UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EUGENE ALLAN, et al.,

Plaintiffs,

v.

REALCOMP II, LTD., et al.,

Defendants.
_________________________________/

Case No. 10-cv-14046

HONORABLE STEPHEN J. MURPHY, III

ORDER DENYING DEFENDANT ASSOCIATIONS OF REALTORS' MOTIONS TO DISMISS (docket no. 38)

From 2004 to 2007, Realcomp II Ltd. (Realcomp) prevented publicly-accessible websites from receiving information on homes for sale in the southeast Michigan region listed by brokers using alternative contracting models with home sellers. The Federal Trade Commission (FTC) found that Realcomp's rules constituted an illegal restraint on trade. *In re Realcomp II, Ltd.*, No. 9320 (F.T.C. Oct. 30, 2009), *available at* http://ftc.gov/os/adjpro/d9320/091102realcomporder.pdf The Sixth Circuit affirmed. *Realcomp II, Ltd. v. F.T.C.*, 635 F.3d 815 (6th Cir. 2011). Plaintiffs, individual home sellers during the relevant time period, claim that they paid more for brokerage services than they otherwise would have paid had the restrictions not been in place. To recoup their losses, they filed this putative class-action lawsuit pursuant to § 1 of the Sherman Act. The suit names Realcomp, along with a number of individuals and organizations with ties to Realcomp, as defendants.

Among the named defendants are the owners of Realcomp — local trade associations composed of licensed members of the National Association of Realtors.[1] These "Shareholders," as the Court will refer to them in this Order, argue that they cannot be held liable for the actions of Realcomp, and have moved to dismiss the complaint as it pertains to them under Civil Rule 12(b)(6) for failure to state a claim upon which relief can be granted. The motion presents the narrow legal issue of whether trade organizations that own and, through appointees, control a single corporation that provides an essential service for members of all of the organizations, can be held liable for the anticompetitive acts of that corporation. The Court will answer that question "yes," and will accordingly deny the motion to dismiss.

STANDARD OF REVIEW

Civil Rule 12(b)(6) allows dismissal of actions that "fail to state a claim upon which relief can be granted." A district court should only grant a motion to dismiss "'if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Minger v. Green*, 239 F.3d 793, 797 (6th Cir. 2001) (quoting *Sistrunk v. City of Strongsville*, 99 F.3d 194, 197 (6th Cir. 1996)). In evaluating a motion to dismiss, the Court presumes the truth of all well-pled factual assertions. *Bishop v. Lucent Techs.*, 520 F.3d 516, 519 (6th Cir. 2006); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))). All reasonable factual inferences are to be drawn in favor of the non-moving

---

[1] These organizations are: 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.

party. *Dubay v. Wells*, 506 F.3d 422, 427 (6th Cir. 2007). "Detailed factual allegations" are not required. *Twombly*, 550 U.S. at 555.

Twombly, the first of the Supreme Court's two recent important decisions refining the law applicable to Civil Rule 12(b)(6) standards, is particularly relevant in a Sherman Act case. The *Twombly* Court held that the Civil Rules require a complaint with "enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement." *Twombly*, 550 U.S. 544, 556 (2007). It emphasized the need for judges to "'insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed.'" *Id.* at 558 (quoting *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983)). In doing so, it discarded the simplistic notion that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove not set of facts in support of his claim which would entitle him to relief," *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957), as an "incomplete, negative gloss on an accepted pleading standard." *Twombly*, 550 U.S. at 563.

Nonetheless, the Court's experience with Rule 12(b)(6) motions suggests that litigants are prone to read too much into *Twombly*. Two aspects of the opinion counsel restraint. First, *Twombly* was concerned not with Sherman Act cases generally, but with a particular problem in such cases: accusations of "consciously parallel" activity that fall short of a showing of an agreement. *Twombly*, 550 U.S. at 557 ("A statement of parallel conduct . . . needs some setting suggesting the agreement necessary to make out a § 1 claim; without that further circumstance . . . an account of a defendant's commercial efforts stays in neutral territory."). Second, the *Twombly* Court itself believed it was merely refining existing pleading standards, in light of what was an exceptional, high-stakes antitrust case.

Id. at 559 (noting the enormous potential scope and expense of the *Twombly* complaint). A plaintiff has always been required to show the "grounds" for his or her claim of relief, including the factual basis on which the legal claims rest. *Id.* at 555 n.3. *Twombly*, like the law before it, requires *enough* facts to make a claim plausible, but not detailed facts. While the Court is sensitive to *Twombly*'s concerns, it is too elemental to say that the opinion requires courts to uncritically apply heightened scrutiny to complaints.

BACKGROUND

A complete summary of the FTC case against Realcomp that forms the backdrop for this litigation may be found in *Realcomp*, 635 F.3d at 819–22. The Court is aware that the Shareholders were not parties to the initial FTC complaint. While the FTC case and this motion present very different issues and confusion is unlikely, the record should nonetheless reflect the Court's understanding that the Sixth Circuit's decision does not dictate a result in this motion.

Realcomp operates the primary "multiple listing service" (MLS) for real estate in southeast Michigan. An MLS is "a database of information about properties for sale . . . that can be viewed and searched by all other local brokers who practice in the area and participate in the MLS." *Realcomp*, 635 F.3d at 820 (internal quotation marks and citation to administrative appendix omitted). The database facilitates information-sharing among brokers representing buyers and sellers. Typically, the MLS itself is closed to those who are not licensed real estate brokers, but it does provide information on listings to web sites open to the general public, such as MoveInMichigan.com, Realtor.com, and ClickonDetroit.com. As might be expected when competitors enter a joint venture, services like Realcomp have been the subject of antitrust scrutiny (for decades). *See generally* Arthur D. Austin, *Real Estate Boards and Multiple Listing Systems as Restraints of Trade*,

70 Colum. L. Rev. 1325 (1970). In 2006, the FTC charged Realcomp with placing unreasonable constraints on the competition for broker services in its coverage area through its policies for deciding which properties listed on the MLS were provided in the feeds to publicly-accessible websites.

To comprehend the charges against Realcomp, a basic understanding of service arrangements between brokers and home sellers is required. The dominant business model for a real estate broker working on behalf of a person selling a home is an Exclusive Right to Sell (ERTS) contract. In this arrangement, the listing, or selling, broker is the exclusive sales agent for a certain period of time. If the home is sold within that time period, the listing broker collects a fee. That fee is usually split with a cooperating, or buying, broker, with whom the listing broker negotiates in order to complete the transaction. But the fee paid by the seller is independent of whether or not the listing agent finds a cooperating agent to work with. Therefore, if the home is sold to an unrepresented buyer, the listing agent still receives the entire agreed-upon fee, collecting a windfall.

Certain brokers saw the ERTS contract as inefficient, and began proposing alternative models. One such model is an Exclusive Agency (EA) agreement. Under an EA contract, the broker agrees to take less or no compensation if the property is sold without further assistance from the listing broker. No fees are paid to a cooperating broker unless one is actually utilized. As a trade-off, certain services which are typically performed by listing brokers in an ERTS deal are either not provided or paid for on an as-needed basis by the seller. In addition to EA agreements, there are a number of other alternative fee systems, all falling under the general heading of “discount” brokerage arrangements, which place market pressure on the traditional ERTS model by cutting back on fees typically associated with selling a home.

The FTC alleged that Realcomp discriminated in favor of brokers using ERTS arrangements over those offering discount contracts, in violation of § 5 of the Federal Trade Commission Act, which tracks § 1 of the Sherman Act. 15 U.S.C. § 45; *see Realcomp*, 635 F.3d at 824 ("[T]he same analysis applies to both violations of Section 1 of the Sherman Act and Section 5 of the FTC Act."). Realcomp did this by creating policies that prevented listings from being placed on the feeds to publicly-accessible websites unless they met certain “minimum services” criteria in their arrangements with home sellers. These requirements blocked discount brokers from appearing on the websites, since the essence of their business was offering fewer services than a broker in an ERTS arrangement. Choking off the flow of discount broker listings to the public had a serious impact on the business of discount brokers, which are dependent on attracting the attention of non-represented buyers and eliminating the "middleman" role played by other brokers in order to provide a lower price to their clients.

The FTC's chief administrative law judge dismissed the case against Realcomp in 2007, but a full panel of the FTC unanimously reversed. It found that (1) Realcomp’s policies in this regard were inherently circumspect and presumptively unlawful, and (2) the policies violated federal law under a full rule-of-reason analysis because of their likely anti-competitive effects. The Sixth Circuit affirmed the FTC on a full rule-of-reason analysis.

The most important facet of Realcomp, as it relates to this motion, is its relationship to the Shareholders. *See* Compl. ¶¶ 6–12 (describing the Shareholders). The Shareholders are all local real-estate boards in southeast Michigan that are structured as Michigan nonprofit corporations and owned by their member Realtors. They formed Realcomp as a joint venture in order to provide a region-wide MLS to their members. Individual membership in Realcomp is only open to brokers who belong to one of the

Shareholders. Each Shareholder appoints two members to Realcomp's Board of Governors (Board). There are also contractual agreements between the Shareholders and Realcomp, although the scope and substance of these agreements are not yet a subject of this case.

DISCUSSION

Every §1 case requires a "contract, combination . . . or conspiracy" between multiple legal persons. 15 U.S.C. § 1. This requirement is not met if the named persons in the complaint act as a "single enterprise" for purposes of the economic decisions in question. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 771 (1984). Trade or professional organizations, like the Shareholders, can be a target of antitrust scrutiny when they make rules or policies because they represent a collective of individual competitors. *See, e.g.*, *Cal. Dental Assn. v. FTC*, 526 U.S. 756 (1999); *Am. Soc'y of Mechanical Engineers v. Hydrolevel*, 456 U.S. 556 (1982); *Nat'l Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679 (1978). Similarly, joint ventures, such as Realcomp, also pose a threat of anticompetitive decisionmaking. *See, e.g.*, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979) (blanket licensing companies formed by composers); *Associated Press v. United States*, 326 U.S. 1 (1945) (reporting organization formed by newspapers). This case presents a novel combination of the two arrangements, with numerous trade organizations entering a joint venture on behalf of their members.

The Shareholders argue that this structure renders them a "single entity" for purposes of § 1 with respect to decisions Realcomp makes that do not effect competition between the Shareholders. Because decisions about what listings are placed on publicly accessible feeds only impacts competition between the Shareholders' *members* for real-estate listings, they conclude that they are immune from antitrust scrutiny for the decisions that prompted

the scrutiny of the FTC. The Court disagrees. The complaint can be read reasonably to allege that the Shareholders exist to serve their members, and that through their ability to influence Realcomp policy, the Shareholders implemented the will of more established brokers using ERTS models so as to reduce competition from discount brokers. Accordingly, dismissal of the case against the Shareholders at this stage would be inappropriate.

I. <u>"Piercing the Corporate Veil" in the § 1 Context</u>

Shareholders rely primarily on principles of corporate law to defeat the notion that they can be held liable for a § 1 violation because of the actions of Realcomp. The members of Realcomp's Board, they argue, are not agents of the Shareholders, but of Realcomp itself. When the Board allegedly agreed to limit the exposure of EA listings to the public, the Shareholders' argument goes, that was a decision of Realcomp that could not be imputed to the authority of the Shareholders. *See Popkin v. Dingman*, 366 F. Supp. 534, 539 (S.D.N.Y. 1973) ("Directors are not agents of the shareholders who elect them. They are fiduciaries with duties running primarily to the corporation."). *But see Wallad v. Access BIDCO, Inc.*, 236 Mich. App. 303, 306–07 (1999) ("[T]he directors of a corporation owe fiduciary duties to *stockholders* . . . . A 'fiduciary duty' is '[a] duty to act for someone else's benefit, *while subordinating one's personal interests to that of the other* person.'" (second alteration and emphasis original) (quoting Black's Law Dictionary, 6th ed. (1990))). Nonetheless "there is an equally fundamental principle . . . that the corporate veil may be pierced and the shareholder held liable for the corporation's conduct when, *inter alia*, the corporate form would otherwise be misued to accomplish certain wrongful purposes . . . ." *United States v. Bestfoods*, 524 U.S. 51, 63 (1998).

Nowhere is the latter principle more pronounced than in antitrust. Courts tend to "eschew[ ] . . . formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate" when analyzing a § 1 issue. *Am. Needle, Inc. v. Nat'l Football League*, 130 S. Ct. 2201, 2210 (2010); *see also* Edward B. Rock, *Corporate Law Through an Antitrust Lens*, 92 Colum. L. Rev. 497, 506 (1992) ("From the corporate law perspective, what is perhaps most striking about the antitrust treatment of joint ventures has been the ease with which the courts have pierced the corporate veil to find a 'contract, combination or conspiracy.'").

This principle was raised early in the Supreme Court's antitrust jurisprudence. In *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912), a group of railroads formed a corporation for the purpose of acquiring the terminal facilities and rail bridges in the St. Louis, Missouri area. *Terminal R.R. Ass'n*, 224 U.S. at 391–92, 399. The shareholder railroads also appointed the defendant's directors. *Id.* at 400. The Court found that the corporation's rules charging more money for terminal usage by non-shareholder railroads were a violation of the Sherman Act on the part of the terminal company and its shareholder railroads. *Id.* Under the circumstances of the case, the Court concluded that the terminal corporation could not be said to be truly "independent" of the control of the railroads, despite the use of a separate corporation to manage the terminal company. *Id.* at 409.

Later cases followed these principles. For instance, in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), the defendant corporation's primary shareholders were licensees of the defendant's products, and both its board of directors and executive committee were dominated by shareholder-licensees. *Id.* at 352–53. The Court found that the defendant was a "mere creature or instrumentality of its stockholders," and concluded that the

licensees were liable for a Sherman Act violation because it was implausible to suggest its officers "wore a Sealy hat when they were acting on behalf of Sealy." *Id.* at 353 (internal quotation marks omitted). Likewise, in *Associated Press*, the Court found that by-laws made by the AP regarding the sale of news to non-member agencies were a combination in restraint of trade among the member newspapers, rather than unilateral action on the part of the AP. *Associated Press*, 326 U.S. at 12–13.

The Court reinforced these basic principles in its recent *American Needle* decision. After analyzing many of the Supreme Court's decisions in this area, the Court explained that when the capacity of the named defendants to conspire is in question, "[t]he relevant inquiry . . . is whether there [are] 'separate economic actors pursuing separate economic interests,' such that the agreement 'deprives the marketplace of independent centers of decisionmaking' . . . ." *Am. Needle*, 130 S. Ct. at 2212 (quoting *Copperweld*, 467 U.S. at 769). The defendants in that case — the thirty-two member teams of the National Football League (NFL) — argued that by forming a separate corporate entity, National Football League Properties (NFLP), to market their intellectual property, they were a "single entity" exempt from antitrust scrutiny. The Court responded that one "cannot evade § 1 scrutiny by giving the ongoing violation a name and label," and found that the actions of NFLP and its member teams were subject to the coverage of § 1 because each team had a distinct economic interest in marketing its own intellectual property. *Id.* at 2213.

Other cases cited by the Shareholders on the importance of corporate form stand, at most, for the proposition that the structure defendants have chosen for their business does not typically dictate results in Sherman Act cases. *See, e.g.*, *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 854 (N.D. Cal. 1979) ("[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." (emphasis added)). To the extent the non-authoritative cases Shareholders cite stray from the jurisprudence of the Supreme Court by relying heavily on corporate form to resolve questions of liability, this Court must follow the principles set forth by the Supreme Court in reaching its decision.

II. The Shareholders' Liability for Realcomp's § 1 Violations

The Shareholders argue that they cannot conspire for purposes of adopting MLS policy because when they adopt the policy, they are acting for the common good of the MLS, rather than their separate interests as organizations. Because the decision only affects competition between their members, rather than amongst themselves, their involvement in it does not create § 1 liability for them. While this is a valid distinction between this case and cases like *Terminal R.R. Ass'n* or *American Needle*, it unduly elevates the Shareholders as organizations that are important for their own sake. The Shareholders primarily exist to promote the common interests of their *members*, not themselves. VII Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1477, at 332 (3rd ed. 2010) ("[A] principal purpose of [trade organizations] is to further their particular industry, thus increasing the profits of individual members."). As an organization of competitors, trade organizations have the potential to reach decisions and make policies that implicate the Sherman Act. *Id.* at 332–33 ("Trade associations are routinely treated as continuing conspiracies or 'combinations' of their members . . . . This brings association rules having a competitive impact within the reach of § 1 of the Sherman Act."). This potential is only amplified when trade organizations band together, as the Shareholders did here.

Among other commonly-held needs, the Shareholders satisfy the brokers' desire for an MLS. Each of the Shareholders could have formed an MLS for their own members, in

which case they would unquestionably be liable under § 1 for the sort of rulemaking in which Realcomp engaged. Instead, they joined with other, similar organizations in the region to form a common MLS covering a wider geographic area, with benefits running to the members of all of the Shareholder organizations. The Shareholders did not cede all control of the MLS by doing this. Rather, they act as gatekeepers and governors of the MLS, for the benefit of their members. Membership in a Shareholder is a prerequisite for participation in the MLS. Perhaps more importantly, the Shareholders influence Realcomp policy by choosing the individuals who will serve on the Board. The system permits cooperation in the operation of a regionwide MLS by all Shareholder members in southeast Michigan on a scale that would be difficult to achieve independently.

Given their relationship to the agents who benefit from the policies enacted by Realcomp, and their power to dictate Realcomp policy through selection of the Board, it is difficult to swallow the notion that the Shareholders behaved as a single economic unit with respect to decisions affecting competition among real estate brokers. Rather, taking the complaint in the light most favorable to Plaintiffs, they represent a large group of conspirators attempting to keep certain forms of competition out of the marketplace. Realcomp's policies may be viewed as little more than a judgment by brokers with a dominant market position about the extent to which certain disfavored parties could participate in MLS. The Shareholders were the only pathway for expressing those wishes. A trade organization of competitors cannot make itself immune from liability for a decision that would be unlawful if made on its own by joining with other trade organizations who wish to make a similar decision, and vesting the power to make such a decision in a closely-held corporation over which they have significant influence. In light of the Plaintiffs' minimal duty to show it has a plausible § 1 claim under *Twombly*, the Court cannot dismiss the possibility

that the Shareholders decisions reflected the anticompetitive conspiracy of their member-brokers. If that is the case, the Shareholders should be held accountable.

An alternative way to conceptualize the problem this case presents on the issue is to view the Shareholders as aiders and abettors of Realcomp's antitrust violations. Aiding and abetting "can be a civil as well as a criminal violation of antitrust law." *In re Brand Name Prescription Drugs Antitrust Litig.* [hereinafter *Prescription Drugs*], 288 F.3d 1028, 1035 (7th Cir. 2002); *see also Allen Bradley Co. v. Local Union No. 3, Intern. Bhd. of Elec. Workers*, 325 U.S. 797, 809 (1945) (finding that labor unions which aided and abetted the monopolistic behavior of manufacturers of electrical goods in the New York City area were liable in kind for such violations). *Allen Bradley* is best known for its explanation of how the labor union exemptions to antitrust liability found in the Clayton and Norris-La Guardia Acts operate, but the Court presumed that the labor union's aiding and abetting activity was unlawful if conducted by any other group. *Allen Bradley*, 325 U.S. at 801. That presumption has never been overruled. The broad language of § 1, which bars all "combinations" in restraint of trade, supports the imposition of aiding and abetting liability. So does the statute's historical development in the courts. *See Nat'l Soc'y of Prof. Eng'rs*, 435 U.S. at 688 ("Congress . . . did not intend the text of the Sherman Act to delineate the full meaning of the statute . . . . [I]t expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.").

In the context of antitrust law, aiding and abetting "means materially assisting a known-to-be-illegal activity in the hope that it will flourish to the benefit, pecuniary or otherwise, of the aider." *Prescription Drugs*, 288 F.3d at 1035; *see also United States v. Peoni*, 100 F.2d 401, 402 (2nd Cir. 1938) (Hand, J.) (observing that aiding and abetting liability "demand[s] that [the defendant] in some sort associate himself with the venture, that

he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed"). Assuming that one accepts the debatable premises that (1) the Shareholders have a strong independent identity separate from their members, and (2) that the decision made by Realcomp does not affect competition between the Shareholders, then, even so, the Shareholders still ought to be held liable for assisting the § 1 violations of Realcomp in a significant way. Even the minimal accusations in the complaint indicate that the Shareholders were essential to implementing Realcomp's anticompetitive policies. Moreover, the Shareholders likely had strong incentives to bring about such policies. Since brokers are not tied to a Shareholder in their particular area, the Shareholder that fails to promote ideas approved of by their membership may watch members leave to join other Shareholders, costing the Shareholder registration fees, or express their dissatisfaction in myriad other ways. There is certainly enough factual matter in the complaint, at this stage, to merit further discovery of the complaint's factual allegations.

The cases discussed by the parties do not undermine the proposition that the Shareholders bear responsibility for the policies made by Realcomp. A case in the California Court of Appeals discussed by the Shareholders, *Freeman v. San Diego Ass'n of Realtors*, 77 Cal. App. 4th 171 (1999), comes closest to addressing the direct question posed here. In that case — filed under California's state antitrust law, but decided using the same cases and analytical methods a federal court adjudicating a § 1 claim would use — the plaintiff, a real estate broker, complained about a monthly fee charged by Sandicor, a service similar to Realcomp serving professional associations of real estate brokers in the San Diego area. The court rejected the plaintiff's claim that realtor boards had fixed the price of MLS services because Sandicor created a new service that did not previously exist, and the price it set reflected "unitary action" rather than a "combination" of separate

interests.[2] The case is pertinent because the court noted that one situation that might require antitrust scrutiny involved restrictions "permitting only [ERTS] MLS listings." *Freeman*, 77 Cal. App. 4th at 193. Those restrictions "involved horizontal restraints on competition at the level the individual brokers would otherwise have freely competed with each other," and represented the "coalescence of 'independent sources of economic power previously pursuing separate interests.'" *Id.* at 193–94 (quoting *Copperweld Corp.*, 467 U.S. at 771 (1984)). Therefore, the case the Shareholders believe provides the strongest support for their position does not necessarily rule out the possibility that if such groups promulgated policies that imposed differential treatment on MLS subscribers based on the business model used, the decisions would potentially submit the Shareholders to § 1 liability.

The Shareholders' other primary case provides little support for its argument. In *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988), the Eighth Circuit found that a conglomerate of forty-six small, rural electricity providers that had, as their common goal, the provision of low-cost electricity to its members, was a "single entity" under § 1. It was crucial to the court's analysis that the named defendants were not in competition with one another and did not have divergent interests. Any disagreements between the cooperatives were "more like those among the board members of a single enterprise, than those among enterprises which are themselves separate and

---

[2] The state court's analysis is more on point than *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2003) (Kozinski, J.). In that case, the Ninth Circuit concluded that the price set by Sandicor for the support fee to be charged by each individual realtor board was pure price fixing, as opposed to an agreement to set a price for the service as a whole. This was true because each realtor board had different costs to provide MLS support services to its members, and the agreement they reached prohibited them from charging different prices. That sort of direct competition between brokers is not present in this case.

independent." *Mt. Pleasant*, 838 F.2d at 277. *Mt. Pleasant* is distinguishable from this case due to the presence of adverse competitive interests of the Shareholders here. While the Shareholders may not directly compete with one another for listings, their members certainly do. It is the mission of the Shareholders to promote common industry interests on behalf of their members. They are more than capable of participating in a conspiracy to create rules that curry favor with certain parts of the brokerage market.

As both parties appear to recognize, the Supreme Court case that most closely resembles this one in form is *American Needle*. The Court acknowledged that analysis of the decisions of the NFLP was not identical to a "decision[ ] made directly by the 32 teams," but nonetheless found that its decisions constituted "concerted action" by the teams. *Am. Needle*, 130 S. Ct. at 2214. This is because each member team "capture[d] individual economic benefits separate and apart from NFLP profits as a result of the decisions they ma[de] for NFLP." *Id.* at 2215. In this case, the decisions of Realcomp affect the economic future of thousands of local real estate agents, who must decide how they contract with customers based on the MLS policies. Because it would be impractical for every real estate broker in southeast Michigan to participate individually in the formation of an organization like Realcomp, the brokers must act through representatives like the Shareholders to advance their agenda. Scrutiny of trade organizations for such decisions is not lifted when they band with like organizations to make those decisions.

CONCLUSION

"Substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1." *Copperweld*, 467 U.S. at 773 n.21. Granting the Shareholders' motion to dismiss would invert this principle. Accordingly, the Court will deny the motion.

WHEREFORE, it is hereby **ORDERED** that the Shareholder Defendants' motion to dismiss (docket no. 38) is **DENIED**.

SO ORDERED.

s/Stephen J. Murphy, III
STEPHEN J. MURPHY, III
United States District Judge

Dated: June 28, 2011

I hereby certify that a copy of the foregoing document was served upon the parties and/or counsel of record on June 28, 2011, by electronic and/or ordinary mail.

Carol Cohron
Case Manager