated PolyGram type
19 analysis? Is that what you said?

20 MR. GATES: I'm not saying it's not appropriate,
21 I think the Commission could, but we did not try this as
22 an inherently suspect restraint. What we showed in this
23 case was that there was market power --

24 COMMISSIONER LEIBOWITZ: So, you don't think
25 this is an inherently suspect restraint?

1 MR. GATES: Under PolyGram, and in the D.C.
2 Circuit.

3 COMMISSIONER LEIBOWITZ: PolyGram, Indiana
4 Federation, Commission past cases.

5 MR. GATES: Yes, what the D.C. Circuit held in
6 PolyGram is that you have to have significant judicial
7 experience or economic learning with regard to the
8 restraint in order to know that it is almost always
9 going to be anticompetitive.

10 Given the fact that this particular restraint is
11 something that we have not dealt with before, we did not
12 try this under inherently suspect analysis.

13 That said, it is very similar to restraints that
14 we have seen before. Of course, it's kind of the
15 evolution of what's happened with MLSes. First they
16 price fix, so get rid of discounting that way. Then
17 they just exclude discount brokers, then they excluded
18 EA listings, until the Commission came in in the
19 eighties and nineties, and now this is excluding them
20 from significantly important services within the MLS,
21 but not the MLS entirely.

22 COMMISSIONER HARBOUR: I just want to follow up
23 on the question Commissioner Leibowitz asked about the
24 standard. Could it be that Realcomp's policies are
25 horizontal agreements among members who provide higher

1 cost services and that these agreements restrict market
2 access by non-member brokers who provide lower cost
3 alternatives to consumers? Could one argue that?

4 MR. GATES: Almost, Commissioner Harbour,
5 because the Realcomp --

6 COMMISSIONER HARBOUR: Almost is good enough.

7 MR. GATES: The Realcomp policies don't preclude
8 brokers per se, what they do is they penalize, they
9 discriminate against a form of discounting and a form of
10 unbundled services which are represented by EA listings.
11 So, I can be a "discount broker" and be on the MLS.

12 COMMISSIONER HARBOUR: Okay, and that is why
13 we're here. Does the agreement to punish discounters
14 constitute horizontal price fixing?

15 MR. GATES: Comes very, very close to it. You
16 know, in Denny's Marina, the 7th Circuit held that an
17 agreement amongst competitors to exclude a discount
18 seller from two trade shows merely because the seller
19 would match anybody's price was, per se, illegal.

20 COMMISSIONER HARBOUR: Let me stop you there.
21 The "very, very close to," I hear you use that now and
22 you also use that term in your brief. How should I
23 evaluate, then, the effect on price? Which precedents
24 would provide for me the best analogies?

25 Now, you did say standard rule of reason, and

1 that you didn't want to put a label on it, you're not
2 going to call it a quick look, you're not going to call
3 it inherently suspect, but what I'm thinking about is
4 Socony Vacuum Oil that dealt with buying distressed
5 gasoline off the market, Catalano, which dealt with an
6 agreement not to offer credit terms, Denny's Marina,
7 which included an agreement to exclude a discounter from
8 participating in a boat show. Aren't the price effects
9 in this case at least as direct as the price effects in
10 the three cases that I just named?

11 MR. GATES: I think they're very close.

12 COMMISSIONER HARBOUR: There you go.

13 MR. GATES: I always have to say, the reason why
14 I hesitate is that this is -- it is a rule that is in an
15 MLS. An MLS is an efficiency-enhancing joint venture.
16 Because of that, I hesitate to apply a per se or even a
17 quick look analysis, because of that fact.

18 So, under a rule of reason, we allow the
19 respondent, after we show anticompetitive effects, to
20 come forward with a positive justification, and also
21 evidence that not only is the -- is there an efficiency
22 justification out there, but it's actually providing
23 some efficiencies.

24 COMMISSIONER HARBOUR: Well, let me go back to
25 price again. I'm trying to understand how important

1 prices are to the operation of the MLS. Homeowners are
2 charged a certain price for listing contracts, we know
3 that. How do these prices relate to the operation of

1 efficient. Most of the governors testified they didn't
2 even know why they had these rules, they didn't know
3 what the reasons were, and we have evidence from MLSes
4 across the country that place EA listings onto their --
5 disseminate them out to websites, let them freely
6 disseminate within the MLS, and yet we don't have any
7 evidence of any problems.

8 We don't even have a complaint. Not a single
9 complaint that, oh, if you let those out to the Internet
10 sites, we're going to have all kinds of problems. We
11 don't even have that. Not even any testimony at all.
12 There is no basis at all to say that these are efficient
13 and there's any justification for these rules, at all.

14 So, that is why -- that is why the evidence
15 of -- the indirect evidence of effects, the market power
16 and the nature of the restraint is dispositive. Yes,
17 Commissioner?

18 CHAIRMAN KOVACIC: Can you tell me, Mr. Gates,
19 what you think is your best case on the relevance of
20 indirect effects as a way of establishing the
21 anticompetitive quality of the restraint?

22 MR. GATES: The best case?

23 CHAIRMAN KOVACIC: In a rule of reason. Which
24 case is perhaps -- give me a couple that you're most
25 fond of.

1 MR. GATES: I am trying to recall. The reason I
2 am hesitating for a second is that there are just cases
3 upon cases that state this rule, but you can take, for
4 instance, let's take Toys 'R Us, at the Commission
5 level.

6 COMMISSIONER ROSCH: That's a per se case,
7 Counsel. Oh, at the Commission level.

8 MR. GATES: At the Commission level, it was not
9 only tried under a per se, but a bona fide per se, but
10 the Commission also did a full rule of reason analysis,
11 and what the Commission looked at was that there was a
12 diminution in the percentage share of these particular
13 types of discounters, and the Commission said, well,
14 wait a minute, even though it's a small amount, and even
15 though we don't have market-wide evidence of any price
16 effects, the Commission said, that is sufficient.

17 Detroit Auto Dealers as well, Detroit Auto
18 Dealers, when it went up to the 6th Circuit, the 6th
19 Circuit held, the fact that this changed forms of
20 competition, even though we don't agree with the
21 Commission that there was a reduction in output, we
22 wouldn't characterize showroom hours as output, because
23 this affected the way in which dealers competed, that is
24 sufficient under it was a rule of reason analysis once
25 again.

1 So, both of those cases, I think, go directly to
2 that.

3 CHAIRMAN KOVACIC: Do you have an appellate
4 decision in mind that comes to the same result?

5 MR. GATES: Well, when I was talking about
6 Detroit Auto Dealers, I was talking about the 6th
7 Circuit decision.

8 CHAIRMAN KOVACIC: Okay.

9 MR. GATES: So, that is an appellate decision.
10 You can look at IFD as well. Now, IFD said that this
11 particular restraint, okay, had the types of effects
12 that it was looking at, it was an effects case. And the
13 court said, all right, even if we go beyond merely
14 looking at the nature of the restraint, what we saw here
15 was that the restraint was effective. How was it
16 effective? Because in some small part of Arizona,
17 x-rays were withheld from customers who wanted them.
18 That was effective, and that was sufficient to show
19 anticompetitive effects.

20 That's the same type of effects that we have
21 here, even the qualitative evidence that brokers are
22 changing the way that they compete. They're using ERTS
23 listings more often. So, it's the same type of effect
24 there.

25 listings were not on there. It's the same type of effect

1 Realcomp's share of EA listings, below one percent, is
2 smaller than other MLSes, there's no question that that
3 has gone down.

4 COMMISSIONER ROSCH: I think the chairman's
5 question, Mr. Gates, went to whether or not you had
6 authority for the proposition that you didn't need to
7 prove any anticompetitive effects at all, and rather, it
8 was enough that you prove the nature of the restraint
9 and market power. And as I hear you right now, you're
10 saying that that really isn't what happened in IFD.

11 MR. GATES: I was using IFD for the actual
12 effects evidence, you're correct. What I'm saying is,
13 if you look at Flegel, if you look at Tops Market, if
14 you look at Bond, all of these cases hold. Now,
15 whether -- I forget what the outcomes were in those
16 cases, but all of them hold that market power and the
17 nature of the restraint is -- and direct effects
18 evidence, are alternatives to show substantial
19 anticompetitive effects under a traditional, full,
20 whatever label you want to put on it, rule of reason
21 analysis.

1 would you specify that?

2 MR. GATES: Well, you look at -- the courts used
3 the term "the nature of the restraint." What does this
4 restraint tend to do? Does it tend to enhance
5 competition? Does it tend to restrict competition?
6 Price fixing, obviously the nature of that is to
7 restrict competition.

8 CHAIRMAN KOVACIC: On that point, do the
9 defendants bear their burden in the case to create
10 ambiguity about the purpose? That is if they offer

1 power, what evidence in the record shows that the
2 website or search function policies were likely or did
3 cause competitive harm?

4 MR. GATES: Well, first off, let me talk about
5 the nature of the restraint, because that's -- there is
6 an inference that they did cause competitive harm.
7 Let's talk about the policies. The website policy
8 restricts dissemination of these listings out through
9 the approved websites.

10 COMMISSIONER HARBOUR: So, there is no evidence
11 in the record, or you're getting there?

12 MR. GATES: I am getting there, Commissioner
13 Harbour. Because I think it's important to lay what we
14 missed and what the ALJ missed, is what is the context?
15 Let's look at the context of the restraints. What do we
16 think they're going to do and then we can look at the
17 actual effects evidence in light of that.

18 So, we know that Internet marketing is
19 important, 80 percent of all buyers go to the Internet
20 to search for homes. We know that 74 percent of them,
21 after looking at a home online, will go look at the
22 house itself. Okay? We know if we look at slide 3, and
23 this is important, because it goes to two points, that
24 20 -- now, in 2006, and this is from the NAR 2006
25 survey, 24 percent of all buyers first found the home

1 that they actually purchased on the Internet, and you
2 can see that that has increased since 1997,
3 dramatically, from two percent, whereas those who found
4 it first from a broker, i.e. through the MLS, has
5 decreased from 50 percent down to 36 percent.

6 So, now, there are two important ways to get to
7 buyers: The MLS, and the Internet. And in fact, this
8 probably understates the importance of the Internet,
9 because if you find it from a yard sign, if your friend
10 tells you about it, if you read about it in the
11 newspaper, where do you go for the ready access to
12 information about the home? You go to the Internet.

13 COMMISSIONER LEIBOWITZ: Or your realtor.

14 MR. GATES: Or to your realtor, correct. But
15 the Internet is available 24/7, that's why people like
16 it.

17 So, is it important, then, to be on the approved
18 websites? Well, this is the testimony of Bob Gleason,
19 he's a Realcomp governor, and I asked him his position
20 at page 123 through 24, I said, "Would you advise a
21 seller to opt out of having their listing go to all
22 these websites through the Realcomp MLS? Because you
23 can do that, that's one of Realcomp's rules, you can opt
24 out as a seller, for privacy reasons, whatever?"

25 He said, "No.

1 "Why not?

2 "Less exposure.

3 "What does less exposure mean?" This sums it
4 up.

5 "It means less price, more marketing time, more
6 expenses involved, lower price on your home, more days
7 on market, more carrying costs. In other words, it's
8 more expensive for everybody concerned."

9 So, he wouldn't advise that his clients opt out
10 of going to all these Internet sites, but he and the
11 other Realcomp governors have decided that EA listings
12 can't, and shouldn't.

13 COMMISSIONER LEIBOWITZ: But aren't there a lot
14 of ways around the restriction? Can't you go to the Ann
15 Arbor MLS? Can't you do flat fee exclusive right to
16 sell, and aren't they fairly inexpensive?

17 MR. GATES: Okay, let me -- two points, if you
18 go to slide 5, okay, the policies prevent EA listings
19 from going from -- to three of the top four. You can
20 get to realtor.com by double listing, listing another
21 MLS, or something like that, but it prevents you from

1 bottom statistic.

2 If you go to the next slide, this is 2005 stats.

3 COMMISSIONER HARBOUR: Mr. Gates, can I go back
4 to my question, because I'm still waiting for the
5 answer. Looking beyond market power, let's put it in a
6 different way, what competitive effects were caused by
7 Realcomp's website and search function policies?

8 MR. GATES: The competitive effects are that it
9 reduced the share of EA listings, changing the forms of
10 competition amongst brokers within the Realcomp service
11 area, in which it has market power.

12 COMMISSIONER HARBOUR: And do we have evidence
13 in the records to support those competitive effects?

14 MR. GATES: Yes. If we go to -- let's start off
15 with slide 27, if you would. I'm starting off with
16 this, because this comes from Realcomp's own economist,
17 rather than a lot of argument about all of the studies
18 that complaint counsel's economist did. This is a

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1 If we go to slide 26, the one before, this is
2 the comparison of the average of all of six MLSes, all
3 the data combined, six MLSes, over a million homes, over
4 time, that the share of MLSes in the ones that don't
5 have website policies, the red line represents those
6 that do, and then Realcomp is the green line below.

7 COMMISSIONER LEIBOWITZ: What about Dayton,
8 wasn't Dayton one of the MLSes that complaint counsel
9 looked at, and wasn't it almost identical, without
10 restrictions, and wasn't it almost identical to the
11 Realcomp geographic area?

12 MR. GATES: Right. Dayton's share on average
13 was about 1.24 percent, still higher than Realcomp's
14 area, by about 20 percent. And --

15 COMMISSIONER LEIBOWITZ: Well, by 20 percent,
16 you mean two-tenths of a percent, right?

17 MR. GATES: Right, two tenths of a percentage
18 point.

19 The important thing is, when you're looking at
20 data, you can't cherry-pick, okay? So, rather than
21 cherry-picking simply Dayton, what we did, we looked at
22 the combined share of all six controlled MLSes, A;
23 number two, we didn't see any decline in Dayton as we
24 did in Realcomp. It's undisputed that the decline of
25 shares in Realcomp, over time, was at least partially

1 attributable to the policies. Realcomp's own economist
2 said he could not attribute the decline wholly to
3 economic or demographic graphs.

4 COMMISSIONER LEIBOWITZ: Let me follow that,
5 because you have this chart that you had up before was
6 very useful. Is there any evidence in the record about
7 communities that had MLSes with restrictions,
8 Internet-type restrictions, those restrictions were
9 lifted and then the effect afterwards whether it's
10 changed, or do you not have any?

11 MR. GATES: Yes, can you go to 24, please. So,
12 this, again, is from Realcomp's own economist. This is
13 Boulder, Colorado, which imposed a website restriction
14 within the time period for which we had data, and there
15 you can see there's a decrease in the share of EA
16 listings.

17 COMMISSIONER LEIBOWITZ: What about post
18 restriction removal?

19 MR. GATES: We don't have that. We don't have
20 the data for something that a restriction was lifted.
21 That's not anywhere.

22 But important thing is, all of the effects
23 evidence, you can take that down. All of the effects
24 evidence is consistent with -- is consistent with the
25 inference that you get from all the indirect evidence

1 and the testimony of all the brokers, that by limiting
2 exposure of EA listings, you're going to make them less
3 valuable to consumers, and you're going to make them
4 less used; therefore, reducing the amount of competition
5 you get in that forum.

6 COMMISSIONER HARBOUR: Let me ask you another
7 question about effects.

8 MR. GATES: Yes.

9 COMMISSIONER HARBOUR: Do flat fee ERTS
10 contracts have the same competitive effect in the market
11 as the EA or the exclusive agency contracts, why or why
12 not?

13 MR. GATES: Right, that's an important question,
14 because the record is, frankly, confused on that point.
15 We failed to clarify it below the -- and I want to do
16 that right now. So, if you go to slide 8, let's go back
17 to basics. An exclusive right to sell listing? An
18 exclusive right to sell listing means that the seller
19 pays the commission to the -- the agreed-upon commission
20 to the broker, regardless of whether the broker sells
21 it, whether there's a cooperating broker involved or
22 whether the seller sells it on their own.

23 Go to the next one, and this is paragraph 8,
24 that was the answer, that was admitted by Realcomp.
25 This is paragraph 9 of the answer, Realcomp admitted

1 that an exclusive agency listing is different because it
2 reserves to the seller the right to sell on their own
3 and if they sell on their own they don't pay a
4 commission. All right.

5 Flat-fee ERTS listings. There are discount
6 brokers in Realcomp's service area that offer ERTS
7 listings. Under those ERTS listings, from, for example,
8 Denise Moody, from Greater Michigan, Mr. Mincy from
9 Michiganlistings.com, under those ERTS listings, even
10 that they're discounted, and even though you pay a flat
11 fee up front, if a cooperating broker is involved, you
12 still pay the offer of compensation.

13 Now, if you go to the next slide, if you would.
14 This is what we saw from Mr. Kermath, it would be slide
15 10. Ten. This is the "flat-fee ERTS" that Realcomp
16 keeps referring to. And if you look here very
17 carefully, it says under this Amerisell "ERTS listings"
18 you are allowed to find your own buyer and avoid any
19 commission except what was paid to us originally.
20 That's an exclusive agency listing. By definition, that
21 is an exclusive agency listing. Why did Mr. Kermath
22 label this as an ERTS listing? To get around the rules.
23 The exposure.

24 COMMISSIONER ROSCH: Do you have any evidence of
25 that? Do you have any evidence that that is why

1 Amerisell did it?

2 MR. GATES: Well, he testified that's why he has
3 this particular offering.

4 COMMISSIONER ROSCH: Is there evidence that he
5 says that he did it to avoid getting around the rules?

6 MR. GATES: No, I don't have that, Commissioner
7 Rosch, I didn't mean to imply that. What I meant to say
8 is that he testified that the reason why he has this
9 "ERTS listing," which he only has in the Realcomp
10 service area, nowhere else in Michigan, is so that he
11 gets exposure on the approved websites. That's what he
12 tells his customers, that's what he testified as to why
13 he did it.

14 Now, whether or not he knows that he's getting
15 around the rules, you know, that this is an EA listing,
16 that's not in the record, but it's clear that under
17 Realcomp's rules, it is. If you go two slides more, we
18 go to CX-100, this is Realcomp's rules themselves, under
19 Section 1.2.1, Exclusive Agency Listings, once again,
20 this is a type of listing they ban from the approved
21 websites, it is one in which if the seller brings their
22 own buyer, the seller is not obligated to pay a
23 commission. Okay.

24 Now, have they caught Mr. Kermath yet? As of
25 trial, they had not. Will they? Yes. What they want

1 the Commission to allow them to do is to discriminate
2 against any listing, however labeled, if it offers the
3 right to sell on your own. Why? Just read their
4 papers. Because if there's a contingent discount, then
5 that gives, according to them, the seller the incentive
6 to try to sell on their own and therefore not use a
7 cooperating broker. That's the type of thing they want
8 to ban.

9 COMMISSIONER HARBOUR: How significant is the
10 fact that not all EA contracts have been eliminated by
11 Realcomp's policies?

12 MR. GATES: That just demonstrates that the rule
13 is just one step removed from banning them all together.
14 Remember, it's -- they're about 0.75 percent, under one
15 percent, of all listings. So, the problem, I think,
16 that we had below was that the ALJ said, wait a minute,
17 these are available. These are -- they're still
18 available. You can still get them. They're still on
19 the MLS.

20 What he failed to recognize, I think, was that
21 even though they're "available," they're less valuable
22 to consumers, as demonstrated by the fact that fewer of
23 them use them, even as compared to right next door, in
24 Ann Arbor.

25 So, I don't find a lot of significance in that,

1 it just shows that it's not banned whatsoever.

2 Ninety-nine percent, that's pretty good.

3 COMMISSIONER ROSCH: Mr. Gates, can Realcomp, in
4 your judgment, make any rule at all that discriminates
5 against EA listings? I mean, no matter what? What's
6 the limiting principle here?

7 MR. GATES: I think the limiting principle is
8 that the competitor has to be statistically significant.
9 For example, I think if they said, all right, everyone
10 who used an EA listings last year, you're not invited to
11 the annual picnic. That's discrimination against people
12 who use EA listings, but who cares? It's not
13 competitively significant. Here, what we have, is a
14 rule that discriminates against EA listings, by limiting
15 their exposure on the Internet and limiting their
16 exposure within the MLS itself. That is, according to
17 all the evidence, and according to Realcomp's own
18 governors, including their president, exposure is the
19 key to selling real estate. So, these limitations,
20 these differences, distinctions, are competitively
21 significant. I think that's your limiting principle.

22 COMMISSIONER HARBOUR: Was the ALJ correct in
23 finding that in despite of -- in spite of Realcomp's web
24 policy, EA contracts were able to reach -- I believe he
25 said 80 percent of the buyers and that dual listing

1 reaches 90 percent, and if the ALJ was correct, how
2 significant is that 20 percent or 10 percent of the
3 buyers that were excluded from access to the EA
4 contracts?

5 MR. GATES: First off, I don't think -- it was
6 not correct. The reason is that that statistic,
7 "statistic," I think is just realtor lore from
8 somewhere. Yes, it was on the sites of two discount
9 brokers, but they couldn't testify what the foundation
10 was. We searched in vein, there is nothing in the
11 record giving foundation to those at all.

12 More importantly, those statistics are
13 contradicted by reliable studies, by NAR surveys, by
14 Mr. Murray's studies, all of which show that the
15 Internet and the MLS are both important. And what we
16 looked at before, the 36 percent, to 24 percent, is
17 probably a pretty good measure of how each of those are
18 important.

19 Now, let's give them the benefit of the doubt.
20 All right, let's take that statistic, the 80/90
21 statistic and just say, okay, you could still get it to
22 all these people, so what's the big deal? Well, you're

1 objective lack of exposure, so 10 percent, that may well
2 be important, okay? Because in this industry, matching
3 buyers with sellers, when you have unique products, and
4 buyers have very, very unique, differentiated tastes,
5 it's very important to have maximum exposure as
6 possible.

7 The Commission found that in the 1993 report, we
8 found it in this case as well. But the second effect,
9 let's put aside the amount, the objective amount of the
10 reduced exposure, what the policies do is they create
11 doubt amongst consumers as to the efficacy of EA
12 listings. So, we see that in the testimony of Craig
13 Mincy. He said, he was here on the stand, he said,
14 "Yes, when I go to a client, I have to overcome all
15 these objections with regard to my EA listings. I have
16 to tell them, no, you're not going to be on IDX sites;
17 no, you're not going to be on MoveInMichigan; I'll get
18 you to realtor.com, but it's going to cost you another
19 \$100. And oh, yes, you're not going to be in the
20 default search." So, governors might have to take --
21 other brokers might have to take another step to find
22 it. So, that creates doubt.

23 So, you have two things: The objective lack of
24 exposure; and second, the doubt that's created by these
25 things, which both feed into an effect in the most

1 important way that real estate brokers get business,
2 referrals, and word of mouth. If you don't get good,
3 satisfied customers for using your listings, trying them
4 out, getting -- being successful, you're not going to do
5 well.

6 COMMISSIONER HARBOUR: There is something that
7 is puzzling me a little bit. I'm going to go back to
8 one of the first questions that was asked about the
9 standard that you're using to evaluate.

10 MR. GATES: Sure.

11 COMMISSIONER HARBOUR: You were saying that
12 labels are not important, you were going to look at a
13 rule of reason analysis, and then when I asked you about
14 whether it's price fixing, you said it came very close
15 to a form of price fixing. So, I'm thinking about this
16 in the context of California Dental. There was a
17 continuum. How can you be very close to price fixing and
18 be rule of reason? Isn't a continuum of rule of reason,
19 you know, quick look, inherent suspect, per se, it's on
20 a continuum. How can I be very close to price fixing if
21 I'm full-blown rule of reason?

22 MR. GATES: You could have price fixing in a
23 joint venture such as in EMI, where it was necessary to
24 fix the enhancing integration of resources.

25 COMMISSIONER HARBOUR: I understand, but that's

1 inherently suspect, and didn't you say that you weren't
2 looking at this under inherently suspect, you were
3 looking at it under a full-blown rule of reason?

4 MR. GATES: Well, I didn't use the term
5 "full-blown," because nobody knows what that means.

6 COMMISSIONER HARBOUR: Exactly, nobody knows
7 what rule of -- I'm just trying to pinpoint how you're
8 looking at this and how this can be if you're saying
9 rule of reason, but very close to price fixing.

10 MR. GATES: Take PolyGram, at the Commission
11 level. What the Commission did in PolyGram was to say
12 that this particular restraint was inherently suspect.

13 COMMISSIONER HARBOUR: And PolyGram, I
14 understand, and that is a framework that I do
15 understand, but I heard you say that you weren't
16 analyzing this under the inherently suspect.

17 MR. GATES: You are correct there, Commissioner
18 Harbour.

19 COMMISSIONER HARBOUR: I remember reading in the
20 complaint that it was inherently suspect. So, I'm
21 confused.

22 MR. GATES: First off, in PolyGram, at the
23 Commission level, the Commissioner went beyond an
24 inherently suspect analysis and did a rule of reason
25 analysis as well, and that's the type of rule of reason

1 analysis that we have -- that you can apply here, which
2 is let's look at the effects, let's look at the market
3 power, let's look at other evidence, other than simply
4 the nature of the restraint. Okay? That's what I was
5 getting at in PolyGram.

6 The complaint says that these restraints are
7 inherently suspect, it also says that they fail under
8 basically alternatively fail under a rule of reason
9 analysis. Paragraph -- what we're presenting to the
10 Commission is sufficient evidence under rule of reason,
11 no matter how you want to do it. If you were to label
12 these as inherently suspect, you could, I think, because

1 COMMISSIONER LEIBOWITZ: As well as in the
2 complaint. So, are you throwing that part of the brief
3 under the bus?

4 MR. GATES: No, no.

5 COMMISSIONER LEIBOWITZ: Or in the house, so to
6 speak?

7 MR. GATES: In our brief, we have always
8 consistently, from the trial level onto the Commission
9 level, argued that the evidence of market power,
10 combined with the nature of restraint, is enough. An
11 inherently suspect analysis only looks at the nature of
12 the restraint. Given the look of judicial experience,
13 look of economic learning on these particular ones,
14 there is a good argument that they could be inherently
15 suspect, but I think the more prudent approach would be
16 to approach this under a rule of reason analysis, given
17 the pernicious nature, given market power, and given the
18 effects.

19 COMMISSIONER LEIBOWITZ: There isn't a realtor
20 case in the 1980s and 1990s where realtors tried to get
21 discounters to keep them out of the MLSes, that's not
22 sufficient for us to see something that's inherently
23 suspect?

24 MR. GATES: If you look at Thomson and you look
25 at real -- you look at Realty Multilist, those are rule

1 of reason cases.

2 COMMISSIONER ROSCH: Mr. Chairman, may I just
3 ask a couple of more questions?

4 CHAIRMAN KOVACIC: Yes, and we will certainly
5 extend the time for Mr. Mandel, too.

6 COMMISSIONER ROSCH: Were you asking a specific
7 question?

8 CHAIRMAN KOVACIC: I would like Mr. Gates to
9 spend a moment, perhaps after your question, to go back
10 to the efficiencies concerns that you have on your first
11 slide.

12 COMMISSIONER ROSCH: Actually, there are just
13 two questions that I have remaining. One follows up on
14 Commissioner Harbour's question and I just want to make
15 sure now, you're waiving reliance on PolyGram. Is that
16 correct?

17 MR. GATES: Correct, we are not relying on an
18 inherently suspect analysis. We are relying on a rule
19 of reason analysis, that's been clear from day one in
20 the post-trial briefs, the pretrial briefs, all the way
21 through, a rule of reason analysis that relies on
22 indirect evidence of substantial anticompetitive
23 effects. In addition to the direct evidence.

24 COMMISSIONER ROSCH: Okay. I want to find out
25 the extent of the waiver here now.

1 COMMISSIONER HARBOUR: Okay.

2 COMMISSIONER ROSCH: With respect to, you know,

3 Realcomp has said that you also stipulated that the

1 COMMISSIONER ROSCH: And is there anything else
2 that you cite besides Mr. Williams' testimony?

3 MR. GATES: For?

4 COMMISSIONER ROSCH: For the proposition that
5 you made it clear that you were not stipulating that the
6 restraints in this case were not price related?

7 MR. GATES: Oh, okay. Our post-trial briefs are
8 clear on that. Also our pretrial brief as well. We
9 have always said --

10 COMMISSIONER ROSCH: Anything below. I
11 understand your post trial briefs, your post trial
12 briefs not to us but to the ALJ made that clear.

13 MR. GATES: Correct. We have always contended
14 that the policies had an effect on brokerage fees, and
15 in fact, Realcomp has -- can't come after us saying you
16 didn't prov1083tbv1083tbv1083tbv1083tbv1083tbv1083tbv1083tbv1083tb

1 there are any services provided to a seller using an EA
2 listing for which the seller does not pay. Now, to be
3 clear, a seller using an EA listing, in order to list on
4 the MLS, has to use the services of a listing broker.
5 They pay for those services. One of the services
6 provided by a listing broker is that they get listed on
7 the MLS, and they enjoy the benefits of the
8 dissemination of their listings, pursuant to the MLS.

9 An ERTS listing is just the same. They pay a
10 listing broker. They just happen to pay them more, if
11 there is not a cooperating broker involved. That's the
12 only difference between the two types of listings, and
13 the fact that there's a discount given by the listing
14 broker to the seller, under an EA listing, does not mean
15 that there's any form of free riding.

16 Second, free riding is only an economic problem.
17 If it causes some kind of diminution of services,
18 there's so much free riding here I'm going to quit the
19 MLS, I'm not going to be a cooperating broker, I'm not
20 going to do anything, I'm not going to provide services.
21 No evidence of that from anywhere. Not quantitative,
22 not even qualitative, not even in the complaint.

23 We have MLSes across the country that don't have
24 these policies. There is nothing in the record that
25 shows that there's any diminution of efficiency in any

1 of those MLSes. In fact, NAR changed the rule for 800
2 MLSes across the country. Presumably if it's going to
3 affect the MLSes so dramatically, they wouldn't have
4 done that.

5 And then the bidding disadvantage theory is
6 simply that somebody who's using a cooperating broker
7 would be better off with this rule. That's simply a
8 wealth transfer, not an efficiency. It doesn't mean
9 that the MLS is any more efficient than it is without
10 the rule. Thank you.

11 CHAIRMAN KOVACIC: Thank you. Mr. Mandel,
12 please.

13 MR. MANDEL: Thank you.

14 CHAIRMAN KOVACIC: And if the clerk would be
15 sure to allow him extra time.

16 MR. MANDEL: Thank you very much, Mr. Chairman.

17 If it please the Commission, Scott Mandel
18 representing Realcomp. If I could take a moment and
19 perhaps answer a question some of you may have, rotator
20 cuff tear, that's why I'm limited to the one hand, and
21 I'm used to talking with my hands, so if you can please
22 bear with me as I attempt to make my argument and
23 respond to your questions.

24 CHAIRMAN KOVACIC: It cut short my major league
25 baseball career, too.

1 and not suggesting that the record is such that it is a
2 shut-out, I'm not making that argument, and Mr. Gates
3 can point to, yes, they have complaints about the
4 restrictions. But on balance, what does the record show
5 us?

6 We believe what's really significant about these
7 exclusive agents' testimony was every single one of them
8 testified that they were doing well, their business was
9 growing. The briefs argue, from complaint counsel,
10 yeah, but that's because these exclusive agents are
11 outside of the Realcomp service area. But if we look at
12 the record, and I'm prepared to show you specific things
13 if you want to see them, we have specific testimony from
14 the exclusive agents who are saying they're doing well,
15 their business is growing, in Southeastern Michigan, in
16 particular. In Southeastern Michigan.

17 Mr. Kermath is an example. On his website, he
18 says that he is the number two agent in Oakland County.
19 That's one of the four major counties in the Realcomp
20 service area. Mr. Hepp in his testimony specifically
21 talks about growing ten to 35 percent since 2004 in
22 Southeastern Michigan.

1 doing it in Southeastern Michigan.

2 So, when we look at whether this is inherently
3 suspect or what is the anticompetitive harm, we see that
4 these exclusive agents are doing well, and they're doing
5 it in Southeastern Michigan.

6 COMMISSIONER ROSCH: Well, let me 0.00 1 doing it in So

1 COMMISSIONER ROSCH: And appeal that finding?

2 MR. MANDEL: We did not appeal that finding. We
3 have not cross-appealed. So --

4 COMMISSIONER ROSCH: Continue, please.

5 MR. MANDEL: Okay. Again, and I'm not
6 suggesting that there's absolutely nothing in the
7 record, but looking at the record on balance, with
8 Mr. Sweeney, coming back to Mr. Sweeney, by way of an
9 example, what he also testified to was that the
10 exclusive agents, again, if we're looking at the record
11 here, and what we're talking about, Southeastern
12 Michigan, that in Southeastern Michigan what was
13 happening was that the exclusive agents weren't taking
14 hold in Southeastern Michigan, not because of these
15 restrictions, but because of market conditions in
16 Southeastern Michigan.

17 What Mr. Sweeney testified to is when you're in
18 a downturn, when you're in a buyer's market, again, the
19 record on that point is unequivocal, there is no
20 contrary evidence that the Southeastern Michigan market
21 in the relevant time period is in and was in a buyer's
22 market, according to complaint counsel's industry
23 expert, Mr. Murray, the worst or among the very worst in
24 the country as far as real estate markets.

25 COMMISSIONER ROSCH: Again, let me put the same

1 question to you that I put to prior counsel: And that
2 is, let us assume that we credit Mr. Sweeney's
3 testimony, and that we credit the ALJ's finding. And
4 that we find, based upon that evidence, and upon that
5 finding, that there is evidence of anticompetitive
6 effects, actual anticompetitive effects, as a result of
7 these practices, on EA -- on brokers who are using EA
8 listings, and that there's also evidence that there are
9 anticompetitive price effects as a result of those
10 policies. Let's make those assumptions for the time
11 being.

12 MR. MANDEL: Okay.

13 COMMISSIONER ROSCH: Now, under your construct
14 of the proper analysis here, if that's so, does that at
15 least shift the burden to you in order to justify those
16 restrictions?

17 MR. MANDEL: To answer that question, I'm going
18 to give you a two-part answer, if I may, please. My
19 first response to that would be alone -- accepting
20 everything you said, no, alone. Because what I would
21 submit is that those findings do not show the amount of
22 the anticompetitive effect. If it's just a de minimis
23 effect, if that's all it is, and I would submit that the
24 record would suggest that all this is a de minimis
25 effect, then complaint counsel still has not borne their

- 1 burden of proof, even if we don't have a plausible
- 2 justification. Canby is an example of a case

1 be members of Realcomp. I mean, that's what's different
2 about this case and the other cases that Mr. Gates
3 relies upon in the MLS area. It's not an exclusion.

4 COMMISSIONER ROSCH: IFD wasn't an exclusion
5 case, either, was it?

6 MR. MANDEL: No, IFD was not an exclusion case.

7 COMMISSIONER ROSCH: As a matter of fact, it's
8 kind of a speckled cow case with respect to this case,
9 isn't it?

10 MR. MANDEL: Well, I'm not sure I agree with
11 that, because IFD, the language there is that this is
12 essentially a group boycott, almost a naked price
13 restraint. You heard Mr. Gates' response to
14 Commissioner Harbour's question, continuing to use
15 adjectives, very close, even he won't go so far as to
16 say this is a price restraint in the Realcomp service
17 area, and the outside consultant retained by complaint
18 counsel acknowledges that he himself, that's
19 Dr. Williams, did not look at the price effects. He
20 didn't even look at that in the Realcomp service area
21 for this.

22 So, we have no evidence from complaint counsel
23 from their expert on the price effects.

24 COMMISSIONER ROSCH: Well, there wasn't any real
25 evidence of price effects either in IFD, was there? In

1 IFD, as I recall the facts of that case, it involved a
2 cartel of dentists, if you will, who conspired not to
3 exclude anybody, not to fix their prices, but rather to
4 deny access to information from payers that they wanted
5 in order to evaluate whether they were getting a decent

1 companies to --

2 COMMISSIONER ROSCH: I hate to be querulous, but
3 isn't that exactly what we've got here? I mean, we
4 can't look at each of these policies in isolation. It
5 looks like what happened was that Realcomp has one
6 policy, and they saw a loophole, they passed another
7 policy, closed that loophole, and they saw another
8 loophole and they closed that policy or they passed that
9 policy to close that loophole. That's what it looks
10 like.

11 And it looks like what they did was to try and
12 relieve that, as the ALJ found price pressure, on
13 traditional broker commissions through these policies.
14 Isn't that very closely akin to what was involved in
15 IFD?

16 MR. MANDEL: I don't agree with that, and if I
17 can try to explain why I don't agree with that, what we
18 have again here, and what Realcomp has said is that
19 their concern is this notion which is not in IFD, they
20 don't believe that their members, the Realcomp members,
21 which is what the MLS is for, to serve the members of
22 Realcomp, should be paying for the advertising of people
23 who are going to use that promotion to avoid having
24 their members have business. That's the difference.
25 That's the --

1 COMMISSIONER ROSCH: I don't understand that
2 argument at all, Counsel. I mean, it seems to me that
3 the purpose of the MLS is to match buyers and sellers.
4 It's not really to advantage or disadvantage any group
5 of brokers who happen to be members of the MLS. Am I
6 wrong about that?

7 MR. MANDEL: The -- you're right about the
8 purpose of the MLS. It's a -- the network effect of the
9 MLS, which is why it's recognized as being enormously
10 pro-competitive in the case law, is the advantage of
11 being able to manage buyers and sellers. The MLS itself
12 is comprised of realtors, of members of the MLS itself.

13 So, the cases have recognized that non-members
14 can be excluded from a -- from the MLS. There is a
15 difference here.

16 When you say that the purpose of the MLS is to
17 match buyers and sellers, the answer is yes, but it is
18 to benefit the members of the MLS. It's not a public
19 utility, in a sense.

20 COMMISSIONER LEIBOWITZ: Can I -- finish up your
21 sentence, because I want to ask some questions for the
22 sort of purpose of these policies. And let me start
23 with a -- with this question: Wouldn't the Realcomp
24 board be happier if discount retailers and discount
25 listings were banned entirely? Wouldn't they just be

1 happier if they were ground into dust and they didn't
2 have to deal with this problem?

3 MR. MANDEL: Well, there's nothing in the record
4 about that, so I am going to surmise with respect to
5 that. What we do have is testimony from a number of
6 these Realcomp members saying that they recognize that
7 there is a place for the exclusive agency listing and
8 that they're fine with exclusive agents competing in the
9 marketplace. So, I do think it's a step removed from
10 what the Realcomp --

11 COMMISSIONER LEIBOWITZ: But didn't the Realcomp
12 board starting in 2001 inquire, I think on multiple
13 occasions, about whether they could ban discount
14 realtors or discount listings from the MLS?

15 MR. MANDEL: Correct.

16 COMMISSIONER LEIBOWITZ: And didn't lawyers say
17 no, and you might have been that lawyer, and it's to
18 your credit if you were, didn't that lawyer say it's in
19 violation of the antitrust laws, you cannot do that?

20 MR. MANDEL: That's correct, it's in the record
21 and they were told that they cannot do that.

22 COMMISSIONER LEIBOWITZ: So, isn't it logical to
23 assume that this was sort of a fallback position, if you
24 can't ban them entirely, let's do things to inhibit
25 them, or inhibit their ability to be effective, and one

1 way to do that is to essentially to prohibit them from
2 getting onto Internet feeds, IDX?

3 MR. MANDEL: Is it logical to assume that? I
4 can't argue that you could make that assumption from
5 this. I do say that there is testimony in the record
6 recognizing, and again, this is coming forward from 2001
7 to the time of trial, that there's a recognition that
8 the exclusive agents do have a right to compete in the
9 marketplace. And the Realcomp board understands that
10 they can't ban exclusive agents entirely.

11 COMMISSIONER LEIBOWITZ: Right, but they seem to
12 think that they can penalize them and make their lives
13 more difficult, right?

14 MR. MANDEL: Can they penalize them?

15 COMMISSIONER LEIBOWITZ: Can they penalize them?

16 MR. MANDEL: If you're going to say that what
17 they're doing is penalizing in the sense that it
18 discriminates against EA listings, I think the answer to
19 that is yes. An example of that is the Flegel case,
20 relied upon by complaint counsel, where the allegation
21 was that some D.O.s were not allowed privileges because
22 they were D.O.s as opposed to M.D.s and they were going
23 to be discriminated against. And the court recognized
24 that even if that was discriminatory, that does not set
25 up an antitrust cause of action.

1 COMMISSIONER LEIBOWITZ: So, let me ask you the
2 question, do Realcomp's policies, or the policies as
3 they were stipulated, refer to discount listings? Does
4 it have any effects at all? Does it have a
5 discriminatory effect?

6 MR. MANDEL: Does it have any effects at all?
7 As Mr. Gates indicated, Dr. Eisenstadt's testimony was
8 that at most you have, at most, a one percent decrease
9 in the percentage of EA listings, and his analyses, he
10 has several analyses which were below the one percent.
11 He testified that they had at most one percent, so I am
12 not going to say that they had no effects.

13 COMMISSIONER LEIBOWITZ: That is, the effects
14 were no big deal? Is what you're saying?

15 MR. MANDEL: Correct.

16 COMMISSIONER LEIBOWITZ: So, let's say the
17 policy were reversed and EA listings were the ones that
18 were sent to the IDX websites, and ERTS listings
19 weren't, that wouldn't have an effect on it?

20 MR. MANDEL: That would not have an effect?

21 COMMISSIONER LEIBOWITZ: It would be no big deal
22 either, isn't that what you're saying? If it's no big
23 deal not to be able to get to the Internet for EA
24 listings, it's no big deal not to get there for ERTS
25 listings, right? You flip the policy.

1 MR. MANDEL: Yeah. Again, we don't have, you
2 know, evidence in the record as to what would happen
3 with the ERTS listings if that were to happen, and what
4 happens if we flipped those policies around, I don't
5 have an answer for that.

6 COMMISSIONER LEIBOWITZ: Because if there's no
7 effect, then how can there be free riding? Or if
8 there's very little effect, how can there be free
9 riding?

10 MR. MANDEL: Well, there's free riding in the
11 sense that -- and again, very little --

12 COMMISSIONER LEIBOWITZ: I just want to
13 understand this, go ahead.

14 MR. MANDEL: The free riding is in the sense
15 that if you're sending these listings out, and the best
16 example is this MoveInMichigan.com, Realcomp's website,
17 okay? The concern there and the free riding concern is
18 that the Realcomp members pay for its own website, and
19 they're paying to maintain that website. So, you have a
20 seller who signs up with an exclusive agent, who is
21 using that for purposes of MLS entry only.

22 COMMISSIONER LEIBOWITZ: Who is a member of
23 Realcomp who pays annual dues.

24 MR. MANDEL: That's correct.

25 COMMISSIONER LEIBOWITZ: Those annual dues go to

1 support the website, right?

2 MR. MANDEL: That's correct. But the free
3 riding is not the number, that's not what the concern
4 is. The free rider is the seller who then ends up
5 having the listing put into MoveInMichigan.com, the
6 prospective purchaser or buyer sees that listing and
7 calls the seller and strikes their own deal with the
8 seller, cutting out the cooperating broker. That's the
9 free rider.

10 COMMISSIONER LEIBOWITZ: But again, I'm not so
11 sure that's free riding. You can disagree with me, I'm
12 sure you will, that may just be bare knuckles
13 competition that's good for consumers, right? They get
14 to choose.

15 MR. MANDEL: It's good for consumers, again, at
16 whose cost, though? The concern there is that Realcomp
17 is paying for this website, MoveInMichigan.com, in a
18 situation where it disadvantages its members. Where the
19 seller then is encouraged to sell on their own, is
20 promoting it and there's no cooperating broker. That's
21 the free riding concern.

22 COMMISSIONER HARBOUR: Mr. Mandel, let me shift
23 the focus. First of all, you have my sympathies about
24 your torn rotator cuff, I am nursing a broken ankle.

25 MR. MANDEL: I'm sorry about your ankle,

1 version. The Amicus brief cites to nothing in the
2 record. Not one citation of anything in the record, and
3 it's not supported. There's nothing in the record about
4 all these foreclosures and the Realcomp policy is going
5 to reek economic havoc in Southeastern Michigan.
6 There's nothing in the record suggesting that at all.

7 What we have is what I would suggest would be a
8 de minimis decrease in the percentage of EA listings.
9 When you look at the record in its entirety here, and
10 it's not having this anticompetitive effect in the
11 marketplace.

12 The EA, again, I come back to the exclusive
13 agent's testimony themselves, that they're doing well,
14 and that they're growing in Southeastern Michigan.

15 So, again, I don't believe the record supports
16 the Amicus brief and the sky is falling.

17 COMMISSIONER HARBOUR: There is another point
18 that the Amicus brief made: Given the current economic
19 situation in this country and the fact that millions of
20 homeowners currently owe more on their homes than
21 they're worth, due to the subprime mortgage crisis, and
22 given the considerable savings that consumers who avail
23 themselves of the EA discount model would realize. Why,
24 then, is the current penetration level of the EA
25 discount model so very minuscule in this market?

1 MR. MANDEL: All right, and to answer that
2 question, again, what you need to understand is the
3 testimony of complaint counsel's expert, the industry
4 expert, Mr. Murray. What he says, notwithstanding what
5 you're referring to with the Amicus, is that in this
6 down market, when you're looking at economic hard times,
7 on balance, again this is the industry expert that
8 complaint counsel has, you're going to have a fall-off
9 in EA listings.

10 And again, first you have to look at the
11 national level to understand this, and this is from
12 Stephen Murray. He has a paper that he published for
13 the industry, separate and apart from coming in and
14 testifying, he creates a paper that's called Consumer
15 Tsunami. What he says is despite the industry's buzz,
16 EAs are not taking off. What he found in the last year
17 that his company did the analysis, 2005 to 2006, was at
18 a national level, exclusive agent contracts actually
19 went down, from 15 percent to eight percent. His
20 explanation at trial for that finding was a cooling off
21 of the markets. What you had before was hot markets,
22 particularly on the west coast, and that promoted the
23 EAs.

24 In the down turn, it's the opposite of what your
25 question suggests. In the down turn, people go away

1 from EAs? Why do they do that? Well, let me give you a
2 couple of reasons. One, what's lost here, as we're
3 looking at this and talking about the advantage of
4 discount brokers, is the model of the EA, and
5 understand, this is in a down market, that says, pay me
6 \$500, flat free, up front, I'll get you in the MLS. It
7 is the most important tool of driving the sale of homes.
8 That's what I will do for you.

9 The payment is \$500 up front. In a down market
10 in Southeastern Michigan, the worst of the worst -- if I
11 can just finish this answer -- there are lots of people
12 whose homes do not sell. They just do not sell.

13 So, you have just forked over \$500, you don't
14 have enough equity in your house to begin with and the
15 house doesn't sell. You're looking at it in the more
16 traditional sense, the ERTS listing, you're only paid a
17 commission if the house sells. And what else do we know
18 about why these aren't working?

19 COMMISSIONER HARBOUR: But I guess the
20 fundamental question I have is that how does
21 discriminatory access to the EA listing benefit
22 consumers and how does making it harder for consumers
23 to identify all of the listings that are available to
24 them for sale promote competition?

25 MR. MANDEL: Well, you said make it harder for

1 them to identify all listings that are for sale. There
2 is nothing that makes consumers difficult -- I'm sorry,
3 could I have your question again? I lost part of it.

4 COMMISSIONER HARBOUR: It was compound, so I
5 will go again.

6 MR. MANDEL: I'm sorry.

7 COMMISSIONER HARBOUR: How does discriminatory
8 access to the EA listings benefit consumers?

9 MR. MANDEL: I'll go back to Mr. Murray to
10 answer that question. How does this benefit consumers?
11 What Mr. Murray testified to was that you have a
12 situation where MLSes level the playing field. He sees
13 them as pro-competitive, just like the case law does.
14 What Mr. Murray also testified to was one of the things
15 that MLSes do is that it is enormously pro-competitive
16 is what Realcomp does. They set up MoveInMichigan.com,
17 their own websites, which promote these listings so
18 people can see them. What Mr. Murray talks about is if
19 you end up with a situation, and let's suggest that the
20 rules invalidate it, so that we understand and the
21 expert report of Dr. Eisenstadt at least gets into
22 unintended consequences. This is how it could hurt the
23 consumer.

24 What the MLS does is it levels the playing field

1 this rule is invalidated, and Realcomp is told that you
2 must put all of the exclusive agent listings into what
3 the members are paying for, your own website, which is
4 MoveInMichigan.com. You've got to do that.

5 One potential reaction Realcomp or other MLSes
6 face in that situation could have, and Mr. Murray
7 recognizes this, is they could say, we're not going to
8 do this. This is our members, we think this would hurt
9 our members to do it, we're going to shut down
10 MoveInMichigan.com. How would the consumer be hurt
11 there?

12 What would happen, this is again from
13 Mr. Murray, is it would disadvantage the small brokers.
14 It would actually help the larger brokers who have the
15 marketing resources, who have the money, the technology,
16 to promote their own listings, but the
17 MoveInMichigan.com realtor -- Realcomp's own website,
18 helps the small broker compete with the bigger broker.

19 So, then, you've eliminated some choice,
20 potentially, for consumers by helping the big guys only,
21 cutting back on the number of potential realtors.
22 Realcomp has already seen a precipitous decline in the
23 number of realtors in Southeastern Michigan, because of
24 the economy. Because the economy has gone down so much,
25 Realcomp, which has 15,000 members by the time of trial,

1 was down to 13,800.

2 So, again, you have a situation where the
3 consumer may be looking at just having to do more and
4 more business with the big brokers and less with the
5 small brokers. That could disadvantage the consumers.

6 COMMISSIONER ROSCH: I'm a little surprised by
7 your answer, Counsel, because I thought I heard you say
8 earlier that it's really not a question of whether or
9 not it benefits the consumers, at least in the first
10 instance, rather, complaint counsel has the burden of
11 showing in the first instance that the policies have had
12 an anticompetitive effect and that that has been
13 something more than de minimis and it's not until then
14 that the burden then shifts back to you in order to
15 demonstrate that the policies have a pro-competitive
16 effect that outweighs that anticompetitive effect.

17 Am I wrong about that?

18 MR. MANDEL: No, you are not wrong about that, I
19 was responding to the question of how this could harm
20 the consumers. That was my reason for that answer. So,
21 no, I'm -- you are correct with respect to what that
22 initial position is.

23 COMMISSIONER ROSCH: Well, I must say that I am
24 somewhat confused about your answer with respect to
25 benefitting consumers. First of all, the consumers,

1 when you're talking about free riding, when you're
2 talking about there being an advantage, the consumers
3 you're talking about are the seller and the buyer,
4 correct?

5 MR. MANDEL: That's correct.

6 COMMISSIONER ROSCH: They're not brokers, are
7 they?

8 MR. MANDEL: They are not brokers.

9 COMMISSIONER ROSCH: Well, are they even in the
10 relevant market? Are they competitors in the market?
11 In the markets which the ALJ defined as the relevant
12 products in this -- product markets in this case?

13 MR. MANDEL: In that context, I would submit
14 that it's relevant for consideration. What the ALJ
15 found is a for sale by owner home is not part of the
16 relevant market. This is not a for sale by owner home.
17 That's -- we're close, if I can use Mr. Gates' words,
18 we're very close, but we're not a for sale by owner.

19 In the situation that we're talking about now,
20 and positing, we do have a seller competing with a
21 Realcomp member. So, again, I understand that the
22 market analysis, it may not quite fit, but in practical
23 terms, they are very much competing in that sense with a
24 Realcomp member, because they're selling their home now,
25 effectively on their own. It's being advertised through

1 Realcomp's resources, as an example, MoveInMichigan.com,
2 a buyer then deals directly with the seller, and does
3 not have a cooperating broker. That's the competition.
4 With the cooperating broker.

5 So, the bidding disadvantage, which is part and
6 parcel of that, is another prospective purchaser who has

1 it disadvantages that cooperating broker. So, again, on
2 that issue, the concern is that Realcomp has paid to do
3 this advertising to drive a prospective purchaser to
4 deal directly with the seller and not have a cooperating
5 broker.

6 COMMISSIONER LEIBOWITZ: So, doesn't the same or
7 a similar problem from your perspective arise when you
8 have an exclusive right to sell seller and then a buyer
9 who's unrepresented? Right? I mean, you're getting a
10 double collection.

11 MR. MANDEL: Right.

12 COMMISSIONER LEIBOWITZ: Someone is free riding
13 on what could have been a cooperative broker's right to
14 help out that buyer. How do you square that with your
15 position on --

16 MR. MANDEL: In that context, again, you have
17 the exclusive right -- and the way it works is the
18 exclusive right to sell broker negotiates up front what
19 this commission is, traditionally it's six percent.
20 There is competition in the market, it could potentially
21 be less than that. So, yes, you do not have a
22 cooperating broker, but there's no bidding disadvantage,
23 there's no bidding disadvantage, because that purchaser
24 and the seller are paying the whole commission. So,

1 COMMISSIONER LEIBOWITZ: But it seems to me from
2 your perspective, if you've got a problem with what the
3 discount listing, what happens with the discount
4 listings, you should also have a problem with sort of
5 the double payment to the ERTS. I mean, it's easily the
6 only distinction is in one instance, you know, your
7 members get potentially six percent, sometimes I'm sure
8 it's rolled back a little bit, and in the other case,
9 you do as well as you would like. It's like bad for you
10 but it may be good for competition, again.

1 listing broker getting the windfall here and the
2 circumstance of the discount broker and the
3 unrepresented buyer.

4 COMMISSIONER ROSCH: Aren't they the free rider?

5 MR. MANDEL: I'm sorry?

6 COMMISSIONER ROSCH: Isn't the ERTS broker the
7 free rider, because they're pocketing the six percent
8 commission, whether there's a cooperating broker or not.
9 Aren't they free riding?

10 MR. MANDEL: I don't believe that's free riding.
11 You know, again, the ERTS broker, they're getting what
12 Commissioner LEIBOWITZ says is a windfall. They're
13 certainly benefitting financially when this happens, but
14 that's negotiated with the buyer.

15 COMMISSIONER LEIBOWITZ: But again, what you're
16 saying is it's free riding and Realcomp doesn't like it,
17 but it's a reasonable contractual relationship and a
18 fair windfall when Realcomp does like it. I mean, it's
19 almost like a mirror image.

20 MR. MANDEL: But again, Realcomp doesn't get --
21 I don't know that it's the mirror image. Realcomp does
22 not get involved in the terms, as Mr. Gates indicated,
23 between the listing broker and the seller. Realcomp
24 doesn't govern that with respect to what those terms
25 are, whether it's six percent, five percent, four

1 also about the bidding disadvantage, and that's in
2 Dr. Eisenstadt's reports as well.

3 CHAIRMAN KOVACIC: Did he have -- remind me --
4 did he have evidence based on actual examinations of
5 markets, or was this done in a more theoretical way?

6 MR. MANDEL: It's theoretical, that's correct.
7 Again, again, we submit that the test is plausible
8 justification, and as California Dental itself said, the
9 economical, this may even be wrong, but if it's
10 plausible, that's enough.

11 So, again, yes, it's theoretical, but I would
12 submit that that is something that could be considered
13 by the Commission.

14 CHAIRMAN KOVACIC: If we were to reject the
15 justification arguments, do you lose this case?

16 MR. MANDEL: I believe we do not lose this case
17 if you reject that, and the reason I submit that we do
18 not lose this case is that if you come back to the
19 anticompetitive effects, since this is not inherently
20 suspect activity, as complaint counsel acknowledges,
21 we -- again, what I submit is that we have a de minimis
22 effect, and it --

23 CHAIRMAN KOVACIC: Did you define de minimis for
24 me? How do I know when I go beyond de minimis into de
25 maximus?

1 MR. MANDEL: Can I define it out of this record
2 as s59 of twt s9A MANDEL: Can I define it out of this record

1 case, where Realcomp has eliminated its search function
2 policy itself, so that window itself has been changed
3 and there's no automatic default on this, as far as what
4 is being seen. And the other thing that Realcomp has
5 eliminated and the brief that complaint counsel filed, I
6 believe, was incorrect in this sense, is the minimum
7 service definition. That's part of the stipulated
8 order, is Realcomp has eliminated the minimum service
9 definition.

10 The reply brief from complaint counsel says
11 about the minimum service definition, well, sure,
12 Realcomp has eliminated that, but a future board could
13 change that. That's not correct. The stipulated order
14 binds Realcomp for ten years on the minimum services
15 definition and the search function policy. And when you
16 look at the effect of the Realcomp restrictions, and
17 this is in the decision itself, before you start talking
18 about price or anything else.

19 Complaint counsel's expert, Dr. Williams,
20 acknowledges that he could not disentangle these
21 policies. He had to look at them all together, so when
22 he says there's been a decline in EA listings, or if you
23 want to go to the next step, and I submit that this
24 record does not support this price decrease by any
25 meaningful measure or price effect, it's looking at

1 MR. MANDEL: Yes.

2 CHAIRMAN KOVACIC: Substantial market power?

3 MR. GATES: We did not cross-appeal, so we do
4 accept that.

5 CHAIRMAN KOVACIC: To go back to the link
6 between the effects and justifications, suppose, again,
7 that we find that there were no plausible efficiencies?
8 I'm not asking you to agree that that's the case, but
9 suppose we found against you on that point. Do I
10 understand you to argue that the combination of

1 I have cited before, recognizes that, again, antitrust
2 law is not designed to regulate de minimis effects.

3 So, if it's really not affecting competition, if
4 it's of no real significance in the marketplace, I would
5 submit that even if you were to find that we do not have
6 a plausible justification, this is not the type of
7 conduct that bears regulation.

8 CHAIRMAN KOVACIC: I wonder how the Indiana
9 Federation of Dentists court would have decided KNB, or
10 perhaps to evaluate this argument, to go back to
11 Commissioner Rosch's original inquiry, where I don't
12 believe there was any it's of no real significance in the marketpl

1 Mr. Gates is saying is not on the table here. Indiana
2 Federation of Dentists, page 461 of that decision, where
3 we get into that market power is a surrogate, what
4 Indiana Federation of Dentists is really saying is,
5 what's it a surrogate for? What it's saying is you
6 don't have to get into market power when the activity
7 itself is so effectively bad that we can understand it.

8 This is something we're more familiar with. And
9 what we had there was the complete elimination. Again,
10 that's what's different between our case and Indiana
11 Federation. There you had a complete elimination. That
12 is that these x-rays were not going to insurance
13 companies, and the record of evidence there was that the
14 insurance companies had no alternative means, none,
15 because what they were saying is that the only -- the
16 dentists were suggesting, come into our office. Come to
17 our office and look. We're not going to send x-rays to
18 you. And the insurance companies convinced the court
19 that that was not an option. Insurance companies can't
20 come into every individual office of a dentist and look
21 at x-rays. It's not going to work.

22 So, you had a complete exclusion, a complete
23 elimination. And again, here, by stipulation, we do not
24 have a complete elimination. EAs are members or on the
25 MLS and have been at all times.

1 So, I don't believe that Indiana Federation of
2 Dentists cuts against, ultimately, when carefully read,
3 Realcomp's position. And again, I would submit, and I'm
4 sorry, you haven't asked me this question, but just so I
5 can respond to it, you asked Mr. Gates for the very best
6 cases, and I would submit, if I'm asked that question or
7 if I can give you the answer, California Dental would be
8 the case that I would say is the best case, the most
9 important case to the Realcomp position, and there are
10 just a slew of cautions against using the quick look,
11 which apparently is not being advocated at this point by
12 complaint counsel, but talks about when we're really not
13 familiar with this, we have to take a good, hard look.

14 And fundamentally, what we have here is the MLS
15 recognized as being pro-competitive, a whole line of
16 cases, Realty Multilist would be probably the best
17 example of that. Supermarket Homes, which recognizes
18 they're a situation where you had somebody who said,
19 basically, look, we're effectively a discount broker, we
20 want to give out some of the MLS stuff to potential
21 marketers, because our properties aren't being shown,
22 they're not being shown, how are we going to compete in
23 that marketplace. And Supermarket Homes said, no,
24 that's not an antitrust violation. We recognize that
25 the MLS there does not violate antitrust law.

1 And California Dental ultimately says boy, you
2 have to take a real careful look when you are in this
3 kind of unchartered territory. Here, we have a case
4 where I am not aware of a case where we have the
5 situation with Realcomp, where it's actually been
6 litigated and we've got the Internet, which I really
7 fully submit that there is a very significant situation,
8 there's record evidence on the Internet which I think
9 all of us recognize as being a dynamic process. That
10 it's effectively a moving target. Kelly Sweeney talked
11 about that. Gary Moody, who was called by complaint
12 counsel, who was one of the so-called discount brokers,
13 talks about the Internet changing all the time.
14 Mr. Gates talks about these preferred sites.

15 CHAIRMAN KOVACIC: How do those changes affect
16 the assessment here? How does the dynamism of this
17 instrument affect this case?

18 MR. MANDEL: I think that those changes
19 ultimately go back to what I'm suggesting, which is why
20 you don't regulate. If you're not -- if you're at the
21 de minimis level, if it's something that we're -- the
22 anticompetitive effect really hasn't been tied down and
23 established, I would suggest that it's an area where you
24 tread particularly cautiously, in a situation like that,
25 because you have things changing, and it's in the record

1 with respect to that.

2 Google, according to Mr. Moody, Gary Moody, he
3 believes is shortly going to be more important than IDX,
4 in the very short term, which Mr. Gates is saying is one
5 of the most important websites available, that's one of
6 the public websites we're talking about.

7 You have Mr. Murray, the industry expert for
8 complaint counsel, talking about Google has publicly
9 announced that they are going in with both feet into the
10 residential real estate area, you have the robust
11 website possible, it's going to be open to all comers.

12 COMMISSIONER HARBOUR: What evidence, though,
13 exists that consumers in your market use Google and
14 Trulia to any significant degree? Can you point us to
15 any evidence?

16 MR. MANDEL: Well, record evidence, I suppose,
17 would be Gary Moody. I do not have statistics,
18 Mr. Gates is right about that. Again, the people who
19 are testifying are not in a position where I can tell
20 you that we've got some elaborate study, but we do have
21 Gary Moody who is in the South Michigan market, that
22 Google, he believes, is growing, he's someone who has
23 special expertise in websites. That's what he does.
24 Not just on the realtor side, that's what he does
25 professionally is the websites. He believes it's very

1 important.

2 COMMISSIONER HARBOUR: I see your yellow light
3 is on. There were a couple of questions about free
4 riding that I didn't get to, so if I can just circle
5 back and ask you a couple of questions.

6 MR. MANDEL: Certainly.

7 COMMISSIONER HARBOUR: Assuming that broker
8 agents are victims as you say of free riding, isn't it
9 fair to say that over the long term, broker agents are
10 likely both to be victims and beneficiaries of free
11 riding, the free riding effects you've outlined in your
12 brief, but wouldn't a benefit occur when a broker agent,
13 for example, receives a commission from an ERT listing,
14 even though they had nothing to do with finding the
15 buyer, and given that likely scenario, wouldn't the net
16 effect of the free riding be a wash or be negligible at
17 best?

18 MR. MANDEL: I need to make sure I understand
19 the broker agent you're referring to. Can I just explain
20 what I think my question is so I'm trying to answer it.

21 The broker agent who has no -- has done nothing
22 to get the buyer in the door.

23 COMMISSIONER HARBOUR: The ERTS listing, that's
24 right.

25 MR. MANDEL: ERTS, okay. There are two broker

1 agent and I need to make sure we're talking about the
2 same thing. The cooperating broker is the -- is what I
3 think you're talking about.

4 COMMISSIONER HARBOUR: Not the cooperating
5 buyer's broker, it would be the full-service broker, the
6 one who is the seller's broker. Or one who just sits
7 back who has the exclusive and if the buyer or the
8 seller finds someone to purchase the home and has done
9 anything at all, they get the commission.

10 MR. MANDEL: Right.

11 COMMISSIONER HARBOUR: Wouldn't that be a wash
12 on the free riding?

13 MR. MANDEL: I don't think it would be a wash.
14 In the context of -- when you enter into an ERTS listing
15 and that particular realtor does nothing to sell the
16 home, it's just fortuitous, you've signed the contract
17 and somebody happens to -- the homeowner in that context
18 actually knew a prospective purchaser.

19 COMMISSIONER HARBOUR: And sells the home.

20 MR. MANDEL: Didn't make a reservation, but
21 again, it's not necessarily the free riding argument.

22 COMMISSIONER HARBOUR: Wouldn't it cancel out
23 the free riding argument? That is certainly a benefit
24 and any negative effect from the free riding wouldn't be
25 cancelled out by the full-service ERTS listing and no

1 efforts at all to --

2 MR. MANDEL: I'm not going to agree that it
3 cancels it out. I do acknowledge that the hypothetical
4 that you're suggesting is a situation where the ERTS
5 realtor, broker, benefits, and that's, again, that's the
6 nature of the ERTS contract, but I don't agree that that
7 cancels out the free riding argument. I'm not sure that
8 that's really free riding. That, again, is the contract
9 signed, that's the nature of the ERTS listing.

10 COMMISSIONER HARBOUR: Let me ask you one last
11 question on the free riding, as Justice Breyer mentioned
12 in Leegin, he said it's not whether free riding occurs
13 that matters, he said, rather, it's whether there is
14 sufficient free riding to induce the victims of this
15 free riding to cease providing optimum levels of
16 service.

17 Given what Justice Breyer said in Leegin, can
18 you identify the services that can no longer be provided
19 to consumers, if the free riding that you described were
20 not prohibited?

21 MR. MANDEL: Well, again, I can -- I'll come
22 back to what I said before: Services that are no longer
23 provided would be an example of MoveInMichigan.com.
24 Realcomp eliminated that. That is a potential service
25 that would be eliminated. Another potential service,

1 and this is in the record, is that the benefit of the
2 MLS is the network effect, and the listing agents
3 themselves, and Kelly Sweeney has talked about this in
4 his testimony, are concerned where you end up with a
5 situation where on the other side you have an EA
6 listing, because they end up having to do more work
7 themselves, those listings are devalued by those listing
8 brokers.

9 So, on the consumer side, what you may
10 potentially have is a situation where you have less
11 attractive listings and you're driving down the number
12 of potential users of the MLS, which would adversely
13 affect consumers. That is something that is in the
14 record.

15 COMMISSIONER ROSCH: Mr. Chairman, could I ask a
16 question that is going to go to complaint counsel as
17 well?

18 CHAIRMAN KOVACIC: Absolutely. I mean, we have
19 Commissioner Leibowitz in the queue, too.

20 MR. MANDEL: Could I take one sip of water? You
21 guys are wearing me out here, the one-armed man.

22 COMMISSIONER ROSCH: Go ahead, Commissioner.

23 COMMISSIONER LEIBOWITZ: No, go ahead.

24 COMMISSIONER ROSCH: Why do you think Leegin
25 doesn't control your free riding argument? I mean,

1 there it seemed like not just Mr. Justice Breyer, but
2 the majority held that a horizontal agreement among
3 rivals to try and cure the evils, perceived evils of
4 resale price maintenance was not governed at all by the
5 same principles that would have been if you have a
6 vertical agreement and we've got a horizontal agreement
7 here, don't we?

8 MR. MANDEL: Yes, we do have a horizontal
9 agreement. The MLS -- I think the MLS is a different
10 animal, if I may. Yes, we have a horizontal agreement
11 among competitors, but we also, and this is the very
12 nature of the MLS, and this is recognized by the initial
13 decision as well, yes they are competitors, but they
14 also, by nature of the MLS, cooperate together.

15 And that's what I was at least attempting to get
16 at, in my response to Commissioner Harbour, is that the
17 MLS itself, to work, you have to have cooperating
18 brokers, who bring the buyers into the transaction, and
19 the listing brokers, who are bringing the sellers into
20 the transaction. And I think that there's got to be a
21 recognition of the very nature of the MLS.

22 Yes, it's a horizontal agreement, among
23 competitors, but they are also working cooperatively
24 together in the MLS context, and again, that's the
25 recognition of the MLS as being pro-competitive. I

1 think that that needs to be taken into consideration,
2 that analysis.

3 COMMISSIONER ROSCH: With respect to these
4 restrictions, though, do you need to demonstrate that
5 they're pro-competitive in order to escape the language
6 of the majority opinion that this is a per se problem
7 when there is a horizontal agreement? Let's assume that
8 the restrictions -- the evidence here is that the
9 restrictions are the result of a horizontal agreement,
10 among rivals.

11 MR. MANDEL: Laurie, could you call up number 9,
12 please. Yes, number 9.

13 Again, this is in response to your question
14 about per se. This is complaint counsel's post trial
15 reply brief. Again, complaint counsel has never
16 contended that Realcomp policies are per se illegal.

17 COMMISSIONER ROSCH: Well, that's not the
18 question.

19 MR. MANDEL: I'm sorry, I thought it was.

20 COMMISSIONER ROSCH: I'm talking about it going
21 to your free riding justification.

22 MR. MANDEL: I'm sorry, who --

23 COMMISSIONER ROSCH: The free riding
24 justification was proffered when retail price
25 maintenance was at issue, and the justices seemed to

1 appear to say that it's one thing for that justification
2 to fly when there's a vertical agreement, it's quite
3 another thing when it's the product -- when the effort
4 to do away with that free riding is the product of a
5 horizontal conspiracy.

6 MR. MANDEL: And again, I come back to the
7 nature of the MLS. That -- I'm sorry, but I'm going to
8 have to answer that way. You've got this joint venture
9 arrangement, which is recognized as having efficiencies,
10 and again, Realty Multilist recognized that because of
11 that pro-competitive nature of the MLS, that we can
12 acceptance ancillary restraints. That they're
13 acceptable in an MLS context.

14 So, again, I don't -- also would respectfully
15 submit that we don't have, on balance on this record,
16 these price restraints of any significance. Again, I
17 come back to my de minimis argument on that particular
18 issue.

19 COMMISSIONER LEIBOWITZ: All right, I'll be very
20 brief, because you've been kind to be up here for I
21 think almost or nearly over an hour. Just a couple of
22 questions on the April 2007 stipulation. One thing it
23 clearly did was eliminated the search function policy.
24 Might be a de minimis search function policy.

25 MR. MANDEL: I'm sorry?

1 are the definitions of exclusive right to sell, and the
2 Kermath approach, Mr. Kermath's approach, the flat fee
3 ERTS, doesn't fit that. And again, Mr. Gates is
4 technically correct on that, but the record evidence is
5 that that nevertheless is being sent on to all of these
6 public websites, and it's \$200 more.

7 And again, Mr. Kermath, if we're going to be
8 technical about this, could correctly fix that by
9 charging a contingent commission, and there's no
10 limitation, there's no provision as to what the amount
11 of the contingent commission could be, so at least in
12 theory, I'm not saying that we have any record evidence
13 of this, it could be a dollar. Mr. Kermath could say,
14 give me \$699, flat fee, ERTS, up front, or the other
15 thing he could do is go flat fee ERTS at the end.

16 COMMISSIONER LEIBOWITZ: Plus a couple of pepper
17 corns or a dollar.

18 MR. MANDEL: But a flat fee ERTS at the end fits
19 technically the definition and would be sent on. But
20 again, the record evidence is that Mr. Kermath's
21 listings are being sent on to all of these websites.

22 COMMISSIONER LEIBOWITZ: With the stipulation of
23 Mr. Kermath, can you discipline him if he continues to
24 not -- if he doesn't change his approach or his comment?

25 MR. MANDEL: The stipulation has nothing to do

1 questions. I want to go back, can I talk record
2 evidence of this. Karen Kage testified that -- that
3 Realcomp had effectively had an extension from
4 realtor.com that did not have to put that policy in
5 effect until October. So, where the record ended here,
6 by way of testimony, was Realcomp was going to be in
7 violation of the NAR rule, if it did not put this in
8 effect -- again, in October, which would be after the
9 record closed on this. There was an acknowledgment of
10 that.

11 Now, if you want to know now, I'm happy to

1 members is this antitrust coverage, and Realcomp, since
2 it's not in compliance with that particular rule, is on
3 its own, on that particular thing, but Realcomp is still
4 part of NAR, even though it's not in compliance with
5 that rule. That's the penalty that's been worked out to
6 date.

7 COMMISSIONER LEIBOWITZ: So, NAR noncompliance,
8 which in other words is a violation. If you want to add
9 something, go ahead.

10 MR. MANDEL: I just want to make sure I'm
11 absolutely correct on everything that's going on now, if
12 I can just have one moment.

13 (Brief pause.)

14 MR. MANDEL: I'm correct. There's nothing
15 further on that.

16 COMMISSIONER LEIBOWITZ: Thank you very much.

17 CHAIRMAN KOVACIC: Thank you.

18 MR. MANDEL: Thank you.

19 CHAIRMAN KOVACIC: Mr. Gates?

20 MR. GATES: I'll get the additional 14 minutes,
21 hopefully I will not use that.

22 Just a few points. First off, Mr. Mandel said
23 that Realcomp doesn't get into the relationship between
24 the buyer and -- or excuse me, the seller and their
25 broker, but they do. That's exactly what they do here.

1 They say, if you have an EA listing instead of an ERTS
2 listing, we're going to get into that relationship and
3 we're going to deny services to you. Why? Because they
4 want to protect the windfall that Commissioner Leibowitz
5 identified. That's why.

6 It's the -- it's an MLS that has market power,
7 it's effecting 14,000 members, half the realtors in the
8 state of Michigan. That's why we don't have to worry
9 about any false negatives, false positives here, because

1 data goes through June of 2006.

2 More importantly, what's really at issue here is
3 the tendency of the restraint. That's what Cal Dental
4 tells us. If a restraint has an anticompetitive
5 tendency, it can't thereby be pro-competitive or good
6 simply because the economy changes. The question is,
7 what is the tendency of the restraint? Does it tend to
8 impact competition? Does it tend to restrict it? If
9 because of the economy it's less effective, maybe, but
10 it's still anticompetitive.

11 On the free riding issue, because there's a lot
12 of struggle about whether or not there's free riding.
13 Notice what Realcomp has answered in their questions.
14 There might be an effect some time in the future with
15 regard to MoveInMichigan, or other brokers might not
16 want to be on the MLS. There's no evidence of that, not
17 a single broker testified to that, not a single broker
18 wrote in and said to Realcomp, we've got to change our
19 policies because of that. Other MLSes have -- don't
20 have these policies, don't have any problems. In fact,
21 NAR has required us, you know, one, that all affiliated
22 MLSes have an IDX, and two, that onto that IDX go all
23 listings, including EA listings.

24 Why aren't brokers, even if they hate
25 discounters, going to go away? Because they need to be

1 on the MLS. Brokers are not only cooperating brokers,
2 they're also listing brokers, they need to list on the
3 MLS, and they want to have the opportunity to earn a
4 commission on the buy side, on the cooperating broker
5 side.

6 To answer your question, Commissioner Rosch,
7 where do we say that this affects prices? In our
8 pretrial brief, that was actually filed before our joint
9 stipulations, page 1, in our introduction, we say that
10 Realcomp's policies cause higher prices. That's been
11 our position throughout the litigation.

12 Finally, this is really under a rule of reason,
13 this is an easy case. Why? Because the nature of the
14 policies is anticompetitive, whether you want to label
15 them as inherently suspect or not. But that -- we have
16 much more than simply the nature of the policies. We
17 tried to make it easy for you. We have conceded market
18 power, we have evidence of actual effects. The evidence
19 of actual effects comes not only in the form of the
20 data, and all the regression analysis, but also in the
21 testimony of your brokers who have said, because of the
22 policies, I compete differently.

23 So, for consumers, what this means is that
24 there's less price competition, and less choice. Less
25 choice because a product is being withheld from them by

1 a combination of competitors, and that, in and of
2 itself, is sufficient evidence of effects under Sullivan
3 versus NFL, under Flegel, and, frankly, under IFD. That
4 is sufficient evidence of effects.

5 What Realcomp's brokers have done is said, if
6 you want all this great exposure, what you have to do is
7 you have to pay more, you have to pay for more services.

1 The only difference is that we have this -- is attached
2 to an efficient MLS. We admit that. But the question
3 is, does it -- is it thereby justified, is it necessary
4 for the functioning of the MLS, is it reasonably
5 ancillary, whatever terms you want to use? The answer
6 to that question is no, it's not.

7 Correct, this is not a total exclusion of
8 brokers, as you have in Realty Multilist, but what we
9 have here is withholding competitively significant
10 benefits of the MLS and the result is that a product
11 that consumers want is withheld from them, and brokers
12 compete differently because of the rule. That is
13 sufficient evidence of effects under Detroit Auto
14 Dealers and all these other cases.

