UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Eugene Allan, Deborah F. Allan, Keith Landen, Matthew J. Cavendish, and Traci Cavendish, on behalf of themselves and others similarly situated,

Plaintiffs,

v

Realcomp II, Ltd., a Michigan Profit Corporation; Dearborn Board of REALTORS®, a Michigan Domestic Nonprofit Corporation; Detroit Association of REALTORS®, a Michigan Domestic Nonprofit Corporation; Eastern Thumb Association of REALTORS®, a Michigan Domestic Nonprofit Corporation; Livingston Association of REALTORS®, a Michigan Domestic Nonprofit Corporation; Metropolitan Consolidated Association of REALTORS®, a Michigan Domestic Nonprofit Corporation; North Oakland County Board of REALTORS®, a Michigan Domestic Nonprofit Corporation; Western Wayne Oakland County Association of REALTORS®, a Michigan Domestic Nonprofit Corporation; Preview Properties, Inc., a Michigan Domestic Profit Corporation; Weir, Manuel, Snyder & Ranke, LLC, a Michigan Domestic Limited Liability Company; Real Estate One, Inc., a Michigan Domestic Profit Corporation; Darralyn C. Bowers, an Individual; Richard Knezek, an Individual; Alissa Nead, an Individual; Douglas Hardy, an Individual; Thomas R. Rademacher, an Individual; and Daniel V. Mulvihill, an Individual,

Defendants.
_____/

Case No. 4:10-CV-14046

Hon. Stephen J. Murphy, III
Magistrate: R. Steven Whalen

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DEFENDANTS DEARBORN BOARD OF REALTORS®, DETROIT ASSOCIATION OF REALTORS®, EASTERN THUMB ASSOCIATION OF REALTORS®, LIVINGSTON ASSOCIATION OF REALTORS®, METROPOLITAN CONSOLIDATED ASSOCIATION OF REALTORS®, NORTH OAKLAND COUNTY BOARD OF REALTORS® AND WESTERN WAYNE OAKLAND COUNTY ASSOCIATION OF REALTORS®' MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

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Defendants Dearborn Board of REALTORS®, Detroit Association of REALTORS®, Eastern Thumb Association of REALTORS®, Livingston Association of REALTORS®, Metropolitan Consolidated Association of REALTORS®, North Oakland County Board of REALTORS®, and Western Wayne Oakland County Association of REALTORS® are all shareholders of Realcomp (collectively the "Shareholder Defendants") through their attorneys McClelland & Anderson, L.L.P, for their Motion to Dismiss pursuant to Federal Rule of Civil Procedure ("Fed R. Civ. P.") 12(b)(6) state as follows:

1. On October 8, 2010, Plaintiffs Eugene Allan et al ("Plaintiffs") filed their Complaint and Demand for Trial by Jury against the Shareholder Defendants and other Defendants asserting a violation of § 1 of the Sherman Anti-Trust Act (the "Sherman Act") 15 U.S.C. § 1 (the "Antitrust Claim").

2. Plaintiffs have failed to state a claim upon which relief can be granted for the Antitrust Claim against the Shareholder Defendants.

3. Plaintiffs have failed to sufficiently plead the Antitrust Claim in accordance with *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); 127 S. Ct. 1955; 167 L. Ed.2d 929 (2007) and their Complaint should be dismissed in its entirety as to the Shareholder Defendants pursuant to Fed. R. Civ. P. 12(b)(6). Alternatively as a matter of law, Defendant Realcomp Ltd. cannot be deemed to have conspired with the Shareholder Defendants and Plaintiffs' Complaint should be dismissed in its entirety as to the Shareholder Defendants pursuant to Fed. R. Civ. P. 12(b)(6).

4. Pursuant to L.R. 7.1, Shareholder Defendants sought concurrence of counsel with respect to this Motion by way of email correspondence with Todd R. Mendel dated January 5, 2011, who responded he was unable to concur.

WHEREFORE, the Shareholder Defendants respectfully request that this Honorable Court dismiss Plaintiffs' Complaint against them in its entirety with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

McCLELLAND & ANDERSON, L.L.P.
Attorneys for Shareholder Defendants

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Date: January 7, 2011

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Eugene Allan, Deborah F. Allan, Keith Landen, Matthew J. Cavendish, and Traci Cavendish, on behalf of themselves and others similarly situated,

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BRIEF IN SUPPORT OF MOTION TO DISMISS ON BEHALF OF DEFENDANTS DEARBORN BOARD OF REALTORS®, DETROIT ASSOCIATION OF REALTORS®, EASTERN THUMB ASSOCIATION OF REALTORS®, LIVINGSTON ASSOCIATION OF REALTORS®, METROPOLITAN CONSOLIDATED ASSOCIATION OF REALTORS®, NORTH OAKLAND COUNTY BOARD OF REALTORS® AND WESTERN WAYNE OAKLAND COUNTY ASSOCIATION OF REALTORS®

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CONCISE STATEMENT OF ISSUES PRESENTED

1. Whether Plaintiffs have alleged sufficient facts as to Realcomp's shareholders' involvement in the adoption of the challenged MLS policies in order to state a claim as to those defendants under § 1 of the Sherman Antitrust Act (the "Sherman Act"), 15 U.S.C. § 1?

2. Whether regardless of the nature of the shareholders' actual involvement, as a matter of law, Defendant Realcomp can be deemed to have conspired with its shareholders in adopting the challenged MLS policies for purposes of § 1 of the Sherman Act, 15 U.S.C. § 1?

CONTROLLING AUTHORITY FOR RELIEF SOUGHT

1. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955; 167 L. Ed.2d 929 (2007).

2. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752; 104 S. Ct. 2731; 81 L. Ed.2d 628 (1984).

I. THE PARTIES

Defendant Realcomp II, Ltd ("Realcomp") operates a multiple listing service ("MLS") in southeastern Michigan. Realcomp's members[1] are real estate brokers and salespersons who compete with one another to provide residential brokerage services to home buyers and sellers.

According to their Complaint, Plaintiffs Eugene Allan, Deborah F. Allan, Keith Landen, *et al*. (collectively hereafter "Plaintiffs") are "purchasers of real estate brokerage services for real estate listed for sale by member brokers and agents of [Realcomp]."

Defendants Dearborn Board of REALTORS®, Detroit Association of REALTORS®, Eastern Thumb Association of REALTORS®, Livingston Association of REALTORS®, Metropolitan Consolidated Association of REALTORS®, North Oakland County Board of REALTORS®, and Western Wayne Oakland County Association of REALTORS® are all shareholders of Realcomp (collectively the "Shareholder Defendants").

The Shareholder Defendants are all local associations of REALTORS®, the members of which are real estate brokers and salespersons, many of whom are also members of Realcomp and use Realcomp's MLS. Each of the Shareholder Defendants is a Michigan domestic nonprofit corporation, Complaint, ¶¶ 6-12. Each of the seven Shareholder

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[1] Realcomp has no "members" in the legal sense of the word as it is not a membership organized non-profit corporation. Realcomp is a profit corporation whose shareholders are the Shareholder Defendants. The real estate brokerage firms who are comprised of licensed brokers and salespersons are more accurately described as "users," "subscribers" or "participants" in the Realcomp MLS. When referring to these users/subscribers/participants in this brief, the Shareholder Defendants use the term "members" to avoid confusion as that is the term that was (imprecisely) used in the prior Federal Trade Commission proceedings and in the Plaintiffs' Complaint.

Defendants, regardless of its respective size, is empowered to select two members of Realcomp's Board of Governors.

The Shareholder Defendants seek dismissal of the Plaintiffs' Class Action Complaint as to them for failure to sufficiently plead federal antitrust claims.

II. PROCEDURAL HISTORY

The Federal Trade Commission ("FTC") issued an administrative complaint against Realcomp in 2006 in which it alleged that certain of Realcomp's MLS policies were anticompetitive. The case was tried before an administrative law judge, who dismissed the complaint on the basis that there was an insufficient showing of anticompetitive effects. *In the matter of Realcomp II, Ltd*. (Docket No. 9320). The FTC reversed the administrative law judge's decision, holding that the challenged MLS policies constituted an unreasonable restriction of trade in violation of § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, and issued a cease and desist order. On December 31, 2009, Realcomp filed a petition for review of the FTC's decision with the United States Court of Appeals for the Sixth Circuit. Briefs have been filed and the matter is scheduled for oral argument on January 20, 2011. *Realcomp II, Ltd. v. Federal Trade Commission,* No. 09-4596. The FTC matters will be referred to collectively hereafter as the "FTC Proceedings." None of the Shareholder Defendants was a party in the FTC Proceedings.

On October 8, 2010, Plaintiffs filed their Complaint alleging claims against Realcomp, the Shareholder Defendants and others under § 1 of the Sherman Act, 15 U.S.C. § 1 (the "Antitrust Claims"). As the Complaint makes clear, the antitrust claims asserted by Plaintiffs

against all Defendants are a direct result of and based upon the decision of the FTC in the FTC Proceedings. Complaint, ¶¶ 25, 153-197. The Shareholder Defendants seek dismissal of the Complaint in its entirety as to the Shareholder Defendants under Fed. R. Civ. P. 12(b)(6).[2]

III. STANDARD OF REVIEW

Fed. R. Civ. P. 12(b)(6) allows for early dismissal of claims that are deficient on their face. "The purpose of Rule 12(b)(6) is to allow a defendant to test whether, as a matter of law, the plaintiff is entitled to relief even if everything alleged in the complaint is true." *Mayer v. Mylod,* 988 F.2d 635, 638 (6th Cir. 1993).

IV. STATEMENT OF FACTS ALLEGED BY PLAINTIFFS

Realcomp's primary purpose is to operate a real estate multiple listing service ("MLS"). Complaint, ¶ 58. The Realcomp MLS provides a platform for its member real estate brokers and salespersons licensed by the State of Michigan to exchange information about properties listed for sale and offer compensation to cooperating brokers who may find buyers for those properties. Complaint, ¶ 5, ¶ 49. Plaintiffs state that an MLS is "the most effective marketing tool and is much more important than other methods of promoting the sale of residential real estate." Complaint, ¶ 50. Members of Realcomp pay dues and fees to it for

[2] The Shareholder Defendants' sole connection to the FTC Proceedings was through their inclusion in the definition of "Realcomp" contained in the FTC's cease and desist order. That is, in its cease and desist order, the FTC ordered Realcomp, in connection with the operation of its MLS, to cease and desist from enforcing certain policies. The term "Realcomp" was defined in that order to include "Realcomp Owners, Board of Directors [*sic*], its predecessors, successors and assigns . . . ." The term "Owners," in turn, was defined in that order to include the "current and future Boards and Associations of Realtors that are the sole shareholders of Realcomp, which include the [Shareholder Defendants]." Upon information and belief, this definition was taken from the stipulation between the FTC's counsel and Realcomp's counsel referenced in ¶ 110 of the Complaint. The Shareholder Defendants were not parties to the stipulation and did not agree or acquiesce to the stipulation.

services, including the use of the MLS. Complaint, ¶ 57. Realcomp's members compete with one another to provide residential brokerage services to customers in southeastern Michigan. Complaint, ¶ 55. Realcomp's MLS listings are available to its members via Internet access and to the public on websites provided by Realcomp, Realcomp's member brokers, the National Association of REALTORS® and WDIV-TV. Complaint, ¶¶ 61-62. Plaintiffs allege that Realcomp's Board of Governors adopted and maintained three illegal polices for varying periods of time from May 1, 2004 through March 2010. Complaint, ¶¶ 94, 98-100. Plaintiffs refer to the three allegedly illegal policies as the "Realcomp's website policy," "Realcomp's search function policy," and "Realcomp's minimum services requirement" (all three of these policies being collectively referred to as the "Policies"). In the FTC Proceedings, Realcomp stipulated that it was "a combination of its members with respect to the [P]olicies at issue." Complaint, ¶ 110. Plaintiffs further allege that in the FTC Proceedings, the FTC concluded " . . . that the Realcomp Policies are unreasonable and in violation of both Section 1 of the Sherman Act and Section 5 of the FTC Act." Complaint, ¶ 184.

In the introductory sections of the Complaint, Plaintiffs identify the Shareholder Defendants as Michigan nonprofit corporations, who are the owners of Realcomp and whose members select Realcomp's Board of Governors. Complaint ¶¶ 4, 5-12. In paragraphs 33-152 of the Complaint, Plaintiffs set forth the factual allegations against all Defendants (collectively the "Factual Allegations"). The Factual Allegations include specific allegations with respect to Realcomp's members (Complaint, ¶¶ 55-57) and Realcomp's MLS (Complaint, ¶¶ 58-71). The Factual Allegations contain one specific allegation of fact against each of the Shareholder

Defendants, *i.e.*, the Realcomp Board of Governors is selected by the Shareholder Defendants. Complaint, ¶ 94.

A conclusory allegation is set forth in paragraph 107 in which is it alleged that Realcomp, "through its Board of Governors, shareholders, officers, and members, did not let innovative member brokers fairly compete with traditional member brokers . . . when they colluded to interfere with the ability of those innovative member brokers to publicize [exclusive agency] and other discount listings . . . ." The only other reference to the Shareholder Defendants in the Factual Allegations is the ultimate conclusion set forth in paragraph 111 which provides as follows:

> Thus, Realcomp's above policies were the result of agreements and concerted action between and among its Board of Governors, officers, the shareholder defendants who selected the Governors, and Realcomp and shareholder members to restrain competition and thereby adversely affect Plaintiffs and the class members.

In sum, the only specific factual claims asserted by Plaintiffs against the Shareholder Defendants are:

1. They are shareholders in Realcomp; and

2. They each select two members to the Board of Governors of Realcomp.[3]

In Plaintiffs' Complaint, there are no specific allegations that all or any of the Shareholder Defendants had any role of any kind in the operation of Realcomp or its MLS or the actions taken by its Board of Governors with regard to the Policies.

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[3] Plaintiffs allege that the Policies were adopted by Realcomp's Board of Governors. Complaint, ¶¶ 112, 128 & 137. There is no Factual Allegation that the Shareholder Defendants had any involvement, directly or indirectly, in the adoption of the Policies.

V. ARGUMENT

Section 1 of the Sherman Act declares illegal "[e]very contract, combination . . ., or conspiracy, in restraint of trade or commerce." 15 U.S.C. § 1. In order to establish a claim under § 1, a plaintiff must establish that the defendants contracted, combined, or conspired among each other, that the combination or conspiracy produced adverse, anticompetitive effects within the relevant product market, that the objects of conduct pursuant to that contract or conspiracy were illegal, and that the plaintiff was injured as a proximate result of that conspiracy. *Crane & Shovel Sales Corp. v. Bucyrus-Erie* Co., 854 F.2d 802, 805 (6th Cir. 1988).

As will be discussed more fully below, in the present case, Plaintiffs have failed to allege any facts which even purport to show that any of the Shareholder Defendants contracted, combined or conspired to produce the Policies at issue. Neither Shareholder Defendants' status as shareholders of Realcomp, nor their role in selecting Realcomp's Board of Governors is a sufficient allegation to state a claim under § 1 of the Sherman Act. Finally, Plaintiffs should not be afforded the opportunity to amend their Complaint to cure this defect for the simple reason that Realcomp cannot, as a matter of law, be deemed to have conspired with the Shareholder Defendants in connection with the Policies at issue.

A. As to Shareholder Defendants, Plaintiffs Have Failed to Allege Sufficient Facts to State a Claim Against the Shareholder Defendants.

The standard for pleading the elements of a Sherman Act claim has been set out on several occasions by the Sixth Circuit Court of Appeals. In *Found for Interior Design Educ. Research v. Savannah Coll. of Art & Design*, 244 F.3d 521 (6th Cir. 2001), the Court stated:

> The essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a defendant's 12(b)(6) motion. While the pleading standard under the federal rules is very liberal, the 'price of entry, even to discovery, is for the plaintiff to allege a factual predicate concrete enough to warrant further proceedings, which may be costly and burdensome.'

Id. at 530 (*internal citations omitted*). *See also, Crane & Shovel Sales Corp., supra,* at 805(essential elements of a private antitrust claim must be alleged in more than vague and conclusory terms to prevent dismissal of the complaint on a 12(b)(6) motion). In similar terms, the Supreme Court has said that while a complaint does not need detailed factual allegations:

> [A] plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do, see *Papasan v. Allain*, 478 U.S. 265, 286, 106 S. Ct. 2932; 92 L. Ed.2d 209 (1986) (on a motion to dismiss, courts 'are not bound to accept as true a legal conclusion couched as a factual allegation').

Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555; 127 S. Ct. 1955; 167 L. Ed.2d 929 (2007).

In *Twombly*, the Supreme Court addressed the allegations necessary to state a claim under § 1 of the Sherman Act, which prohibits only restraints effected by contract, combination, or conspiracy. Because a claim under § 1 of the Sherman Act is at its core about an agreement, *i.e.*, a contract, combination, or conspiracy, the Supreme Court in *Twombly* was sensitive to what, exactly, the complaint alleged the defendants had done to give rise to such an agreement.

> The need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.' . . . An

> allegation of parallel conduct is thus much like a naked assertion of conspiracy in a § 1 complaint: it gets the complaint gets the complaint close to stating a claim, but without further factual enhancement it stops short of the line between possibility and plausibility of 'entitle[ment] to relief.' Cf. *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 56 (CA 1 1999).

Id. at 557.

Acknowledging the high cost of federal antitrust litigation, and antitrust discovery in particular, the *Twombly* Court added that the requirement of allegations suggesting an agreement serves the practical purpose of preventing a plaintiff with "a largely groundless claim" from "tak[ing] up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value." *Id*. at 558, citing *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 347; 125 S. Ct. 1627; 161 L. Ed. 2d 577 (2005), quoting *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 741; 95 S. Ct. 1917; 44 L. Ed.2d 539 (1975).

The allegations by Plaintiffs in this case fall short of these standards. Plaintiffs' conclusory allegations in paragraph 107 that Realcomp, "through its Board of Governors, shareholders, officers, and members, did not let innovative member brokers fairly compete with traditional member brokers . . . when they colluded to interfere with the ability of those innovative member brokers to publicize [exclusive agency] and other discount listings . . . " is not based on any apparent factual matter in the Complaint. In the same vein, the conclusion in paragraph 111:

> Thus, Realcomp's above policies were the result of agreements and concerted action between and among its Board of Governors, officers, the shareholder defendants who selected the Governors, and Realcomp and shareholder members to restrain competition and thereby adversely affect Plaintiffs and the class members.

is not based upon any preceding allegation of "agreements" or "concerted action" that would justify that conclusion (or beginning the sentence, "Thus . . .).

Plaintiffs' Complaint leaves no doubt that their § 1 claims against the Shareholder Defendants are based solely on the status of the Shareholder Defendants as shareholders in Realcomp and the fact that each of the Shareholder Defendants selects two of the Board of Governors of Realcomp. No other actions by the Shareholder Defendants related to the adoption, implementation, or enforcement of the Policies is alleged. Plaintiffs provide details as to the mechanics of Realcomp's MLS (¶¶ 49-54), dissemination of the listings on the MLS via websites (¶¶ 62-68), the distinctions made in listings under the Policies adopted by Realcomp (¶¶ 93-96, 112, 128, 137), and how they appear in the MLS or on the websites (¶¶ 97-99, 112-119, 128-135, 137-141). None of these allegations, however, include any actions by the Shareholder Defendants. Nor do they suggest that the Shareholder Defendants' actions – limited to each selecting two of the Governors on the Board of Governors – were in any way related to the Policies that are the subject of the Complaint. Rather, as discussed further below, those actions are simply consistent with the ownership of stock, which carries with it the power to elect directors.

The Shareholder Defendants were not parties to FTC Proceedings detailed in the Complaint. The actions set out in the FTC Proceedings do not include any findings of any actions by the Shareholder Defendants. Nothing in that factual context suggests that the Policies therefore represent an agreement, conspiracy, or the product of any other action by the

Shareholder Defendants. There is nothing about appointing directors or holding shares in Realcomp that would, by itself establish agreement or itself constitute a Sherman Act offense.

Without any factual allegation of the essential element of an agreement by the Shareholder Defendants as to the Policies, the Complaint fails to state a claim against them. See, *Crane & Shovel Sales Corp., supra,* at 805 ("Since either conspiracy or restraint of trade is an essential element of a Section 1 Sherman Anti-Trust claim, failure to allege either one justifies dismissal of an antitrust claim.")

B. Neither the Shareholder Defendants' Status as Shareholders of Realcomp, Nor Their Role in Electing Realcomp's Board of Governors is Sufficient to State a Claim Under § 1 of the Sherman Act.

Where there is no allegation that a corporate shareholder has engaged in independent anticompetitive behavior, the ownership of shares does not make the shareholder liable without resort to piercing the corporate veil, based upon facts that would justify doing so. In the present case, Plaintiffs allege neither independent actions on the part of the Shareholder Defendants nor any facts that would support piercing the corporate veil.

The Sherman Act, Clayton Act, and FTC Act do not, by their terms, make shareholders liable for the actions of a corporation in violation of the provisions of those acts. Antitrust cases addressing the issue of piercing the corporate veil do not hold shareholders liable where their only actions are stock ownership – even 100 percent – and the election of directors. Thus, where there was no evidence that a parent corporation had engaged in any operations of a wholly-owned subsidiary, "let alone that it participated in any possibly unlawful practice or conduct," the parent:

> can therefore not be held liable for having participated directly in the antitrust violations. If liability is to be imposed, it would have to be on the theory that [the parent] is responsible for the acts of its subsidiaries. But a parent corporation is not liable for its subsidiaries' acts simply because the parent owns all the stock of the subsidiaries and shares common officers and directors. *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir. 1963); *Spears v. Transcontinental Bus System*, 226 F.2d 94, 98 (9th Cir. 1955), *Cert. denied,* 350 U.S. 950, 76 S. Ct. 326, 100 L. Ed. 828 (1956); Annot., 7 A.L.R.3d 1343, 1350-51 (1966).

Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co. Ltd., 467 F. Supp. 841, 854 (M.D. Cal. 1979), *aff'd on other grounds*; *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981). Accord, *United Nat'l Records, Inc. v. MCA, Inc.*, 616 F. Supp. 1429 (N.D. Ill. 1985); *Reynolds Metals Co. v. Columbia Gas System, Inc.,* 669 F. Supp. 744, 750-51 (E.D. Va. 1987) (granting 12(b)(6) motion). *See*, *Caribbean Broadcasting System, Ltd. v. Cable & Wireless P.L.C.*, 148 F.3d 1080, 1088-1089, (D.C. Cir. 1998) (rejecting Sherman Act §§ 1 and 2 claims against a company on the basis of its ownership of 27% of the stock of a competitor of plaintiff; as the court observed, "one company's minority ownership interest in another company is not sufficient by itself to make the owner a competitor, for purposes of the antitrust laws, of the subsidiary's rivals.").

These holdings are in line with the general rule explained by the Supreme Court in a case seeking to hold a parent/shareholder corporation liable under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"):

> CERCLA is thus like many another congressional enactment in giving no indication that 'the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute,' *Burks v. Lasker*, 441 U.S. 471, 478, 99 S. Ct. 1831, 1837; 60 L. Ed.2d 404 (1979), and the failure of

> the statute to speak to a matter as fundamental as the liability implications of corporate ownership demands application of the rule that '[i]n order to abrogate a common-law principle, the statute must speak directly to the question addressed by the common law,' *United States v. Texas*, 507 U.S. 529, 534, 113 S. Ct. 1631, 1634, 123 L. Ed.2d 245 (1993) (internal quotation marks omitted). The Court of Appeals was accordingly correct in holding that when (but only when) the corporate veil may be pierced, may a parent corporation be charged with derivative CERCLA liability for its subsidiary's actions. [*Internal footnotes omitted*].

United States v. Bestfoods, 524 U.S. 51, 63-64, 118 S. Ct. 1876 (1998).

Without a showing of any independent action by the Shareholder Defendants, to hold them liable as shareholders, the Complaint:

> would have to show that the subsidiary was a mere instrumentality of the parent, indicated by such facts as inadequate capitalization, absence of independent activity, action in the interest of the parent rather than the subsidiary, and failure to observe the legal requirements of separate corporate existence. *Steven v. Roscoe Turner Aeronautical Corp., supra,* 324 F.2d at 161; Annot., *7* A.L.R.3d 1343, *[s]upra*, at 1354-55.

Shipowners & Merchants Towboat, supra, at 854.

Although the circumstances for piercing the corporate veil may vary from case to case, Plaintiffs do not allege any such theory or the facts to justify its application to hold the Shareholder Defendants liable for the actions alleged to violate the antitrust laws here. So far as can be told from the Complaint, the Shareholder Defendants hold shares of stock and each selects two of the Board of Governors. Beyond that, nothing in the Complaint suggests that they exercise any other control. See, e.g., *Kennecott Copper Corp. v. Curtiss-Wright Corp.,* 584 F.2d 1195, 1205 (2d Cir. 1978) (finding no violation of § 8 of Clayton Act where interlocked parent

corporations had competing subsidiaries, but reserving issue whether statute would cover "parent corporation that closely controls and dictates the policies of its subsidiary"); *Phoenix Canada Oil Co. Ltd. v. Texaco, Inc.,* 658 F. Supp. 1061, 1084-85 (D. Del. 1987) (holding that parent is liable for acts of subsidiary under agency theory only if parent "dominates" subsidiary; parent of wholly-owned subsidiary that had seats on board, took part in financing, and approved major policy decisions was not liable because parent did not have day-to-day control); *Gledhill v. Fisher & Co.*, 272 Mich. 353, 357-358; 262 N.W. 371 (1935) (under Michigan law, "[b]efore the corporate entity may be properly disregarded and the parent corporation held liable for the acts of its subsidiary . . . it must be shown not only that undue domination and control was exercised . . . but also that this control was exercised in such a manner as to defraud and wrong the complainant, and that unjust loss or injury will be suffered by the complainant as the result of such domination unless the parent corporation be held liable.")

The election of directors does not make the shareholder liable for the actions of the corporation in which it holds stock. As Justice Souter explained in *Bestfoods*, *supra,* at 61-62:

> 'Thus it is hornbook law that 'the exercise of the "control" which stock ownership gives to the stockholders . . . will not create liability beyond the assets of the subsidiary. That "control" includes the election of directors, the making of by-laws . . . and the doing of all other acts incident to the legal status of shareholders. Nor will a duplication of some or all of the directors or executive officers be fatal.' *Douglas [& Shanks, Insulation from Liability to Subsidiary Corporations*, 39 Yale Law Journal 193 (1929)] 196.

The allegations of the Complaint fail to allege any independent actions by the Shareholder Defendants. Nothing in the Complaint states or even implies a basis for piercing the corporate veil of Realcomp to make the Shareholder Defendants liable for the Policies of Realcomp.

C. As a Matter of Law, Realcomp Cannot be Deemed to Have Conspired with the Defendant Shareholders in Connection with the Policies at Issue.

Even assuming Plaintiffs had alleged facts from which even an inference could be made that the Shareholder Defendants had participated in Realcomp's Board of Governors' decision to adopt the Policies, as a matter of law, the Shareholder Defendants could not deemed to have conspired with Realcomp under § 1 of the Sherman Act. As will be discussed below, the Shareholder Defendants are a conglomeration of legally distinct entities who cannot conspire among themselves where, as with the adoption of the Policies, would be pursuing the common interests of the MLS rather than the separate interests of the various local associations.

In the seminal case, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752; 104 S. Ct. 2731; 81 L. Ed.2d 628 (1984), the Supreme Court was asked to determine whether a parent and its wholly-owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. The Court noted first that obviously a corporation and its unincorporated division are not capable of conspiring in violation of § 1 of the Sherman Act. The Court concluded that liability under § 1 of the Sherman Act should not depend on whether a "corporate subunit" is organized as an unincorporated division or a wholly-owned subsidiary. The Court found that a parent and its wholly-owned subsidiary always have a "unity of

purpose," and that "the ultimate interests of the subsidiary and the parent are identical," such that they must be viewed as a single economic unit. *Id*. at 771-772. The Supreme Court concluded that coordinated behavior of a parent and its wholly-owned subsidiary are, therefore, not subject to claims under § 1 of the Sherman Act.

In its decision, the Supreme Court in *Copperweld* explicitly stated that "[w]e do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own." *Id*. at 766. Since *Copperweld*, many courts have applied the *Copperweld* decision in cases that do not involve a wholly-owned subsidiary of a single parent, but do involve related entities or other conglomeration of two or more legally distinct entities.

For example, in *Mt. Pleasant, Iowa v. Associated Electric Coop.*, 838 F.2d 268 (8th Cir. 1988), a single entity ("Associated") operated an electrical generating plant. Associated was owned by six transmission cooperatives who each purchased electricity from Associated and transported electricity for sale in their respective regions. Associated also provided electricity to third parties at rates higher than it charged to its members. A third party customer brought a conspiracy claim under § 1 of the Sherman Act, which had been summarily dismissed by the District Court for the Eastern District of Missouri based upon the analysis in *Copperweld*. On appeal, the plaintiff argued that *Copperweld* analysis should not be extended to cases that do not involve a wholly-owned subsidiary of a single parent. The Eighth Circuit Court of Appeals rejected this argument, noting that "the logic of *Copperweld* reaches beyond its bare result." *Id*. at 274. The Court then applied the principles in *Copperweld* and found that Associated's

constituent members, although legally distinct entities, comprised a single enterprise pursuing a common goal of generating low cost electricity:

> Because [such] coordination . . . does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not activity that warrants § 1[of the Sherman Act] scrutiny.

Id. at 274 (citing *Copperweld*, *supra*, at 770-771).

The broader applicability of *Copperweld* was recently confirmed by the United States Supreme Court in *American Needle Inc. v. Nat'l Football League,* _____ U.S. _____; 130 S. Ct. 2201; 176 L. Ed.2d 947 (2010). In that case, the Supreme Court noted that in order to determine whether the actions of the National Football League, an unincorporated association of thirty-two separately-owned football teams, should be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act, "the inquiry is one of competitive reality," rather than whether or not the parties to the alleged § 1 violation are legally distinct entities:

> . . . there is not necessarily concerted action simply because more than one legally distinct entity is involved.
>
> * * *
>
> The relevant inquiry, therefore, is whether there is "a contract, combination . . . or conspiracy" amongst "separate economic actors pursuing separate economic interests . . . ."

Id. at 2210, 2212.

The law is also clear that a conglomeration of legally distinct entities may be viewed as a single enterprise for § 1 purposes in some contexts, but not in others. The question is whether in taking the action being challenged, the legally distinct entities were pursuing the common interests of the whole or pursuing interests separate from the group itself. In other

words, does the conduct complained of restrain competition at the same level at which these legally distinct entities had previously competed?

The case of *Nurse Midwifery Assoc. v. Hibbett*, 918 F.2d 605 (6th Cir. 1990), *order modified on reh'g,* 927 F.2d 904 (6th Cir. 1991), for example, involved a claim by several nurse midwives that a hospital and individual members of the hospital's medical staff had conspired to deny them privileges. The issue before the Sixth Circuit Court of Appeals was whether under *Copperweld*, there could be a § 1 conspiracy between the hospital and its medical staff. The Court rejected the argument that because the medical staff members were competitors, every decision of the medical staff was subject to § 1 scrutiny. The Court determined that whether or not such a combination could exist depended on the nature of the decision being examined, and whether or not that decision affected the competition between the medical staff members. The Court stated:

> The fact that medical staff members may be in competition with each other does not mean that every decision of the medical staff warrants scrutiny under section 1 of the Sherman Act. When the staff as a group makes decisions or recommendations for the hospital in areas that do not affect the market in which they compete as individuals, there is no reason not to treat them as agents of the hospital. However, when competing physicians are making privilege recommendations concerning another competitor, sufficient anticompetitive concerns are raised to warrant a conclusion that the members of the medical staff are not acting as agents of the hospital for purposes of applying the intracorporate conspiracy doctrine to preclude a conspiracy among staff members.

Nurse Midwifery, Id. at 614.

The application of the *Copperweld* decision to the role of the Shareholder Defendants in the case at hand is perhaps best illustrated by contrasting two cases, one federal and one out of the state of California, involving Sandicor, a regional MLS, the shareholders of which were a number of local REALTOR® associations. At issue in the federal case, *Freeman v. San Diego Ass'n of REALTORS®*, 322 F. 3d 1133 (9th Cir. 2003), was a support fee paid by Sandicor to the local REALTOR® associations to compensate them for certain administrative work they did for the Sandicor MLS. Testimony at trial had established that Sandicor charged each MLS subscriber (real estate agent) $44/month, $21.50 of which was retained by Sandicor and $22.50 of which was paid to the particular subscriber's local association as a "support fee." Testimony had also established that, originally, the local REALTOR® associations had set their own support fees and that these fees had varied between $10 and $50.

Plaintiffs were real estate agents who subscribed to Sandicor's MLS. While the Plaintiffs had no objection to Sandicor's monopoly MLS database itself, Plaintiffs argued that Sandicor's price was inflated because the support fees Sandicor paid the local associations "are fixed at a supracompetitive level." *Id*. at 1142.

The defendants – both Sandicor and its local association shareholders – argued that under the *Copperweld* decision, they were immune from § 1 of the Sherman Act liability because together they constituted a single entity and were thus incapable of conspiring with one another. The District Court for the Southern District of California agreed and granted the defendants summary judgment on this basis. The Ninth Circuit Court of Appeals overturned that decision.

In its decision, the Court of Appeals noted that under the "board of choice" system of National Association of REALTORS® ("NAR"), the local associations were now actual competitors. Prior to 1994, the Court noted, NAR's rules required a REALTOR® to join the local association in the geographical area where the REALTOR®'s office was located. Under the "board of choice" system NAR had adopted in 1994, a REALTOR® could choose its local association and thus, local associations now competed for members.

The Court of Appeals found that the local associations were not immune from § 1 liability in this instance because in providing support services, they were not functioning as one economic unit. Since REALTORS® could subscribe to Sandicor's service by joining any of the defendant local REALTOR® associations, and because Sandicor paid support fees to local associations on a per-subscriber basis, the defendant local associations were, in fact, actual competitors. In overturning the decision of the lower court, the Court noted that the defendants had admitted that they fixed support fees because otherwise some local associations would have been able to offer MLS services at much lower prices than other local associations. The Court concluded "[r]arely do antitrust defendants serve up their own heads on so shiny a silver platter." *Id*. at 1150.

In an (earlier) California case against Sandicor and its local association shareholders, the plaintiffs had argued that the total MLS fee charged by Sandicor for access to the MLS was excessive. *Freeman v. San Diego Ass'n of REALTORS®*, 77 Cal. App. 4th 171; 91 Cal. Rptr.2d 534 (2000). The defendants in that case – again, both Sandicor and its local association shareholders – argued that the local associations could not conspire with Sandicor

to fix prices because they were not separate entities holding separate and independent economic interests.

While the complaint was based upon the California antitrust statute, the California Court examined federal precedent because the state statute was "similar in language and in purpose to the Sherman Act." The Court examined *Copperweld*, *supra*, along with *Mt. Pleasant*, *supra,* and *In re Appraiser Foundation Antitrust Litigation*, 867 F. Supp. 1407 (D. Minn. 1994). The Court recognized that the question was whether the conduct complained of operated to restrain competition at the same level at which these actors previously had been actual or potential competitors. The Court found that while the local associations competed for members, they were not actual or potential competitors with Sandicor for county-wide MLS service. Accordingly, for this purpose, the local associations could not conspire with the MLS for purposes of § 1 liability:

> The combination of entities into Sandicor to provide a new service . . . does not support conspiracy theories of antitrust liability. The combination of the local associations is a single enterprise whose members are interdependent (because its product arises only from the unified whole) and share the common purpose of creating and marketing the new product rather than a 'joining of two independent sources of economic power previously pursuing separate interests.'

Freeman, supra, 77 Cal. App. 4th at 193 (citing *Copperweld*, *supra* at 771).

As in the California case involving Sandicor, in the present case, the Policies in no way affect competition at the level at which the Shareholder Defendants would ordinarily compete with each other. Thus, even assuming for purposes of argument only that the Shareholder Defendants had somehow participated in the adoption of the Policies, under the

analysis in *Copperweld* and its progeny, their actions would not be subject to scrutiny under § 1 of the Sherman Act.

VI. CONCLUSION

Plaintiffs allege in their Complaint that the Policies were adopted by the Board of Governors of Realcomp to illegally inhibit competition from brokers using and desiring to use so-called exclusive agency listings or other discount listings. Complaint, ¶103. Plaintiffs' Complaint does not allege that the Shareholder Defendants were involved in adopting these Policies, only that the Policies "were adopted by the Board of Governors selected by members of the Shareholder Defendants." Complaint, ¶ 94. Certainly such action on the part of the Shareholder Defendants is not sufficient to state a claim under § 1 of the Sherman Act, as it always the case that the directors of a corporation are chosen by its shareholders.

Moreover, even if through discovery it could be established that one or more of the Shareholder Defendants were somehow involved in the adoption of the Policies, they could not be found to have conspired within the meaning of § 1 of the Sherman Act for the simple reason that in adopting the Policies, the local associations would have been pursuing the common interest of the whole (*i.e.*, the Realcomp MLS) rather than the separate economic interest of the local associations. In other words, the challenged MLS Policies do not in any way affect the competition that existed between the Shareholder Defendants. Where coordinated action of legally distinct entities comprising a single enterprise does not represent a sudden joining of independent sources of economic power previously pursuing separate interests, it is

not activity that warrants § 1 scrutiny. *Mt. Pleasant, supra*, at 274 (citing *Copperweld*, *supra*, at 770-771).

In summary, as it relates to the MLS Policies of Realcomp, Plaintiffs have not stated a claim, and in fact could not state a claim, against the Shareholder Defendants under § 1 of the Sherman Act.

VII. RELIEF REQUESTED

For the reasons stated, the Shareholder Defendants respectfully request that this Honorable Court dismiss the Plaintiffs' Complaint against them in its entirety with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

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CERTIFICATE OF SERVICE

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