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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REALCOMP II, L

pressure on the traditional model for brokerage services. Under the traditional model, home sales involving the use of real-estate brokers incorporate both a listing broker, who works with home sellers, and a cooperating broker, who works with home buyers. Although representing one party in a particular transaction, brokers do not often specialize as either a cooperating or listing broker and may represent either buyers or sellers. The agreement between a listing broker and home seller, called a listing agreement, specifies the duration of the contract, the types of services to be provided by the listing broker, the compensation to be paid to the listing broker, and the offer of compensation to be paid to any cooperating broker who secures the home purchaser. A listing broker is compensated either by a flat fee paid up-front at the time of the listing agreement or by commission based on the selling price of the home, or by some

Under an EA listing agreement, the listing broker acts as the exclusive agent of the home seller, but is paid less or no additional compensation if the property is sold without further assistance from the listing broker. Cooperating brokers are paid directly by the seller. EA contracts may offer a flat, or unbundled, brokerage services, with a compensation structure characterized by an up-front fee to the listing broker rather than a commission, and a 3% offer of compensation from the seller directly to any cooperating broker.

In a commission-based ERTS transaction, if the home is sold to an unrepresented buyer, the listing broker retains the compensation that otherwise would have been paid to the cooperating broker, and the cost to the home seller remains the same. Under an EA agreement, in contrast, if the home is sold to an unrepresented buyer, the compensation to the listing broker remains the same, and the compensation that would have been paid to the cooperating broker is retained by the home seller. ERTS agreements typically govern a traditional package of full brokerage services, while EA agreements and flat-fee ERTS agreements are conducive to providing discounted, limited brokerage services. The traditional set of services provided by a listing broker to the home seller include showing and marketing the property, presenting and evaluating offers to the seller, and negotiating counteroffers. Full-service listing brokers in Realcomp's area typically charge commission rates around 6% and are compensated through commission-based ERTS contracts.

The discount, limited-service brokerage model exemplified by EA listings offers a lower-cost alternative to the traditional full-service model. A listing broker in a limited-service listing may provide any, but not all, of the services provided under a traditional brokerage model, according to the preferences of the home seller as consumer. As described by the ALJ, unbundled brokerage services "meet a consumer demand for lower cost brokerage services where consumers are willing to carry out some of the home selling tasks themselves that otherwise would be performed by real estate professionals." Pet'r App. Vol. II at 75 (Dec. ¶ 73) (internal quotation marks omitted). Home sellers may "purchase a subset of full-range brokerage services (such as listing

in an MLS), while self-supplying other services” such as “show[ing] the property, hold[ing] open houses, negotiat[ing] with buyers, and clos[ing] the transaction . . . without broker assistance.” (Dec. ¶ 72).

The expansion of the market share of limited-service brokers since 2003 has been attributed in part to the role of the internet in making it easier for brokers to market directly to home buyers and in enabling consumers to self-supply services. The development of the internet and MLS databases, the increase in the number of broker websites, and data feeds provided from local MLS to public websites have enhanced the ability of brokers to share real-estate information and of members of the public to access it. As a result, the traditional brokerage model faces competitive pressure arising from the technological developments that enable consumers to self-supply certain services and from limited-service brokers who discount their fees in response to these developments.

According to complaint counsel, pursuant to Realcomp's website policy, Realcomp prohibited information about EA listings and other nontraditional listings² on Realcomp's MLS from being distributed to public real-estate advertising websites through the MLS feeds. Adopted in 2001, the website policy was first enforced in 2004 when Realcomp incorporated the requirement that members designate a listing type for all listings. The policy violated an NAR rule forbidding member MLSs from excluding EA listings from their IDX feeds. But the Realcomp board voted against adopting the NAR IDX policy and retained its data-feed exclusions.

Pursuant to the search-function policy adopted in 2003 and eliminated in 2007, EA and other nontraditional listings were excluded from the default search setting in the Realcomp MLS. As a result of the default settings on the MLS, a broker wanting to display EA listings in her search results had to select specifically to search all listings or the EA listings, or change permanently her search default by saving changes to her settings.

In addition to requiring members to disclose each listing's type, Realcomp

²The rules prohibit distribution to real-estate internet advertising sites of "Exclusive Agency, Limited Service and MLS Entry Only Listings" Pet'r App. Vol. II at 107 (Dec. ¶ 358).

No. 09-4596

II. ANALYSIS

A. Standard of Review

When we review a decision of the Federal Trade Commission, the legal issues are “for the courts to resolve, although even considering such issues the courts are to give some deference to the Commission’s informed judgment that a particular commercial practice is to be condemned as ‘unfair.’” *FTC v. Ind. Fed’n of Dentists*, 476 U.S. 447, 454 (1986). The Commission’s findings of fact are conclusive if supported by substantial evidence. *Barnett Pontiac-Datsun, Inc. v. FTC (In re Detroit Auto Dealers Ass’n)*, 955 F.2d 457, 469 (6th Cir. 1992), *cert. denied*, 506 U.S. 1151 (2002); 15 U.S.C. § 45(c). When we review the Commission’s findings, we may not “make [our] own appraisal of the testimony, picking and choosing for [ourselves] among uncertain and conflicting inferences.” *Ind. Fed’n*, 476 U.S. at 454 (quoting *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934)). Rather, under the substantial-evidence standard, we uphold the

Camera Corp. 340 U.S. at 496³. Thus, because “we defer to the inferences that the [agency] derives from the evidence, not to those of the ALJ,” *Arhadore v. Sec’y of Labor*, 141 F.3d 625, 630 (6th Cir. 1998) (interpolation marks omitted), the relevant inquiry is whether substantial evidence supported the Commission’s conclusion that the website policy constitutes an unreasonable restraint of trade.

B. Restraint of Trade

Because “[t]he FTC Act’s prohibition of unfair competition and deceptive acts or practices . . . overlaps the scope of the Sherman Act . . . aimed at prohibiting restraint of trade,” we rely upon Sherman Ac

³We have stated that “[w]hen the Commission rules the ALJ and substitutes its own findings, we should carefully scrutinize the Commission’s determinations of fact, and therefore its conclusions based upon those facts.” *In re Detroit Auto Dealers Ass’n*, 955 F.2d at 469. The Supreme Court has explained, however, that consideration of the examiner’s findings is only one of many “other factors which in sum determine whether evidence is ‘substantial.’” *Universal Camera*, 340 U.S. at 497; thus, a court “need not limit its reexamination of the case to the effect” of those findings beyond “the relevance that they reasonably command.”

With respect to the second element, in evaluating whether Realcomp unreasonably restrained trade, the Supreme Court has explained that “a restraint may be adjudged unreasonable either because it fits within a class of restraints that has been held to be per se unreasonable, or because it violates a standard that has come to be known as the ‘Rule of Reason.’” *Ind. Fed’n*, 476 U.S. at 457–58. Under per se analysis, “certain agreements or practices are so ‘plainly anticompetitive,’ . . . and so often ‘lack . . . any redeeming virtue,’ . . . that they are conclusively presumed illegal without further examination.” *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 8 (1979) (internal citations omitted). “A court need not then inquire whether the restraint’s authors actually possess the power to inflict public injury . . . , nor will the court accept argument that the restraint in the circumstances is justified by any procompetitive purpose or effect.” *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362 (5th Cir. 1980) (internal citations omitted).

When restraints are not per se unlawful, and their net impact on competition not obvious, the conventional rule-of-reason approach requires courts to engage in a thorough analysis of the relevant market and effects of the restraint in that market. *Ind. Fed’n*, 476 U.S. at 461. A full rule-of-reason inquiry “may extend to a ‘plenary market examination.’” *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499, 509 (4th Cir. 2002) (quoting *Gal. Dental Ass’n*, 526 U.S. at 779), which may include the analysis of “the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed.” (quoting *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978)), “as well as the availability of reasonable, less restrictive alternatives,” *id.* If Realcomp’s challenged policies are shown to have an anticompetitive effect, or if Realcomp is shown to have market power and to have adopted policies likely to have an anticompetitive effect, then the burden shifts to Realcomp to provide procompetitive justifications for the policies. See *infra* Part II.C.; see also *Worldwide Basketball Ass’n*, 388 F.3d at 959.

An abbreviated or quick-look analysis, however, does not require “elaborate industry analysis,” and applies when an observer with even a rudimentary

understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.” *Dental Ass’n*, 526 U.S. at 770 (internal quotation marks omitted); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 209–10 (3d Cir. 2005) (quick-look analysis applies when “no elaborate industry

e.g, *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 853 F.2d 1217, 1220–22 (7th Cir. 1993). Here, in comparison, the challenged restraint is an internal rule within an MLS regarding its distribution of certain types of real-estate listings to the public. We need not and do not decide whether this policy is sufficiently analogous to practices already deemed by courts to be anticompetitive for it to qualify as a facially anticompetitive restraint. See *Cal. Dental Ass'n*, 526 U.S. at 775 n.12 (“[T]here must be some indication that the court making the decision has properly identified the theoretical basis for the anticompetitive effects and considered whether the effects actually are anticompetitive. Where . . . the circumstances of the restriction are some

Dealers Ass'n 955 F.2d at 469 (quoting Fed. 955 F.2d at 469 (quoting Fed'n 476 U.S. at 460) (emphasis added)). Under either inquiry, substantial evidence supports the Commission's findings.

1. Potential Adverse Effects

a. Market Power

The Commission adopted the ALJ's finding that Realcomp possessed substantial market power in the relevant markets, and Realcomp does not dispute those findings. The ALJ defined the relevant product market as real-estate-brokerage services and found that, for most home sellers and buyers, no reasonable substitutes for such services exist because of the significant advantages of using a real-estate broker to sell a home. Because of the local nature of real-estate markets, the ALJ found that counties in southeastern Michigan define the geographic scope of competition for real-estate-brokerage services. Because of the lack of substitutes for brokerage services, the ALJ found that a broker monopolist could profitably increase commissions significantly above competitive levels.

Defining the relevant input market as the supply of multiple listing services to real-estate brokers, the ALJ found that an MLS like Realcomp exhibits network effects, meaning that the value of the MLS increases as the number of other users of the service increases. The value of an MLS to home sellers (or their representatives) increases with the number of home buyers (or their representatives) using the site, and, similarly, the value to home buyers increases as more home sellers list their properties on the MLS. "Brokers without full access to an MLS would . . . be at a significant competitive disadvantage," Pet'r App. Vol II at 101 (Dec. ¶ 313), "listing services with fewer users are not economically viable substitutes." (Dec. ¶ 310), and barriers to entry make it "improbable" for a rival MLS successfully to enter the market. at 104 (Dec. ¶ 333). Because the value of an MLS depends on the number of users, the ALJ observed that

⁷ See AREEDA ¶ 1511 (Supp. 2010) ("The proof of actual market effects that the ALJ insisted on would certainly be appropriate in a private Stat Act proceeding under which proof of private harm were required. . . . But in the presence of market power and the absence of a convincing justification the FTC's treatment of highly suspicious restraints is warranted.").

“market share is a good indicator of market power,” and found that Realcomp possessed a large market share in each relevant county. Id. at 103 (Dec. ¶ 329). In light of Realcomp MLS’s market share, network effects, and barriers to entry, the ALJ concluded that Realcomp possessed substantial market power in the relevant markets.

Adopting these findings, the Commission agreed that “Realcomp possessed substantial market power in two relevant markets in Southeastern Michigan: the market for residential real estate brokerage services and the market for multiple listing services, which is a vital input into the brokerage services market.” Pet’r App. Vol. I at 42 (Comm’n Op. at 36). Given the extensive and undisputed market analysis undertaken by the ALJ and adopted by the Commission, substantial evidence supports the Commission’s findings that Realcomp possessed substantial market power.

b. Anticompetitive Nature

Because Realcomp possesses substantial market power, we next evaluate the anticompetitive tendencies of the Realcomp website policy. Realcomp does not regulate rates of commission, offers of compensation, or other price terms; thus, we examine the effect of Realcomp’s restrictions on consumer choice, specifically, the reduction in competitive brokerage options available to home sellers. The relevant output to be measured, therefore, is the share of FMLS listings in the Realcomp MLS, the exposure of these listings to consumers, and the relationship of these outcomes to the Realcomp website policy.

In establishing that Realcomp’s policy “narrow consumer choice” and “hinder the competitive process,” the Commission made the following relevant findings:

- (1) because of its database of listings, the Realcomp MLS is the most effective tool for the sale of residential real estate in Southeastern Michigan;
- (2) brokers offering limited service and brokers offering traditional, full-service brokers’ services compete with one another for new listings;
- (3) limited service brokers’ services potentially cost less than the services of brokers offering only full-service listings (they not only unbundle the services offered but also unbundle the commission structure);
- (4) limited service brokers’ listings consequently exert ‘price pressure’ on full-service brokers’ listings;
- (5) Realcomp’s Website

prevented EA listings from reaching “only a relatively small additional percentage of home buyers”—the 10% who perused home listings on the inaccessible websites. Pet'r App. Vol. II at 162 (Dec. at 101). To the contrary, however, by reducing by 10% the number of home buyers that are exposed to discount listings, the website policy may very well constitute an unreasonable restraint. Restricting the online dissemination of home listings is especially pernicious because of the emerging competitive impact of the internet and of discounted brokerage services in the residential real-estate market. As the D.C. Circuit observed, “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). The D.C. Circuit was analyzing a monopolization claim under Section 2 of the Sherman Act, rather than a horizontal restraint under Section 1 at 80. Substantial evidence shows, though, that “the exclusion of nascent threats such as discount brokerage services and consumer access to online listings “is reasonably capable of contributing significantly” to anticompetitive effects.

As discussed in Part II. *Supra*, courts have found potential antitrust violations when MLS rules deny MLS membership to some brokers, e.g. *Realty Multi-List, Inc.*, 629 F.2d at 1388–89, and when dealers have excluded discount brokers altogether from a venue, see, e.g. *Denny’s Marina, Inc.*, 8 F.3d at 1220–22. At issue here is a different sort of restriction than membership exclusion—internal rules within an MLS regarding its distribution of certain types of real-estate listings to the public. There is no rule of complete exclusion from the MLS, and evidence shows that brokers are allowed to and do place limited-service listings on the Realcomp MLS.

Nonetheless, similar to excluding discount brokers from the MLS altogether, the website policy limits exposure of discount listings. “[L]istings [are] not . . . distributed as widely as possible” due to the website policy, “resulting in inefficient sales prices,” which is the same kind of economic harm caused by MLS exclusions. *Tompson v. Metropolitan Multi-List, Inc.*, 934 F.2d 1566, 1580 (11th Cir. 1994); *Ind. Fed’n*, 476 U.S. at 461–62 (holding that proof of higher prices is not required in the context of “[a]

concerted and effective effort to withhold (make more costly) information desired by

⁸Despite this initial finding of anticompetitive tendencies, the ALJ ultimately credited Realcomp's procompetitive justifications and found insufficient the Commission's direct econometric evidence to establish an unreasonable restraint of trade.

⁹ A decline in the share of EA listings would have real implications for consumers who would otherwise purchase those listings. Assuming an average home sale price of \$200,000, and assuming that

Attributing the decline in EA shares to a buyers' market, the ALJ credited testimony that "in a declining or distressed market, where both the value of a home and the seller's equity are declining, more home sellers would choose full service ERTS listings over EA listings because they wanted professional marketing services of a full service broker." Pet'r App. Vol II at 164 (id. at 103). Indeed, the ALJ found that, between 2003 and 2005, EA listings grew from 20% to 15% of listings nationally, but

No. 09-4596 Realcomp II, Ltd. v. FTC

Page 24

brokers who pay dues to Realcomp in order

¹⁶The Commission's analysis is persuasive on this point, noting that EA listings disadvantage not the cooperating brokers, but rather "the listing broker who signs an EA contract for less compensation than an ERTS contract would have provided, and the listing broker who insists upon an ERTS contract and loses a listing as a result. . . . In other words, ~~case~~ two categories of listing brokers are not losing money through free-riding; they are losing money through competition." Pet'r App. Vol. I at 37 (Comm'n Op. at 31).

a policy insulates cooperating brokers' commissions from competitive pricing pressure. As the Commission found, the bidding-disadvantage justification "reinforces the conclusion that [the policies] have an anticompetitive effect" by deliberately protecting established commissions and preventing the reduction in the cost of selling a home. Pet'r App. Vol. I at 39 (Comm'n Op. at 33). Even if there are financial incentives for a home seller to contract with an unrepresented buyer over a cooperating broker, Realcomp offers no meritorious procompetitive justification for protecting cooperating brokers from pressure to lower costs. And, as with the free-riding justification, Realcomp fails to demonstrate how EA listings give rise to a greater "bidding disadvantage" than do ERTS listings give a listing broker in an ERTS agreement presumably prefers to retain the cooperating broker's commission for herself by transacting with an unrepresented buyer.

III. CONCLUSION

Under a full rule-of-reason analysis, we conclude that substantial evidence supports the Commission's findings that: 1) Realcomp's website policy gave rise to potential genuine adverse effects on competition due to Realcomp's substantial market power and the website policy's anticompetitive nature; 2) the website policy in fact caused actual anticompetitive effects; and 3) Realcomp's proffered procompetitive justifications were insufficient to overcome a prima facie case of adverse impact. These findings establish that Realcomp's website policy unreasonably restrained competition in the market for the provision of residential real-estate-brokerage services in southeastern Michigan and the Realcomp MLS area. Therefore, we DENY Realcomp's petition for review.

¹⁷ The ALJ also noted that the website policy reflects the greater value of ERTS over EA contracts to the MLS because cooperating brokers often must deal directly with EA home sellers rather than listing brokers when engaging in EA contracts, and, as a result, may be required to provide transactional services that would otherwise be performed by full-service listing brokers. We agree with the Commission, however, that Realcomp has failed to carry its burden of demonstrating how meeting the preferences of cooperating brokers ultimately benefits consumers, why the price for EA listings does not incorporate these costs, or how this policy in particular offers efficiency benefits. It is also worth noting that, despite Realcomp's assertions of the website policy's necessity, the NAR has ruled that MLSs may no longer exclude EA listings from their IDX feeds.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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Re: Case No. 09-4596 Realcomp II, Ltd., v. FTC
Originating Case No. 9320

Dear Counsel,

The court today announced its decision in the above-styled case.

Enclosed is a copy of the court's opinion together with the judgment which has been entered in conformity with Rule 36, Federal Rules of Appellate Procedure.

Yours very truly,

Leonard Green, Clerk

Linda K. Martin
Deputy Clerk

Enclosures

Mandate to issue.