NO. 09-4596

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REALCOMP II, LTD.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

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

BRIEF OF RESPONDENT FEDERAL TRADE COMMISSION

RICHARD A. FEINSTEIN
Director

PEGGY BAYER FEMENELLA
JOEL CHRISTIE
Attorneys

BUREAU OF COMPETITION

WILLARD K. TOM
General Counsel

JOHN F. DALY
Deputy General Counsel for Litigation

IMAD D. ABYAD
Attorney

FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20580
(202) 326-2375

APRIL 5, 2010

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to 6 Cir. R. 34, the Federal Trade Commission agrees with petitioner that the legal issues presented in this petition for review are important. While ultimately without merit, petitioner's arguments regarding the Commission's application of the rule of reason analytical framework may have implications beyond the circumstances here, and may le.0T0w0 1.400000 1.00000 0.029l52ao13.4800 0.0000 TDh(e

e.00000 1.400000 1.00000 sees

ctarT a nccordingm

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – Cont'd **Page**

eS

TABLE OF AUTHORITIES

CASES **Page**

F A

CASES (Cont'd) **Page**

CASES (Cont'd) **Page**

32,271,30, 21,535

CASES (Cont'd) **Page**

MISCELLANEOUS (Cont'd) **Page**

STATEMENT OF JURISDICTION

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

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

2. Whether Realcomp's proffered justifications for its anticompetitive policies – that they were enacted to address a "free ṙpol

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to contest the Final Order as to the "Search Function Policy" and the "Minimum Services Requirement" – both of which it repealed after the Commission's complaint had issued.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

STATEMENT OF FACTS

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

A. Realcomp and the Traditional Business Model

Realcomp has approximately 14,000 members (almost half of all Michigan realtors), and no other Michigan MLS has a comparable geographic reach or membership size. ID [illegible] 0.00.4200 Tc0.5400 Tw(m)Tj10.6800 0.0

cooperating broker who secures a buyer for the property. IDF 24-25 (Appx. 69). Under the traditional Exclusive Right to Sell ("ERTS") listing agreement, a home seller appoints a broker as the exclusive agent for a designated time to sell the property on the seller's stated terms. Brokers offering ERTS listings typically provide a full set of brokerage services (such as helping determine the asking price, devising a marketing stra

the usual 6% commission, the listing broker retains 3% and pays the cooperating broker 3%. I

noting that “a majority of home buying and selling now begins on the Internet”). Realcomp’s system, for example, allows members access to its MLS from any computer with Internet access. IDF 180 (Appx. 88). But the more competitively significant change has been that the Internet makes it possible to market properties *directly* to consumers. MLS operators have sought to capitalize on this new tool

sool

by dissemin0 0.8000 TD(s)Tj5.400000 TD(i)Tj3.8i0 TD(S)Tj7.8000 0.0000f23546.120

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

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

C. Unbundled Brokerage Services and the New Pricing Structure

The increasingly vital role of Internet marketing dramatically changed the competitive landscape in the real estate industry. It brought to the forefront the

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

One type of limited service offering is the Exclusive Agency ("EA") listing agreement, under which the listing broker acts as the seller's exclusive agent, but the seller retains the right to sell the property without further assistance from the broker. IDF 58 (Appx. 73). A typical EA agreement calls for an up-front flat fee of as little as $500 to the listing broker, and a 3% offer of compensation to cooperating brokers. But, although EA listings include offers of compensation identical to those under ERTS listings, the seller need not pay for the services of a cooperating broker when none is used, *i.e.*, when an unrepresented buyer purchases the property. IDF 59-60 (Appx. 73). Moreover, unlike with ERTS listings, brokers who offer EA contracts often provide an unbundled menu of services from

which home sellers may select – and pay only for – what suits their individual needs. IDF 62, 70 (Appx. 74-75).

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

D. The Price Pressure Exerted by Limited Service Brokerages

As would be expected, the market entry of these innovative, lower-cost offerings has exerted increasing competitive pressure on the traditional business model for providing residential brokerage services. IDF 99-101 (Appx. 79-80).

n(y)Tj6.9600 0.0000 TD(ed se)Tj29.8800 0.0000 TD240 0.00000 0.00000 1.0000 T
ed servi
Broker(tco)Tj19.0800 0.0000 TD(m)T9o(m)T9o7000 0.00v.80.0800 0.0000 TD1fo(25.9200

consumers are asking agents to reduce their commissions. This has been sparked by awareness of discounted online and limited-service models, and remains a challenge for full service agents." IDF 100

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

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

Realcomp actively enforced those policies, using fines of up to $2,500 for each violation, lengthy suspension from the MLS, and expulsion from Realcomp. IDF 380-387 (Appx. 110-111). The Search Function Policy remained until April 2007, when Realcomp repealed it, along with the Minimum Services Requirement. IDF 370, 375 (Appx. 109).

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

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

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

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

Realcomp enjoys substantial power in those markets, derived from high market shares and high barriers to entry, and reinforced by the "network effects" inherent in the cooperative nature of the MLS (where the value of the service to each MLS user rises as the number of users increases). IDF 305-310, 329-348; ID 84-85, 97 (Appx. 100-101, 103-106, 145-146, 158).

G. The Proceedings Below

The Commission issued its administrative complaint on October 10, 2006, charging that Realcomp's adopting and enforcing those policies unlawfully restrained competition in the provision of residential real estate brokerage services in Southeastern Michigan, thus violating Section 5 of the FTC Act. Op. 3-4; ID 1 (Appx. 9-10, 62). The ALJ

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

prima facie case against Realcomp. Op. 34-37 (Appx. 40-43). Lastly, contrary to the ALJ's conclusion, the Commission found substantial evidence of actual anticompetitive effects resulting from Realcomp's policies. Op. 43-47 (Appx. 49-53).

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

STANDARD OF REVIEW

"The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c); *In Re Detroit Auto Dealers Ass'n*, 955 F.2d 457, 461 (6th Cir. 1992). This Court reviews Commission findings "on the standard of whether there is substantial evidence in the record to support the finding made, not on a preponderance of evidence standard." *Id.*; *see also id.* ("We will 'accept the Commission's *findings of fact* if they are supported by such relevant evidence as a *reasonable* mind might accept as adequate to support a conclusion'.") (quoting *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 454

(1986); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). Thus, a reviewing court may not "'make its own appraisal of the [evidence], picking and choosing for itself among uncertain and conflicting inferences'." *Indiana Federation*, 476 U.S. at 454 (quoting *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934)).

In various parts of its brief, Realcomp argues that, because the ALJ had reached a contrary conclusion to that of the Commission, the Commission's findings are entitled to less deference by this Court. Pet. Br. 12, 23-24, 31. Realcomp's argument not only misconstrues the proper legal standard, but is particularly inapt in this case, where the Commission's conclusions were in fact based almost

findings. *See, supra*, at 3-14. Where the Commission disagreed with the ALJ's inferences or conclusions drawn from factual findings, moreover, it addressed those disagreements directly and provided a detailed explanation of its reasoning. *See, e.g.*, Op. 4-5 n.4, 10-11, 13-14, 21-22 n.16, 24-

the ALJ. *E.g., Varnadore v. Sec'y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998); *Zoltanski v. FAA*, 372 F.3d 1195, 1200 (10th Cir. 2004); *Swan Creek Comms., Inc. v. FCC*,

those discounted listings from its MLS default searches. Not only did those policies facially make it more difficult for discount brokers to compete for listings, but Realcomp's substantial market power ensured that the harm to competition (and consumers) is even more likely. This consumer harm was further corroborated by qualitative and quantitative evidence of actual detrimental effects. The Commission, accordingly, concluded that, under any variation of the rule of reason, Realcomp's policies are anticompetitive, and are not justified by procompetitive considerations.

First, the Commission had ample basis to conclude that Realcomp's practices are "inherently suspect," and thus require justification regardless of any showing of market power or actual effects. Its policies penalized the offering of innovative, low-cost alternatives to the traditional model, by restricting the dissemination of information about those offerings to consumers. By limiting the exposure of EA listings on the most important venues for selling and buying homes, Realcomp's policies impair consumers' ability to evaluate rival offerings by making the information about EA listings more difficult and costly to obtain. The courts have consistently condemned comparable restraints, even when imposed by otherwise-procompetitive joint ventures. The Commission correctly

concluded that the anticompetitive tendency of such restraints is sufficient, on their face, to require procompetitive justification.

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

analysis shows that the Realcomp policies actually *increase* the number of EA listings on its MLS (*i.e.*, that suppressing marketing exposure for the more flexible and lower cost EA listings would somehow lead consumers to choose them more often).

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

ARGUMENT

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

by restricting the dissemination of information about their offerings on Realcomp's MLS and Approved Websites, is anticompetitive under any variation of the rule of reason.

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

There is no dispute here that Realcomp's conduct should be evaluated under the rule of reason. As the Supreme Court's teachings and court of appeals decisions make clear, however, the application of that analytical framework is far more flexible than Realcomp's brief implies. *See* Op. 16-20 (Appx. 22-26); Pet. Br. 14-16. There can be little doubt, for example, that antitrust jurisprudence has evolved "away from any reliance upon fixed categories and toward

the challenged restraint enhances competition"). But, as the Commission explained, answering that inquiry may be accomplished in a number of ways under

minimum rate each would accept and using results in negotiating rates in payor agreements); *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), *aff'd*, *Polygram*

as numerous courts of appeals have confirmed, the Court's description of market power as a valid proxy for detrimental effects compels the conclusion that, "if the tribunal finds that the defendants had market power and that their conduct tended to reduce competition, it is unnecessary to demonstrate directly that their practices had adverse effects on competition." Op. 18 (Appx. 24) (citing, *e.g.*, *United States* [illegible]

---

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

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

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

The Commission carefully considered the "circumstances, details, and logic" of Realcomp's policies, and concluded (correctly) that, by their very nature, they likely harm competition. Realcomp's policies singled out an innovative and low-cost form of service for unfavorable treatment, by limiting the exposure of non-ERTS listings to consumers, both via the MLS and on the most popular real estate websites in the Realcomp region. Such advertising restrictions can reasonably be expected to res0.00 0r.S00 TD(ia)Tj9.9600 0.0000 h s

those policies alone renders them *prima facie* anticompetitive, thus necessitating countervailing procompetitive

based pricing model. As such, they bear a "close family resemblance" to conduct deemed anticompetitive by the courts without a showing of market power or actual detrimental effects. *Polygram v. FTC*, 416 F.3d at 37.

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

Particularly when such restrictions single out discounters or innovative rivals offering y, t

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

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

Under these circumstances, the Commission's conclusio

ethical canon barring competitive bidding, by prohibiting members from discussing cost of services with customers until after the initial selection of an engineer, is unlawful, and "[w]hile * * * not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id*. at 692-93, 696. Indeed, then-judge Sotomayor confirmed that, although joint ventures are "typically evaluated as a whole under the rule of reason," that does not necessarily apply to every joint venture restraint: "a *per se* or quick-look approach" may well apply "when a challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing purposes" of the joint venture, in which case "a challenged restraint must have a reasonable procompetitive justi, [illegible]

the advertising of, and the dissemination of vital information about, limited service offerings such as EA listings, on both the MLS and Realcomp's Approved Websites, greatly diminishing their exposure to consumers.[7] Realcomp contends that it "merely does not facilitate such advertising and dissemination," Pet. Br. 16, but *the facilitation of advertising and dissemination of information about real estate listings is at heart of why Realcomp was created*; that is the very source of its efficiency-enhancing status. That Realcomp so readily admits that its policies are contrary to its *raison d'etre* is alone sufficient to treat those policies independently from the Realcomp joint venture itself, and to insist that they be justified by countervailing procompetitive reasons that are "related to the efficiency-enhancing purposes of the joint venture." *Salvino*, 542 F.3d at 339 (Sotomayor, J., concurring); *see also* Federal Trade Commission and U.S. Dep't of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (hereinafter "*Collaboration Guidelines*"), § 3.36(b) (April 2000).[8]

---

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

[8] Citing *United States v. Visa USA Inc.*, 344 F.3d 229 (2d Cir. 2003), Realcomp argues that because its MLS is a two-sided market with network effects, its policies cannot be analyzed under the inherently suspect framework, but it fails to explain why that fact alters the legal analysis. To the extent Realcomp is arguing that its policies somehow increase the efficiency of its two-sided market, it is proffering

Realcomp also argues that its policies constitute "internal" rules of operation for a legitimate joint venture and thus cannot be inherently suspect. Pet. Br. 18-19. This is an incorrect understanding of the law governing agreements among joint venture participants. As a threshold matter, when faced with an agreement among joint venture participants, "[a] court must distinguish between 'naked' restraints, those in which the restriction on compet

---

a *justification*, which is not precluded by the inherently suspect framework. In any event, Realcomp's policies diminish, rather than enhance, the efficiency of its two-sided market because they likely result in fewer listings on its MLS. *See* Op. 14 n.10 (Appx. 20) (upholding ALJ's rejection of same argument). *See also* IDF 74 (Appx. 76) (policies likely result in fewer MLS listings because limited service brokers "cater to cost-conscious home sellers who might otherwise have sold their properties as [For Sale By Owner]"); 289 (Appx. 99) (FSBO properties not listed in MLS).

"by-product of the joint venture MLS." Pet. Br. 19. What this assertion glosses over, however, is the fact that Realcomp'

constituting horizontal price fixing"). Moreover, to the extent it matters that a restraint is an internal rule for the operation of tj13.9200 0.0000 TD(er)TjD(fi)Tjr00 0.0000 TD

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

stand for is the noncontroversial proposition that application of the rule of reason is *contextual*, hence the Supreme Court's guidance of "an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint," in order to reach "a confident conclusion about the principal tendency of a restriction." *California Dental*, 526 U.S. at 781. That is exactly what the Commission did here. That other tribunals concluded that the inherently suspect framework was not appropriate under the circumstances of those cases says nothing about the propriety of that mode of analysis here.

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

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

In conducting a market structure-based analysis, the Commission applied the well established rule, supported by a long line of precedents, that permits an inference of anticompetitive effects from the existence of market power combined with the tendency of the restraint to impair competition. *See, e.g.*, *Craftsmen Limousine*, 491 F.3d at 388 ("plaintiff may satisfy the 'detrimental effects' element * * * by making 'an inquiry into market power and market structure designed to assess the [restraint]'s actual effect") (citations omitted); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (plaintiff may prove detrimental effects "indirectly by establishing * * * sufficient market power to cause an adverse effect on competition"); *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996) (same); *Law v. NCAA*, 134 F.3d at 1019 (applying quick-look analysis but acknowledging that "plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market"); *Brown Univ.*, 5 F.3d at 668-69 (same); *see also* ABA Section of Antitrust Law, 1 ANTITRUST LAW DEVELOPMENTS, at 65 (6th ed. 2007); ABA Section of Antitrust Law, MONOGRAPH NO. 23, THE RULE OF REASON, at 161-63 (1999). The logic of this rule is sound yet simple: because an entity with market power has the ability, by definition, to unilaterally affect consumer welfare, and not be deterred in doing so

by competitive forces, conduct by that entity that has the tendency to harm competition can be expected to do so. Thus, when an MLS has market power, its enforcing policies that disfavor particular types of listings likely will result in placing those listings at a significant

market power" must be "*combined with* the anticompetitive nature of the restraints, [to] provide the necessary confidence to predict the likelihood of anticompetitive effects." Op. 34 (Appx. 40) (emphasis added). In assessing the anticompetitive tendency of the restraints in this part of its analysis, the Commission naturally relied on the characteristics it had already identified in connection with its analysis under the "inherently suspect" rubric, but also went on to analyze in greater detail the mechanisms by which Realcomp's policies are likely to harm competition. *See* Op. 22-28, 37-41 (A'st-28,

the definitions of the relevant product and geographic markets, IDF 282-328 (Appx. 98-103); the existence of network effects and high entry barriers, IDF 329-338 (Appx. 103-104); and Realcomp's shares in those markets, I

[10] Realcomp characterizes the Commission's conclusions regarding competitive effects as findings, and argues tha

The Comm

Darrell Williams, conducted three types of econometric analyses to determine if Realcomp's policies affected competition in the relevant markets. He concluded that each of those analyses shows significant reduction of output flowing from Realcomp's policies.

1. Time Series Analysis

Dr. Williams first conducted a time-series analysis, which compared the share of EA listings in the Realcomp MLS before and after the policies went into effect. He found that the monthly average share of EA listings fell from about 1.5 percent of total MLS listings before the policies took effect to about 0.75 percent afterward. IDF 487 (Appx. 122). Realcomp's expert, Dr. Eisenstadt, concurred, finding that the percentage drop in the share of ne-.9600 0.0000 TD(f)Tj4.6800 0.0000 TD(

the ALJ had confused the reduction in absolute percentage points with the change in market share, which showed that EA listings had lost *half* their toehold in Realcomp's market. Op. 45 (Appx. 51). Indeed, even a 1% decrease can preclude significant consumer savings – in the millions of dollars annually in Realcomp's area. *See* IDF 61 (Appx. 74); Eisenstadt, Tr. 1520-21; *see also* CX 133-063; RX 161-035 (Eisenstadt reporting sale of over 71,000 homes in Realcomp's area in 2004-2006, at an average price of over $200,000 – leading to potential consumer losses of over $4 million, assuming, conservatively, that EA listings save only half the typical 6% commission). Moreover, particularly when dealing, as here, with emerging competition to an incumbent with market power, the relevant question is not whether the new entrant would necessarily have developed into a viable substitute for the dominant product, but whether "the exclusion of nascent threats is the type of conduct that is reasonably capable of contributing significantly to a defendant's continued monopoly power." *United States v. Microsoft Corp.*, 253 F.3d 34, 79 (D.C. Cir. 2001); *see also Radiant Burners*, 364 U.S. at 660 (practice which "has, by its nature and character, a monopolistic tendency * * * is not to be tolerated merely because the victim * * * is so small that his destruction makes little difference to the economy") (citations and internal quotation marks omitted).

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

2. Benchmark Study

Dr. Williams also conducted a benchmark (or cross-section) study, which compared the share of EA listings in Realcomp's MLS and in the local MLSs of nine Metropolitan Statistical Areas (MSAs), six without restrictions similar to Realcomp's Website Policy ("Control MSAs"), and three with such restrictions ("Restriction MSAs"). IDF 490 (Appx. 123). The selection of the MSAs was based on a number of economic and demographic characteristics deemed relevant to the seller's choice of EA or ERTS listing agreement. IDF 491-496 (Appx. 123). Dr. Williams found that the average share of EA listings (weighted according to the total listings in each MSA) is higher in the Control MSAs than in Restriction MSAs, IDF 514 (Appx. 126), and concluded that Realcomp's MLS has a significantly smaller share of EA listings than MLSs without similar restrictions. IDF 509 (Appx. 125).

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

acknowledged that the values of the seven variables used as selection criteria varied across the MLSs in the control sample. RX 161-08, ¶13. It is reasonable to expect, then, that as the values of those variables change, so do the EA shares in the corresponding MSAs. Indeed, the observations of Realcomp'

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

First, Realcomp asserts that the Commission, "having not itself heard the testimony, was in an inferior position to make an assessment" of this economic evidence. Pet. Br. 31. But, as discussed above, economic analysis is not the kind of evidence for which the ALJ might enjoy any observational advantage over the Commission. *See, supra*, at 38-39. Realcomp's assertion is, therefore, patently false.[11]

Second, Realcomp repackages its flawed criticism of Dr. Williams's benchmark study criteria in the context of his regression analysis, arguing that "the different values of these variables across different metropolitan areas precisely formed the basis for Dr. Eisenstadt's rationale that each should be included as a separate independent variable in measuring the effect of MLS restrictions." Pet. Br. 32. But the choice of variables in a regression analysis is based not only on the

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

[12] That confusion also underlies Realcomp's criticism that Dr. Williams's regressions did not use certain variables that he had deemed relevant to the share of EA listings. Pet. Br. 32-33. That some variables are relevant does not necessarily make them appropriate for regression analysis, because they could be heavily correlated (or "collinear") to other variables already in the model. An example of this would be including "MSA-level" or "zip code-level" population and housing data, w

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

---

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

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

asserted

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

Although efforts to prevent free-riding are properly recognized as cognizable justifications, *see, e.g.*, *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55 (1977); *Business Electronics, Inc. v. Sharp Electronics, Inc.*, 485 U.S. 717, 731 (1988), there simply is no free-riding problem to be addressed

IDF 200-201, 204 (Appx. 90). When a cooperating broker does not bring in the buyer, he is *not* providing *any* service to the EA seller, and thus is not entitled to any compensation. Second, the record is also clear that Realcomp provides no free services to the EA seller, so the latter does not free-ride on Realcomp itself. The EA seller can only make use of Realcomp's MLS by retaining (and paying a fee to) a listing broker who in turn is a dues-paying Realcomp member. JX 1-04, 07 (Joint Sti

true in the case of an EA contract with a cooperating broker. That cooperating broker's contribution to Realcomp's MLS serv

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

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

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

more specifically, to the ALJ's views about cooperating brokers' incentives under EA contracts. Op. 30-31 (Appx. 36-37). Moreover, the Commission's reasoning for rejecting the ALJ's views on cooperating brokers' incentives with regard to free-riding applies with equal force to Realcomp's argument now that it is "the bidding disadvantage faced by cooperating brokers when they show EA-listed properties" that "reduce[s] incentives to show those properties." Pet. Br. 59. In other words, to the extent that the bidding disadvantage is about the brokers, not the buyers (as Realcomp i[illegible]

Respectfully submitted,

RICHARD A. FEINSTEIN
Director

WILLIAM K. TOM
General Counsel

PEGGY BAYER FEMENELLA
JOEL CHRISTIE
Attorneys

JOHN F. DALY
Deputy General Counsel for Litigation

BUREAU OF COMPETITION

/s/ Imad Abyad
IMAD D. ABYAD
Attorney
FEDERAL TRADE COMMISSION
600 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, DC 20580
(202) 326-2375

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B), and with 6 Cir. R. 32(a), because it contains 13,981 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

Dated: April 5, 2010

/s/ Imad Abyad
Imad D. Abyad
Attorney for
FEDERAL TRADE COMMISSION