
09-4596

In The United States Court of Appeals

For the Sixth Circuit

Realcomp II, Ltd.,
Petitioner

— v —

Federal Trade Commission,
Respondent

Petition for Review from the Opinion and Order of the Federal Trade Commission

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Brief of Petitioner

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February 9, 2010

DISCLOSURE OF CORPORATE AFFILIATION AND FINANCIAL INTEREST

Petitioner, Realcomp II, Ltd., pursuant to 6th Cir. R. 26.1, makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned company?

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome?

   No.

Respectfully submitted,

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By:/s Scott L. Mandel
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February 9, 2010

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STATEMENT REGARDING ORAL ARGUMENT

Petitioner Realcomp II, Ltd. requests oral argument. Petitioner believes that oral argument would be appropriate due to the importance and complexity of the issues presented. At its core, this petition for review of the Federal Trade Commission's Final Order and Opinion concerns the proper scope and application of the abbreviated "quick-look" analysis under antitrust law as opposed to the traditional "rule of reason" analysis. Petitioner also believes that oral argument would be helpful in light of the lengthy administrative record.

STATEMENT OF JURISDICTION

The Federal Trade Commission exercised jurisdiction under 15 U.S.C. § 45(a)(2).

This Court has jurisdiction to review the Commission's Final Order, dated October 30, 2009, under 15 U.S.C. § 45(c). The petition for review was timely filed on December 31, 2009.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the FTC erred by treating Petitioner's Website Policy as "inherently suspect" and applying a "quick-look" analysis, under which the Commission was not required to prove that Realcomp's actions had actual adverse effects on competition, but instead, Realcomp had the burden to prove its policy was justified by procompetitive benefits plausibly offsetting the presumed harm.

Petitioner Realcomp says Yes.

The Commission says No.

II. Whether there was substantial evidence that Realcomp's website policy had an anticompetitive effect when (1) there was no direct evidence that the policy adversely affected the demand for or sale price of properties with exclusive agency listings, (2) the brokers using exclusive agency listings in the relevant market were thriving despite Michigan's economic downturn, and (3) the Administrative Law Judge found that the Commission's expert opinions were not credible and were unreliable due to flawed methodology and analysis.

Petitioner Realcomp says No.

The Commission says Yes.

III. Whether Realcomp presented evidence of plausible procompetitive justifications for its policy, *i.e.*, reducing "free-riding" by sellers with exclusive agency listings and eliminating the bidding disadvantage for buyers represented by brokers.

Petitioner Realcomp says Yes.

The Commission says No.

STATEMENT OF THE CASE

Petitioner Realcomp II, Ltd. seeks review of the October 30, 2009, Opinion and Order of the Federal Trade Commission, reversing the Initial Decision of Chief Administrative Law Judge Stephen McGuire in favor of Realcomp and dismissing the FTC's Complaint.

The Commission ruled that certain policies and practices of Realcomp, involving the dissemination of "Exclusive Agency" real estate listings, constituted a restraint of trade in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. The Commission's Order directs Realcomp to cease and desist from adopting or enforcing any policy, rule, practice or agreement that denies, restricts or interferes with the ability of Realcomp members (who are real estate agents and brokers) to enter into lawful real estate listing agreements, including "Exclusive Agency" agreements, with sellers of property. Realcomp is required to modify its website operations, amend its rules and regulations, provide each member with a copy of the Order, communicate directly with each member to inform them of the amendments to Realcomp's rules and regulations, and post the Order on its website, along with a statement directing any website user to the Order.

STATEMENT OF FACTS

Realcomp is a membership organization of real estate agents and brokers in Southeastern Michigan. (For simplicity, Realcomp's members are referred to as "brokers.") Realcomp's member brokers compete with one another to provide residential brokerage services to customers. IDF 80-Appx 76[1]. Most Realcomp members are traditional, full service brokers; however, Realcomp's membership is not limited to full service brokers. Brokers who offer limited services listing contracts may, and do, become Realcomp members. IDF 164-Appx 86. Realcomp's primary member service is its multiple-listing service (MLS). An MLS is an information exchange for residential property listings. IDF 14-Appx 68. Its purpose is to bring together brokers representing buyers with brokers representing sellers. IDF 103-Appx 80. The online system allows members access to the Realcomp MLS from any computer with internet access. IDF 180-Appx 88. Individuals who are not Realcomp members, for example, individual home sellers or buyers, cannot access the MLS. It is a member service. IDF 106, 108-Appx 80; IDF 289-Appx 99.

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[1] References to the record are abbreviated as follows:

ID = Initial Decision–Appx 55-198
IDF = Initial Decision Finding
OP = Opinion of the Commission–Appx 7-54

(continued…)

Most Realcomp members do business as both "listing brokers" (representing the seller) and "cooperating brokers" (assisting prospective buyers). IDF 82-Appx 77.

Realcomp adopted three policies concerning "Exclusive Agency" ("EA") listing agreements that became the subject of the FTC's Complaint, only one of which remains the focus of this appeal. Under an EA listing agreement, the listing broker acts as the property owner's exclusive agent in the sale of the property, but the owner retains the right to sell the property without further assistance from (or compensation to) the listing broker. IDF 58-Appx 73. EA listings are distinguished from "Exclusive Right to Sell" ("ERTS") listings, where the owner appoints a real estate broker as the exclusive agent to sell the property and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. IDF 51-Appx 72.

Cooperating brokers, who bring the home buyer to the transaction, typically are paid for their services from a portion of the commission otherwise payable to the listing broker. IDF 40-Appx 71. ERTS listings present better compensation opportunities for cooperating brokers than EA listings, where the home seller has

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(..continued)

RPF = Respondent's Proposed Findings of Fact

Tr = Transcript of testimony before the Administrative Law Judge

the option to find his own buyer and thereby avoid paying a cooperating broker commission. There, the home seller is the *de facto* competitor of any cooperating broker. IDF 608-Appx 137.

Realcomp provides listings from the MLS to certain Realcomp-approved public websites, which are Realtor.com (the National Association of Realtors' website); MoveInMichigan.com (Realcomp's web site); and its Internet Data Exchange ("IDX"), through which its members can put listings on their own websites. IDF 119-120-Appx 21; IDF 210-211-Appx 91.

In 2001, Realcomp adopted the "Website Policy" which stated that Realcomp would not disseminate EA listings to the approved public websites. IDF 355-Appx 107. The Website Policy did not remove or otherwise affect the availability of EA or other types of listings on Realcomp's MLS, and at no time has Realcomp restricted the inclusion of EA listings on its MLS. IDF 181-Appx 88; IDF 433-Appx 117.[2]

[2] Realcomp also adopted a "Search Function Policy" that did not display EA listings when the default search mode was used on its MLS. A related definitional requirement (the "Minimum Service Requirement") stated that a listing agreement had to provide for certain minimum services in order to be treated as an ERTS listing on the MLS. IDF 361-Appx 108; IDF 374-Appx 109. Realcomp rescinded these two policies in 2007. IDF 370, 375-Appx 109.

Proceedings Before the Administrative Law Judge

The FTC issued its Complaint on October 10, 2006, alleging that Realcomp violated Section 5 of the FTC Act, 15 U.S.C. § 45. The Complaint specifically challenged the Website Policy, the Search Function Policy, and the Minimum Service Requirement.

The FTC's Chief Administrative Law Judge ("ALJ"), Stephen McGuire, held hearings over eight days in June, 2007. The ALJ heard live testimony from eight witnesses and admitted deposition testimony from 28 witnesses and over 800 exhibits. In an extensive opinion (the "Initial Decision") issued December 10, 2007, Judge McGuire found that none of the challenged Realcomp policies violated Section 5 of the FTC Act. ID 3-Appx 64.

The ALJ found that the Commission's Complaint Counsel failed to demonstrate that the Realcomp Policies were inherently suspect in nature, and therefore concluded that the policies could not be condemned on a "quick look," *i.e.*, without inquiry into their effects on competition. Rather, the ALJ held that traditional rule of reason analysis provided the proper framework for decision, including an examination of actual effects on competition. ID 86-90-Appx 147-151.

Based upon the evidence adduced at trial, the ALJ concluded that:

- Brokers using EA listing agreements are able to list their properties on the Realcomp MLS, are able to list their properties on Realtor.com, are able to compete on the Internet, and are "thriving" despite the Realcomp policies. Consumers in Southeast Michigan have a choice of real estate listing products. ID 55-60-Appx 116-121.
- The testimony of the Commission's expert witness failed to demonstrate a significant effect of the Realcomp Policies on the prevalence of EA listings in Southeast Michigan and that, in any event, such testimony was based on methodologically flawed analyses. ID 106-109-Appx 167-170.
- The Commission's expert offered no testimony directly estimating or credibly demonstrating adverse price or other effects on consumers using either EA or ERTS listings from the Realcomp Policies. ID 106-Appx 167.
- Realcomp demonstrated credible procompetitive justifications for its Policies, specifically the elimination of a "free-rider" problem and, on a limited basis, the elimination of a bidding disadvantage. ID 119-126-Appx 180-187.

The Initial Decision dismissed the Complaint, concluding that the Commission failed to meet its burden of demonstrating that the Realcomp Policies

unreasonably restrained or substantially lessened competition in the relevant market and thus had not proven that the Realcomp Policies resulted in actionable consumer harm in violation of Section 5 of the FTC Act. ID 2-Appx 63.

Opinion of the Commission

The Commission, by Complaint Counsel, appealed the Initial Decision to the Commission. Argument was heard on April 1, 2008. The Commission issued its Final Order and Opinion on October 30, 2009, reversing and vacating the Initial Decision, holding:

- The Website Policy is a *de facto* price restraint and, accordingly, is "inherently suspect" under the standard articulated in *Polygram Holding, Inc.*, 136 F.T.C. 310 (2003), aff'd, *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), and therefore presumptively unlawful absent a demonstration by Realcomp that the Website Policy enhanced the efficiency of the MLS. OP 32-34-Appx 38-40.
- The ALJ erred by crediting Realcomp's proffered efficiency justifications. The Commission concluded that there is no free riding on the MLS by EA home sellers and that eliminating the bidding disadvantage for home buyers represented by a real estate broker is in fact contrary to the best interests of consumers. OP 28-34-Appx 34-40.

- Under a full rule of reason analysis, the ALJ erroneously concluded that the Commission's expert failed to present credible evidence that the Website Policy was likely to result in harm to consumers. OP 35-43-Appx 41-49. The Commission also concluded that the ALJ erroneously failed to credit direct testimony from certain brokers concerning the perceived effects of the Website Policy. OP 35-43-Appx 41-49.

The Commission entered its Order, directing Realcomp, *inter alia*, to cease and desist from adopting or enforcing any policy, rule, practice or agreement that denies, restricts or interferes with the ability of Realcomp members to enter into lawful real estate listing agreements with sellers of property, including Exclusive Agency agreements, or that otherwise discriminates between "traditional" and "non-traditional" forms of listings. Order-Appx 1-6.

SUMMARY OF ARGUMENT

This case asks whether a restriction on some members of an association that does not cause anticompetitive harm constitutes an unreasonable restraint of trade. The ALJ concluded it did not. The Commission reversed in a manner that raises questions about: 1) Whether an abbreviated analysis of the restriction, called a "quick look," can be substituted for the traditional "rule of reason" approach where the restriction is not akin to per se violations like price fixing or membership exclusions; and, if not, 2) Does the "rule of reason" permit finding an antitrust violation when the restriction did not harm those who were purportedly adversely affected by it and who acknowledge both that they grew and prospered in the marketplace and that there were readily available alternatives for listing properties on publicly accessible websites. Because the ALJ correctly answered these questions in a decision based on his assessment of the demeanor and credibility of critical witnesses, an opportunity not available to the Commission, this Court is asked to reverse the Final Opinion and Order and reinstate the ALJ's Initial Decision.

STANDARD OF REVIEW

Review of matters of law is plenary, and the Court must determine whether the agency's statutory interpretations are "reasonable, consistent, and persuasive." *In re Detroit Auto Dealers' Assn.*, 955 F.2d 457, 461 (6th Cir. 1992). The Commission's construction and application of the FTC Act are reviewed *de novo*. *Rambus, Inc. v FTC*, 522 F.3d 456, 462-63 (D.C. Cir. 2008)

The FTC's findings of fact "if supported by evidence" are determinative. *In re Detroit Auto Dealers' Assn.*, 955 F.2d at 461, *citing* 15 U.S.C.§ 45(c). However, when the Commission overrules the ALJ and substitutes its own findings, this Court "should carefully scrutinize the Commission's determinations of fact, and therefore its conclusions based upon those facts." *Id.* at 469, citing *Thiret v. FTC*, 512 F.2d 176, 179 (10th Cir. 1975); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 772-73 (6th Cir. 1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951).

ARGUMENT

I. The Commission's Opinion Rests on an Unsupported Assumption.

The Opinion rests upon the erroneous conclusion that the Website Policy "discriminate[s] against members who offer a product that creates 'pricing pressure' against the offerings of other members" and thus is equivalent to a horizontal price restraint. OP 21-Appx 27. This conclusion fails to recognize that

no Realcomp policy prevents any MLS member from making listing information available to the public through means outside the MLS, and that the MLS was, by the Commission's own analysis, an efficiency enhancing joint venture, which necessarily must establish rules to function. OP 22-Appx 28.

The Commission's conclusion rests entirely on the assumption that EA listings define the business of discount brokers and that ERTS listings are synonymous with more costly "traditional" brokers. The uncontroverted evidence in the record does not support this assumption.

"Discount" brokers in Southeast Michigan offer discounted (flat fee) ERTS listings (in addition to EA listings). IDF 479-481-Appx 122. Those are considered to be ERTS listings. In the Realcomp service area, discount brokers use ERTS listing contracts with great frequency, and on average at twice the rate of EA contracts. CX 133-030-031, ¶45, n. 84.

Concomitantly, "traditional" brokers in Southeast Michigan offer EA listings (in addition to ERTS listings). Those listings appear as EA listings on the Realcomp MLS. CX 133-014-015, ¶25, n. 31. On the Realcomp MLS, "traditional" brokers account for as much as 60% of the EA listings. CX 133-014-015, ¶25, n.31.

The Website Policy concerns types of listings, not types of brokers. All participants in the Realcomp MLS are equally subject to the Website Policy, and

the evidence shows that both traditional and non-traditional brokers use both types of listings.

II. The Commission Incorrectly Applied a "Quick Look" Analysis.

A. The Court Must Carefully Scrutinize the Commission's Findings that are Contrary to Those of the Administrative Law Judge.

The Opinion devotes great effort to defending the Commission's preferred "quick look," short cut, approach to antitrust law violations, paying little attention to the record – particularly compared to the ALJ's Initial Decision that discusses the record in careful detail. The Commission preemptively, but erroneously, asserts that its decision to use a "quick look" analysis is entitled a "highly deferential standard of review." OP 15, n.11-Appx 21.

When the Commission overturns the findings of its ALJ, the Commission's findings of fact and resulting conclusions are "carefully scrutinize[d]." *In re Detroit Auto Dealers' Assn., supra*, 955 F.2d at 461.[3]

[3] In an apparent effort to bolster its argument for deference, the FTC suggests that it has decided a large number of real estate cases and devoted "a substantial amount of the agency's attention" as "an adjudicatory tribunal" to real estate services and multiple listing service issues. OP 1, n. 1-Appx 7. However, the only cited real estate matter in which the Commission conducted an adjudicatory proceeding is this one -- Realcomp. Every case cited by the Commission was settled by consent order.

This case is the latest of a trilogy of recent Commission antitrust decisions reversing the ALJ's decision. In each of the other cases, the Court of Appeals took a close look, recognized the ALJ's value as fact finder who heard and judged the credibility of witnesses. And significantly, in each of the other cases, the Court of Appeals reversed the Commission and reinstated the ALJ decision. *See Rambus Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008), and *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), cert denied, 548 U.S. 919 (2006). By contrast, the Court of Appeals' decisions in the same approximate time period affirming the Commission have followed ALJ decisions finding for complaint counsel. *N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008), *South Carolina State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006), cert denied, 127 S. Ct. 1123 (2007); *Ky. Household Goods Carriers Ass'n, Inc. v. FTC*, 199 Fed. Appx. 410 (6th Cir. 2006); *PolyGram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

B. The Website Policy Cannot be Accorded "Inherently Suspect" Treatment.

The Commission determined that the Website Policy is "inherently suspect" because (1) its nature is to penalize lower-priced competitors by restricting the availability of competitively significant information to consumers, OP 24-Appx 30, and in this respect, (2) it bears a "close family resemblance" to conduct that has been condemned by the courts without elaborate inquiry into competitive effects.

OP 25-Appx 31. Both premises lack support in the record. However, based on its characterization of the Website Policy as "inherently suspect," the Commission applied its *Polygram* decision, which holds that further inquiry into competitive effects (i.e., a rule of reason analysis) is unnecessary unless respondents can establish "cognizable" and "plausible" efficiencies. Concluding that Realcomp's proffered efficiencies were not credible, the Commission ruled that the Website Policy is unlawful. OP 16, 21-22-Appx 22, 27-28.

The Supreme Court has described when an abbreviated review of competitive effects is appropriate. In *California Dental Assn. v. FTC*, 526 U.S. 756 (1999), the Court differentiated between a "naked restraint on price and output requir[ing] some competitive justification even in the absence of a detailed market analysis," *Id.* at 770, and cases in which the likelihood of anticompetitive effects is not "comparably obvious." *Id.* at 771. The Court disapproved the Ninth Circuit's failure to differentiate between classically condemned prohibitions on the advertising of objectively verifiable price and quality information and the dental association's restrictions on potentially false and misleading advertising which "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Id.* at 771-72.

The Court emphasized that differences in fact patterns must be taken into account when determining the potential for antitrust liability. 526 U.S. at 773-74.

The Court stressed that a "quick look" analysis should not be applied incautiously. Rather, there must be a solid theoretical foundation for presuming that challenged practices have anticompetitive consequences. 526 U.S. at 775 n.12.

Thus, the Court explained that a truncated analysis is appropriate only when a "great likelihood of anticompetitive effects" can easily be ascertained. *Id.* at 770. Such cases are those in which the restraint is sufficiently threatening to place it presumptively in the *per se* category. P. Areeda & H. Hovenkamp, *Antitrust Law* (1995) at ¶ 1911a (emphasis added).[4] Only *if* that condition is satisfied must the defendant proffer a "plausible" efficiency justification for the restraint. But if the defendant does so, the *plaintiff* retains the burden to prove by empirical evidence that the restraint is anticompetitive. 526 U.S. at 774-776. At that point, the traditional rule of reason framework applies.

The Commission misinterprets *California Dental* to be a manifesto for the "inherently suspect" standard. The Court describes the rule of reason as a "continuum," explaining: "What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow

[4] As Judge McGuire correctly observed (ID 89-Appx 150), this admonition has been well-heeded by the federal courts following *California Dental*.

from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental*, 526 U.S. at 780–81.

1. An MLS is an Efficient Joint Venture for Which the "Inherently Suspect" Analysis is not Presumptively Appropriate.

This case does not involve a naked agreement by members of an association about how each of them will do business independently, nor a restriction on the activities in which members of the venture can engage outside of the venture. It involves a restriction on how an admittedly efficient joint venture will operate.

The Commission asserts that "The issue in this case is whether Realcomp adopted policies that unreasonably hinder the ability of some competitors to advertise and disseminate information about their service offerings." OP 23-Appx 29. To the contrary, Realcomp's policies do not restrict any competitors from advertising and disseminating information about their offerings; nor have members agreed to limit their advertising of EA listings. Realcomp merely does not facilitate such advertising and dissemination.

An MLS brings together expert intermediaries in a closed database system accessible only to member brokers and, in more limited form, to the general public through data feeds to various public websites. OP 2-Appx 8. Thus, the Commission acknowledges that the MLS information available to consumers is

limited, and that the MLS is an information system that facilitates interactions among its member-brokers.

> By centralizing … information, the MLS makes the marketplace for homes more efficient and orderly. … An MLS exposes listings to all other MLS members, 'dramatically increasing' the listing brokers' marketing reach.

OP 7-Appx 13 (emphasis added).

Indeed, the Commission acknowledges that, "The MLS is an example of what economists call two-sided markets with network effects. … In this framework, the MLS product is a 'platform' for which there are two types of users [*i.e.*, listing brokers and cooperating brokers]. Each group of users regards the platform as more desirable if the platform succeeds in attracting the other category of users… the value of an MLS increases as the number of properties listed on the MLS grows." OP 8-Appx 14.

United States v. Visa USA Inc., 344 F.3d 229 (2d Cir. 2003), considered an antitrust challenge to restrictions in a similarly complex, two-sided market with network effects. Credit card markets require the participation of both merchants and cardholders, just as an MLS requires the participation of listing brokers and cooperating brokers. The restraint at issue in *Visa* was a rule that prohibited any bank issuing Visa or MasterCard cards from doing business with other credit card issuers, *e.g.*, American Express. The trial court applied a traditional rule of reason

to this restraint, and the court of appeals agreed that "the proper inquiry is whether there as been an '*actual* adverse effect' on competition as a whole in the relevant market." 344 F.3d at 242 (emphasis in original).

No less of an inquiry should apply here as this is hardly a case where one can determine the effects of the Website Policy "in the twinkling of an eye." *NCAA v. Bd. of Regents*, 468 U.S. at 109 n.39. The Commission does not assert, nor could it, that the market has sufficient experience with rules like the Website Policy to understand its principal tendencies. *California Dental*, 526 U.S. at 780–81. Indeed, this case is the first and only such case to be litigated.

The Commission's contrary conclusion is belied by the extensive debate in the record as to the Website Policy's predicted effects, which are reviewed in great detail by the ALJ in the Initial Decision. ID 97-119-Appx 158-180.

2. The Website Policy is not a Naked Restraint.

As *California Dental* explained, a quick look analysis may be appropriate when examining a naked horizontal restraint, such as the restraint on dentists' independent decisions to provide x-rays to insurance companies (*FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986)), on independent decisions regarding hours of operation of auto dealers (*Detroit Auto Dealers*), or outright exclusion from a trade show (*Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir. 1993)). Nor does this case involve a total exclusion from MLS

membership, as in *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1384 (5th Cir. 1980), since Realcomp does not exclude brokers who offer EA listings from membership. IDF 164-Appx 86. None of the cases relied on by the Commission involved a productive joint venture establishing rules for operation of the joint venture.

In contrast, decisions applying a quick look to joint ventures have only done so when the restrictions at issue concerned conduct by members outside of the venture. *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984), struck down a restriction on member schools selling television rights not previously regulated by the venture. Likewise, *Polygram Holdings* concerned an agreement by joint venturers to restrict their discounting and promotion practices for non-joint venture products. Here, the issue is distribution by the MLS of its own website feeds, which is a by-product of the joint venture MLS. Neither the Website Policy nor any other policy restricts members' distribution of their own EA listings or posting EA listings of other brokers on their websites. IDF 243, 247, 353-354-Appx 94-95, 107.

3. Courts Apply the Commission's "Inherently Suspect" Framework With Caution.

In *Realty Multi-List*, 629 F2d at 1367, the Fifth Circuit warned: "We must be cautious to determine whether conduct whose apparent purposes, standing alone, might warrant per se treatment are reasonably connected to an integration of

productive activities or other efficiency-creating activity in such a manner as to require an inquiry into the net competitive effects under the rule of reason." This Circuit likewise has been cautious in the application of a quick look analysis. *Expert Masonry, Inc. v. Boone County*, 440 F.3d 336 (6th Cir. 2006). In reviewing *California Dental*, this Court explained that "only if a restraint clearly and unquestionably falls within one of the handful of categories that have been collectively deemed per se anticompetitive can a court be justified in failing to apply an appropriate economic analysis to make this determination." *Id.* at 343-44.

Similarly, *Worldwide Basketball and Sport Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004), ruled that an abbreviated quick-look analysis is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that an arrangement in question would have an anticompetitive effect on customers and markets." *Id.* at 961. Thus, in concluding that the district court erred in applying a quick look to assess whether an NCAA rule limiting member schools to two certified tournament appearances over a four-year span was an output restriction violating the Sherman Act, the Court stated, "the failure to account for market alternatives and to analyze the dynamics of consumer choice simply will not suffice." *Id.*

Detroit Auto Dealers Assn., while affirming the Commission's decision based on an "inherently suspect" categorization, nonetheless expressed skepticism:

"[T]he Rule of Reason is the preferable analysis to apply … We believe that the inherently suspect conclusion arises from a per se approach by the Commission absent a demonstrated effect on the price of cars in the Detroit area. … While we do not agree in all respects with the Commission's rationale, we find some legal basis and support for its conclusions in an area that is murky and unclear." *Id.*, 955 F.2d at 472.[5]

Other Circuits have similarly concluded that a quick look approach is inappropriate in cases where competitive effects are not obvious. Of particular note, *Madison Square Garden, L.P. v. National Hockey League*, 270 Fed. Appx. 56, 58 (2d Cir. 2008), refused to short-cut the rule of reason in examining a ban by the National Hockey League on individual team websites, stating that "the likelihood of anticompetitive effects is not so obvious that '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.'" (quoting *California Dental*)

Craftsman Limousine v. Ford Motor Co., 491 F.3d 380, 388-393 (8th Cir.), cert. denied, 128 S.Ct. 654 (2007), declined to use a quick look for analyzing a

[5] As discussed above, the restraint in *Detroit Auto Dealers* involved an express limitation on how association members would do business individually. It was not a rule concerning the operation of the association.

prohibition against advertising by certain limousine builders in trade publications. *Brookins v. International Motor Contest Assn.*, 219 F.3d 849, 854 (8th Cir. 2000), similarly rejected a quick look analysis of an auto racing sanctioning body's rule that precluded use of the plaintiff's transmission because the rules were "not the kind of 'naked restraint' on competition that justify foregoing the market analysis normally required in Section 1 rule-of-reason cases." *Law v. NCAA*, 134 F.3d 1010, 1018 (10th Cir. 1998) held that an NCAA rule expressly limiting compensation of coaches must be analyzed under the rule of reason.

Even *Polygram Holdings*, the case on which the Commission most relies, acknowledges that any presumption involving impairment of competition must be "obvious" based on "economic learning and the experience of the market", 416 F.3d at 36. The Opinion points to no such market experience.

The Commission ignored the fact that the Website Policy is an internal rule of an efficient joint venture. The Commission's application of its "inherently suspect" test accordingly was erroneous as a matter of law. The ALJ correctly concluded that a fuller analysis is required. A full rule of reason analysis retains the burden of proof on the Commission, as explained in *Visa*:

> [T]he government must demonstrate that within the relevant market, the defendants' actions have had substantial adverse effects on competition, such as increases in price, or decreases in output or quality.…Once that initial burden is met, the burden of production shifts to the defendants, who must provide a procompetitive

> justification for the challenged restraint.…If the defendants do so, the government must prove either that the challenged restraint is not reasonably necessary to achieve the defendants' procompetitive justifications, or that those objectives may be achieved in a manner less restrictive of free competition. 344 F.3d at 238 (internal citations omitted)

III. The Commission's Findings Under the Rule of Reason Are Not Supported by Substantial Evidence.

The Commission determined that, notwithstanding its conclusion that no significant inquiry into competitive effects was warranted, the Website Policy constituted an unreasonable restraint of trade under a full rule of reason inquiry. OP 34-35-Appx 40-41. The record shows otherwise.

A. The Commission's Findings that are Contrary to Those of the Administrative Law Judge Warrant Careful Scrutiny.

The Commission's findings of fact are conclusive "if supported by evidence." 15 U.S.C. § 45(c). The statute is understood to be a statement of the "substantial evidence" standard. *See Polygram Holdings*, 416 F.3d at 33. In determining whether an agency's determination is supported by substantial evidence, the court must examine the evidence *as a whole*, taking into account "whatever in the record fairly detracts from" the agency's factual findings." *NLRB v. Garon*, 738 F.2d 140, 141 (6th Cir. 1984), and any "contradictory evidence or evidence from which conflicting inferences could be drawn." *TNS, Inc. v. NLRB*,

296 F.3d 384, 394-395 (6th Cir. 2002) (both quoting *Universal Camera*, 340 U.S. at 490).

Here again, the Commission's rejection of the ALJ's findings and conclusions is relevant to the inquiry, and warrants closer scrutiny of the Commission's findings and conclusions. *In re Detroit Auto Dealers' Assn.*, 955 F.2d at 469.

B. A "Truncated" Rule of Reason Does Not Apply to this Case; Market Power Alone is not a Standard of Liability.

The Commission asserts that even if an "inherently suspect" rule of reason analysis is unavailable, it may satisfy the rule of reason by "a showing of [Realcomp's] market power, which when combined with the anticompetitive nature of the restraints, provides the necessary confidence to predict the likelihood of anticompetitive effects." Op 34-Appx 40. This is simply a restatement of the truncated rule of reason – not a different standard for a full rule of reason analysis – as the cases cited by the Commission show.

Law, supra, and *United States v. Brown University*, 5 F.3d 658 (3rd Cir. 1993), are *not* applications of a traditional rule of reason, but "quick look"

decisions.[6] Their observations regarding the significance of market power are reliant on other "quick look" authorities.[7]

Indiana Federation holds that the requirement for proof of market power can be obviated by evidence of actual anticompetitive effects, not the other way around. 476 U.S. at 462; *see Visa*, 344 F.3d at 238 n.4. *Indiana Federation* does not hold, and the Supreme Court has never held, that the requirement for evidence of substantial anticompetitive effects – whether actual or predictive – can be eliminated under a traditional rule of reason analysis if the defendant has market power. To maintain otherwise would subject a wide range of lawful conduct to antitrust liability.

Even under the "quick look," a plaintiff must present credible evidence that "the 'arrangement has the potential for genuine adverse effects on competition,' for example, substantial market foreclosure" in order to rely on inferences of anticompetitive effects drawn from market power (*i.e.*, in lieu of evidence of actual

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[6] *See Law*, 134 F.3d at 1019-20 ("A naked, effective restraint on market price or volume can establish anticompetitive effect under a truncated rule of reason analysis. … We find it appropriate to adopt such a quick look rule of reason in this case.") (emphasis added); *Brown University*, 5 F.3d at 673 ("As the [Antitrust] Division points out, … if an abbreviated rule of reason analysis always required a clear evidentiary showing of a detrimental effect on price, output, or quality, it would no longer be abbreviated.") (emphasis added)

[7] *Law*, 134 F.3d at 1020 (citing *NCAA*, 468 U.S. at 109*)*; *Brown University*, 5 F.3d at 672-72 (citing *Indiana Federation* and *NCAA*).

adverse effects). *Capital Imaging Assocs. v. Mohawk Valley Assoc.*, 996 F.2d 537, 546 (2d Cir. 1993) (quoting *Indiana Federation*, 476 U.S. at 460-61). Such evidence does not exist here.

C. The Evidence Provided by the Commission's Economic Expert Does Not Satisfy the Substantial Evidence Standard.

At trial, the Commission presented no empirical analysis as to whether Realcomp's Website Policy affected commissions on ERTS-listed properties or sale prices of EA-listed properties. IDF 571-575-Appx 133. Rather, the only economic evidence of anticompetitive effect relied upon by the Commission was the opinion of its expert, Dr. Darrell Williams, who opined that Realcomp's Policies reduced the percentage of home sellers in Realcomp's service area who chose EA contracts. OP 35-Appx 41. Dr. Williams' analysis, however, provides no evidence from which the Commission could reasonably conclude that Realcomp's Website Policy actually harmed consumers, *i.e.*, home sellers who chose EA contracts. Dr. Williams' analysis was flawed and the Commission's reliance on it is entitled to no deference.

Dr. Williams relied principally on a "cross-section" analysis, in which he compared the share of non-ERTS residential listings[8] in six "control" MLS's (*i.e.*, MLS's that did not have the restrictions on EA contracts imposed by Realcomp) with the share of EA listings in the Realcomp MLS and three other MLS's that had the same or similar restrictions. IDF 490-494-Appx 23. He estimated that the share of non-ERTS listings was, on average, about 6.5% for control MLS's versus about 1% for the MLS's that imposed Realcomp-type restrictions, and concluded that the restrictions were therefore the cause of the difference. IDF 510-Appx 125. However, Dr. Williams testified that he was unable to calculate how much the Website Policy (as opposed to other types of restrictions at issue) contributed to the reduced percentage. IDF 504-507-Appx 124-125.

The ALJ concluded that Dr. Williams' testimony should be accorded "little weight" because of critical flaws in the methodology underlying his opinion. IDF 511-Appx 125. The Opinion rejected these findings, OP 4, n. 4-Appx 10; OP 44, n. 45-Appx 50, thereby placing the Commission at odds with the hearing examiner's unique ability to assess the credibility and demeanor of witnesses who testified at trial. This raises the concern recognized by *Universal Camera* and its

[8] Non-ERTS contracts include both EA contracts and contracts under which the only service that the listing agent provides is entering the property into the MLS database. ID 1-Appx 62.

progeny. It is apparent how strained Dr. Williams' opinions are when the entire record is considered.

The "control" markets chosen by Dr. Williams purportedly were selected based on their socio-economic and other comparability to the Detroit area. IDF 492-Appx 123; Williams, Tr. 1249-1250. The purpose of choosing control markets comparable to Detroit is that the share of non-ERTS contracts in a local real estate market can be affected by factors in addition to MLS-imposed restrictions. IDF 491-492-Appx 123. Hence, by choosing "control" markets similar to Detroit, the difference in the percentage of EA usage between the control areas and Detroit should reflect only the effects of the MLS restrictions. As Realcomp's expert, Dr. David Eisenstadt, pointed out, Dr. Williams' statistical procedure for choosing areas comparable to Detroit was ad hoc and failed to produce reliable controls. IDF 553-Appx 130. Dr. Eisenstadt explained that if, in fact, each of the control markets was similar to Detroit, then each should be similar to the other, and the percentage of EA contracts should not vary substantially among them. IDF 526, Appx 127. But, the share of EA listings varied considerably among the six different control areas, ranging from 1.24% in Dayton,

Ohio to 13.78% in Denver, Colorado. (IDF 494, 525-Appx 123, 127.)[9] Thus, factors other than the presence of MLS restrictions must explain some of the observed difference in the relative usage of EA contracts across different markets, and Dr. Williams' procedure did not adequately control for the differences in the socio-economic, demographic and housing market characteristics that affect whether home sellers choose EA or ERTS contracts. IDF 526-Appx 127. The ALJ agreed that this cross-section evidence that purported to show the average effect of MLS-restrictions on the relative usage of EA contracts was unconvincing. IDF 512-534; ID 107-108-Appx 125-128, 168-169.

Realcomp's economic expert, Dr. Eisenstadt, testified that the proper method for controlling for characteristics affecting the decision to use an EA contract is to include each such factor as a separate independent variable in a multiple regression analysis. Regression analysis sorts out the effects of the different "independent" factors on the choice of an EA or ERTS contract, including whether the MLS employed restrictions. IDF 557, 565-Appx 131-132.

Dr. Eisenstadt performed two different regression analyses. In the first, he included as separate independent variables the eight socio-economic characteristics that Dr. Williams had identified as relevant to identifying control markets that were

[9] Not surprisingly, Dayton (with the lowest percentage) had characteristics more similar to Detroit's than any other control market. IDF 493-Appx 123.

statistically close to Detroit. IDF 558-Appx 131. He also included a variable that measured whether the MLS had restrictions on EA listings, and he included separate MLS-restriction variables for the MLS's that employed restrictions. IDF 565-Appx 132. Realcomp's restrictions were estimated to have reduced the share of non-ERTS contracts in its service area by only 0.24 percentage points, IDF 564, 510-Appx 132, 125, and this small estimated effect of the Realcomp restrictions was not statistically significant (i.e., predictably different from zero). IDF 503-Appx 124; RPF ¶225, 230.

Dr. Eisenstadt's second analysis predicted the share of EA contracts in Realcomp's service area based on its socio-economic and demographic characteristics. IDF 568-Appx 132. That is, among the six non-restriction control markets Dr. Eisenstadt estimated a regression equation that examined the effect of the different characteristics on the decision to use an EA contract. IDF 569-Appx 132. Based on the results of this regression, Dr. Eisenstadt posited the question "what should the percentage of EA listings have been in Realcomp's service area if (it too) had not employed restrictions?" Dr. Eisenstadt found that the actual prevalence of EA contracts in Realcomp's service area was higher than that predicted by the regression. IDF 569-Appx 132. This evidence squarely contradicted Dr. Williams' inference that the lower percentages of EA listings he

observed in the Realcomp service area were due to the Website Policy and/or other restrictions maintained by Realcomp.

The ALJ cited Dr. Eisenstadt's study to support his conclusion that the Commission's analysis was unpersuasive. OP 44-46-Appx 50-52. The Commission rejected the ALJ's findings with regard to the effect of Realcomp's policy on the share of non-ERTS contracts, claiming to have more expertise in the technical matters at issue. OP 44-Appx 50. The Commission's independent re-assessment of the evidence is entitled to no deference.

First, the Commission's largely gratuitous criticisms of its Chief ALJ's purported lack of expertise are nothing more than an extra-record effort to evade the substantial evidence standard. OP 44-Appx 50 The ALJ's role is to judge the credibility of the testifying economic experts, not to be an economic expert. Judge McGuire, upon hearing extensive expert testimony from both sides, found that Dr. Williams' testimony was not credible and was not persuasive. IDF 511-Appx 125. The Commission, having not itself heard the testimony, was in an inferior position to make an assessment of credibility, much less to assert itself into the role of economic expert. *Universal Camera*, 340 U.S. at 493.

Second, the Commission faults the ALJ (OP 45, Appx 51) for concluding that if the FTC economist "had correctly identified the economic and demographic factors that determine the share of EA contracts at the Metropolitan Statistical Area

(MSA) level, then one would expect the shares of EA listings in the Control MSA would also be different." The Commission notes, instead, that "even if the seven variables used as criteria to select the control sample were perfect predictors of the percentage of EA listings, this would not imply that the percentages in each MSA would be equal or nearly equal to each other because the values of the seven explanatory variables are not equal." (OP 45, Appx 51) However, the different values of these variables across different metropolitan areas precisely formed the basis for Dr. Eisenstadt's rationale that each should be included as a separate independent variable in measuring the effect of MLS restrictions. CX 458-Pages 7-8, ¶¶12-13; CX 458-Pages 14-15, ¶22. As the context of Judge McGuire's conclusion suggests, ID 108-109, Appx 169-170, it was Dr. William's failure to control for (in a regression) these economic and demographic variables that weakened his analysis. Hence, the Commission's criticism is meaningless (because the differences in those variables across markets were in fact taken into account by Dr. Eisenstadt's regression analysis that reached a contrary conclusion). This illustrates a lack of technical substance in the Commission's criticisms.

Third, the Commission asserts that Dr. Williams did include all the relevant variables in his regression analysis that purported to show a correlation between MLS restrictions and the share of EA listings on an MLS. OP 44, Appx 50. However, that regression on its face did *not* use as explanatory variables

population and housing characteristics that Dr. Williams had elsewhere testified affected the share of sellers who choose non-ERTS contracts. CX 498, Pages 41-52, 71, ¶88, Appx D.

Fourth, Dr. Williams' efforts to rehabilitate his own results by critiquing Dr. Eisenstadt's work also failed. For his rebuttal testimony, Dr. Williams re-estimated Dr. Eisenstadt's first regression analysis. But in doing so, Dr. Williams excluded a number of the independent variables that Dr. Eisenstadt had included, asserting that Dr. Eisenstadt's study was flawed because it included values for some variables (*e.g.*, percent of high school degree, percentage of bachelor's degrees, median household income, percent African American households) at two geographic levels, *i.e.*, the larger Metropolitan Statistical Area ("MSA") level as well as the narrower county or zip code level. Dr. Eisenstadt testified that inclusion of these variables at both geographic levels was appropriate because the decision to list a residential property using an EA or ERTS contract is not just based on "neighborhood" factors that are proxied by zip code level data, but also by MSA-wide factors, given that property sellers located in one zip code do not compete only against property sellers also located in that zip code for buyers, as well as that fact that sellers are likely to seek buyers located throughout the MSA. For that reason, seller and/or buyer characteristics measured at both the MSA and

zip code level are pertinent to a home seller's decision to use an EA or ERTS listing contract. ID 113, Appx 174; Eisenstadt, Tr. 1471.

Dr. Williams offered two criticisms of Dr. Eisenstadt's inclusion of same-defined variables at both the zip code or county level and the MSA level. First, he argued that measuring certain variables at both levels would "decrease the number of degrees of freedom in the analysis, thus inflating the variance of the estimated parameters." Second, he argued that including a variable at both geographic levels was redundant, "without providing any more helpful information" and led to results that were "inaccurate and meaningless." OP 44, Appx 50,. The Commission adopted Dr. Williams (rebuttal) regression results measuring independent variables at only the most disaggregated level, reasoning that "county level data vary more than MSA or zip code level controls and, arguably, provide more detailed information." *Id.*

Dr. Williams' assertion, adopted by the Commission, belies several basic principles of statistics, and demonstrates that the Commission does not possess the technical expertise that it claims for itself. The regression exhibits and data which were turned over by each economic expert show that sample size was in the thousands of observations and that inclusion of several variables at both the MSA-level and county or zip code level has an insignificant and immaterial effect on the

number available "degrees of freedom."[10] Second, the Commission's reliance on Dr. William's position that measuring a variable at both geographic levels is "redundant" and yields no information beyond that which is conveyed by including the variable at a single geographic level demonstrates a lack of economic reasoning.

The relevant questions are whether values of socio-economic characteristics at both the zip code and the MSA level could affect sellers' choice of the type of listing contract or whether all of those characteristics are best measured at the same level (*e.g.*, zip code rather than MSA). As it happens, Dr. Eisenstadt's regression results provided answers to those questions. When the variables in question were measured at both levels, some characteristics were statistically significant at both levels, a result that would not occur if the measurement of a variable at both geographic levels was truly "redundant," as the Commission's own expert agreed.[11] This establishes, as Dr. Eisenstadt surmised, that a socio-economic

[10] "Degrees of freedom" is measured by the sample size minus the number of regression parameters (coefficients) to be estimated. *See* Kennedy, *A Guide to Econometrics* at 73. This text was offered in evidence as an authoritative statistical text by Dr. Williams. D. Williams, Tr. 1670-73. Degrees of freedom in excess of 30 is sufficient to claim reliable regression results. Kennedy at 33.

[11] An independent variable included in a regression equation that measures essentially "the same phenomenon" as another independent variable produces a statistical condition called multicollinearity. As Dr. William's testified, when multicollinearity is severe, its effect is that neither independent variable will have a

(continued…)

characteristic measured at one geographic level can convey different (or additional) relevant information to the home seller's choice of type of listing contract than the same characteristic that is measured at a second geographic level. The Commission ignored the fact that its own expert validated Dr. Eisenstadt's conclusions.

Finally, Dr. Williams' efforts to discredit Realcomp's economic expert, Dr. Eisenstadt's, analysis not only failed, but showcased his lack of credibility, as the record demonstrates at length. During his direct examination, Dr. Williams testified as to demonstrative exhibits DX 12-3 and 12-4, taken from his Surrebuttal Report, CX 560, asserting that the graphs directly indicated a high degree of correlation or "multicollinearity" (a type of statistical problem) between several variables and the "rule variable" (a yes/no variable measuring whether an MLS had restrictions on EA listings). Williams, Tr. 1674-76. In this regard, Dr. Williams identified Dr. Peter Kennedy's *A Guide to Econometrics* as an "authoritative text" discussing the concept of collinearity, Williams, Tr. 1670-73; *see also* CX 560 at 9-10, nn. 15, 17, and testified the portions of that text read into

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(..continued)
statistically significant impact on the variable of interest (e.g., the dependent variable – in this case the type of listing contract, EA or ERTS, chosen by the home seller). Williams, Tr. 1668-1672. Thus, the fact that Dr. Eisenstadt's regression results showed statistical significance for "redundant" variables indicates that inclusion of the variables at two levels was, statistically, appropriate.

evidence concerned acceptable thresholds for collinearity among *variables*, not collinearity among *regression coefficients*. He reiterated this proposition during cross-examination. Williams, Tr. 1720.

Subsequently, however, Dr. Williams admitted that DX 12-3 (CX 560) was not in fact what he had represented it to be during his direct testimony. During redirect, Dr. Williams testified that the title of the table graph in DX 12-3 should be changed from "Correlation Between Rule Variable and Other Explanatory Variables" to "Correlation Between *the Coefficient Estimates* for the Rule Variable and *Coefficients for* Other Explanatory Variables." Williams, Tr. 1756-57 (emphasis added). Significantly, Dr. Williams failed to either explain or retract his earlier testimony that the significance of any correlation between *coefficients* was either none at all, or, alternatively, beyond his ken:

> Q. So I just want to make sure I understand your testimony. Are you familiar with the concept of running a correlation matrix of the coefficients in a context like this where you've got a number of explanatory variables and you're comparing it with something like the rule? …
>
> A. I would generally run a correlation between the underlying data or explanatory variables, so no, I wouldn't do it that way. But I'm not -- yeah. I really don't know what you're referring to.
>
> Q. Okay. You don't know what I'm referring to. If I told you that what this is a correlation of the coefficients, not of the rule versus the explanatory variables, would that … affect your opinions as it relates to the multicollinearity issue?

> A. Again, I'm not clear what that concept means, so I'd have to be more familiar with what exactly you're talking about.

Williams, Tr. 1741-42 (emphasis added).

Although Dr. Williams initially indicated uncertainty as to what software program had been used to generate the matrices underlying the incorrectly identified DX 12-3 and DX 12-4, he eventually conceded that they had been created by a program called STATA. Williams, Tr. 1724-28, 1757-60. He could not independently identify a portion of the STATA technical manual. *Compare* Williams, Tr. 727-28 ("I mean it looks like there are some instructions on STATA, but I have no idea what the source for this is..."), *with* Williams, Tr. 1757 ("I went back and I took a look at the STATA manual to see what the procedure -- it's a diagnostic procedure within STATA to look at how you interpret that procedure . . . "). He acknowledged that he had not personally run the software to generate the table in question and that he does not use STATA. Williams, Tr. 1728. ("In this case somebody did it under my supervision... I don't use STATA, I use SAS.")

Despite his previous unfamiliarity with STATA or its technical help manual, Dr. Williams during redirect and re-cross explicitly referenced the manual, relying on it as a brand-new and exclusive basis for his substantially revised opinion on the data depicted in DX 12-3. Williams, Tr. 1757-60. That revised and never-before-disclosed opinion, based on the STATA manual that he perused over the lunch

break, expounded that a "correlation between *coefficient estimates* for the rule variable and other explanatory variables" is "an indicator of multicollinearity." Williams, Tr.1757 (emphasis added). Dr. Williams failed to cite any reliable authority for this new opinion, basing it solely on his own interpretation of what he believed to have been the STATA manual's depiction of the test run to create the matrix for DX 12-3. Williams, Tr. 1760.

Dr. Williams offered no testimony concerning the statistical threshold at which any correlation between *coefficients* would be significant (*i.e.*, in contrast to his testimony, based on the Kennedy text, that correlations among *variables* of 0.8 or higher would be indicative of "high" correlation in this context, *see* Williams, 1676-78). Dr. Williams thus relied on inferences unsupported by his new source, or any source, in attempting to resurrect DX 12-3 and CX 560.

Judge McGuire did not credit Dr. Williams' critique of Dr. Eisenstadt, and rightly so. (ID 113-Appx 174). Dr. Williams testified without personal knowledge of the software program used or the test run to create the data behind DX 12-3 and 12-4. When it came to light that DX 12-3 reflected the correlation between coefficients of explanatory variables and the coefficient of the rule variable, rather than correlation between the variables themselves and the rule variable, Dr. Williams belatedly attempted to educate himself about the STATA test that had been run. Dr. Williams' newly minted opinion was unreliable and speculative.

Expert testimony must be relevant and rest on a reliable foundation. Fed. R. Evid. 702; *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 589 (1993). Opinion evidence is not rendered admissible by being "connected to existing data only by the *ipse dixit* of the expert," *General Electric Co. v. Joiner*, 522 U.S. 136, 146 (1997), Rather, to be reliable, it must "be based on the 'methods and procedures of science' rather than on 'subjective belief or unsupported speculation'; the expert must have 'good grounds' for his on her belief." *See, e..g., Bailey v. Allgas, Inc.*, 148 F. Supp. 2d 1222, 1233-47 (N.D. Ala. 2000) (striking expert opinion as "unreliable," "contain[ing] multiple inconsistencies, inaccuracies, and baseless assertions" and based on flawed methodology). What matters is "not what the experts say, but what basis they have for saying it." *Daubert*, 43 F.3d at 1316.

Finally, Dr. Williams admitted that the Kennedy text, the authority on which he relied, warns that eliminating "collinear" variables (unless they are perfectly collinear) may introduce another type of error into the regression, and that he omitted Kennedy's *caveat* from his report and direct testimony. Williams, Tr. 1710-1719. None of Dr. Eisenstadt's variables questioned by Dr. Williams were perfectly collinear. Williams, Tr. 1713-1714. Thus, even if Dr. Williams had correctly identified a multi-collinearity problem, it did not follow that Dr. Eisenstadt's inclusion of the variables was erroneous. The Commission's reliance

on Dr. Williams' testimony to refute Dr. Eisenstadt's criticism of Dr. Williams' original work was not supported by substantial evidence.

In summary, the Commission had no statistical basis for accepting Dr. Williams' modification of Dr. Eisenstadt's regression or for rejecting the ALJ's finding that Dr. Williams' own study was flawed by the exclusion of relevant variables. Therefore, Dr. Williams' analysis of cross-section data provided no evidence that Realcomp's rules had a statistically significant effect on the share of sellers who choose EA contracts, and the Commission's conclusion is entitled to no deference.

D. Broker Testimony Solicited by the Commission, Considered in Light of the Record as a Whole, Did Not Establish Anticompetitive Effects.

The Commission also concludes that the Website Policy is anticompetitive because Realcomp does not post EA listings on its own public website or to Realtor.com, and that access to Realtor.com through "dual-listing" on another MLS is not without cost. OP 41-Appx 47. But these observations are not sufficient as a matter of fact or a matter of law to establish an antitrust violation.

The record shows that, with respect to the exposure of EA Listings in the Realcomp service area, there has been no restriction on the form of Internet exposure deemed to be the most important and no practical restriction on the exposure to the second most important Internet site.

The discount brokers who testified agree that the MLS is the most important form of Internet exposure. IDF 430-432-Appx 116. Realcomp has never restricted Exclusive Agents from being listed on its MLS. IDF 433-Appx 117. Testifying brokers ranked Realtor.com as being the second most important source of Internet exposure. IDF 434-Appx 117.

Brokers in the Realcomp Service Area can have their EA listings placed onto Realtor.com through several readily available means. First, EA listings can be placed on the Realcomp MLS and published to Realtor.com simply by listing the property in the first place on another MLS, with which Realcomp has a data sharing agreement. IDF 436-Appx 117. Realcomp has data sharing arrangements with seven MLSs in Southeastern Michigan. IDF 438-Appx 117. Second, an EA-listed property can be listed on Realtor.com by listing the property on another MLS that downloads their EA listings to Realtor.com. IDF 436-Appx 117. Discount brokers have availed themselves of this means for having their EA listings placed on Realtor.com. IDF 440-Appx 117.

The record shows that limited service/discount brokers called by Complaint Counsel used the Ann Arbor, Shiawassee and Flint MLS's to place their EA listings on Realtor.com. IDF 440-Appx 117. Discount brokers also can have their listings sent to Realtor.com by placing them in MiRealSource, another MLS in Southeast Michigan. IDF 441-Appx 117. The costs associated with this type of

dual-listing are nominal. Those charges, as an example, are just $55 per month to be a member of the Ann Arbor MLS. IDF 442-Appx 117.

Simply by placing their EA listings into the MLS, limited service brokers reach 80% of all buyers. IDF 431-Appx 116. If one combines that option with placing those EA Listings onto Realtor.com, the combination of the two distribution channels reaches 90% of all buyers. RPF ¶ 101. Against that backdrop, it is not surprising that Mr. Kermath, a Commission witness, represents to the public that while he has better success with ERTS listings, he has "great success" with limited service listings. RX 2, Kermath, Tr. 796-7.

Additionally, public web sites (*i.e.*, other than the Realcomp-approved websites) are numerous, and listings of all types reach those web sites without regard to Realcomp's Website Policy. IDF 448-Appx 118. In light of their growing popularity, these other web sites are an economically viable and effective channel for reaching prospective buyers. IDF 453-Appx 119. Other publicly-available web sites for EA listings include Google and Trulia, each of which is (by admission of the Commission's own witnesses) gaining momentum. IDF 450-Appx 118. Gary Moody, the owner of Greater Michigan Realty, another Commission witness, believes Google Base will be more important than the IDX in the near future. IDF 451-Appx 119.

E. Mere "Disparate Treatment" of EA Listings Does Not, as a Matter of Law, Establish an Antitrust Violation.

Notwithstanding the extensive contrary evidence in the record, the Commission concluded that Realcomp's decision not to forward EA listings to a limited number of websites violated Section 1 of the Sherman Act on the basis that the unavailability of EA properties on those websites placed home sellers using EA listings at a competitive disadvantage. The Commission relies principally on *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), to argue that disparate treatment of EA listings under the Website Policy was tantamount to the exclusion of competitors:

> Like the ALJ's emphasis on the lack of price effects, his emphasis on the lack of exclusion from Realcomp and from its MLS was an error of law; for complete exclusion is not the standard of liability here. In *Northwest Wholesale Stationers*, the Supreme Court stated that a combination of competitors with market power need not exclude other competitors from their association in order to restrain trade unreasonably under Section 1. 472 U.S. at 295, n.6 ("Northwest's activity is a concerted refusal to deal with Pacific on substantially equal terms. Such activity might justify *per se* condemnation if it placed a competing firm at a severe competitive disadvantage.").
>
> OP 41-Appx 47.

This criticism, however, is misplaced, as the Judge McGuire emphasized:

> The [Supreme] Court [in *Northwest Wholesale Stationers*] did not generalize its determination to condemn all such disparate treatment. Indeed, the Court observed that disparate treatment *"might* justify *per se* invalidation *if* it placed a competing firm at a *severe* competitive disadvantage." *Id.* [472 U.S. at 295, n.6] (emphasis added). As

> discussed in Section III.E.2.c, *infra*, the challenged activity in this case did not place discount brokers at a severe disadvantage.

ID94-Appx 155 (emphasis in original)

Judge McGuire's added emphasis is correct. Disparate treatment is not, in and of itself, an antitrust violation. *Northwest Wholesale Stationers* emphasized that ventures such as the wholesale purchasing cooperative at issue there "must establish and enforce reasonable rules in order to function effectively" and "unless the [venture] possess market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have anticompetitive effect is not warranted." 472 U.S. 284, 296 (1985) (emphasis added). See *Carleton v. Vermont Dairy Herd Improvement Ass'n*, 782 F. Supp. 926, 933 (D. Vt. 1991) ("*Northwest Stationers* says only that 'market power or exclusive access' is a necessary precondition before expulsion from a cooperative should be deemed per se unreasonable. *Neither market power nor exclusive access is a sufficient condition.*") (emphasis added).

The Website Policy is not a concerted refusal to deal. As the record demonstrates, the Website Policy concerns listing types, not broker types. IDF 349-Appx 106. Discount brokers are members of the Realcomp MLS, IDF 164-Appx 86, and EA listings are not the exclusive province of discount brokers, all EA listings are displayed on the MLS. IDF 181-Appx 88. Moreover, the question

of whether the Website Policy creates *any* disadvantage, let alone a severe disadvantage, for non-traditional brokers is not established by any substantial evidence in the record. *All* of the non-traditional brokers who testified for the Commission are "thriving." ID 59-60-Appx 120-121.

The Commission also relies on *Marin County Bd. of Realtors v. Palsson*, 16 Cal. 3d 920, 935-36 (1976) for the proposition that an MLS rule denying multiple listing services to part-time brokers "narrowed consumer choice" and "hampered" the competitive effectiveness of nonmember brokers. OP 42-Appx 48. The implication, of course, is that Realcomp is similarly restricting entry into the market.

However, the Commission's summary omits critical facts. The issue in *Palsson* was not just that the part-time broker was denied access to the MLS, but that the MLS rule in effect precluded him from being employed by any broker in Marin County who was a member of the MLS. *See* 449 P.2d at 835, 843. Restricting the part-time broker's employment opportunities indeed restricted his entry into the market. *Palsson* was plainly unlike that this case where there is no credible allegation or evidence that the Realcomp Policies have resulted in denial of employment opportunities to licensed agents or brokers.

Thompson v. Metropolitan Multi-List, Inc., 934 F.2d 1566 (11th Cir. 1991), also cited by the Commission, concerned a rule that completely precluded licensed

brokers and agents from participating in the MLS at all and thereby prevented entry into the market. Such is not the case here, and the case provides no support for the Commission's position. Likewise, *Cantor v. Multiple Listing Service of Dutchess County, Inc.*, 568 F. Supp. 424 (S.D.N.Y. 1983) is cited by the Commission for the proposition that the court found the restrictions unlawful *because* some brokers had been discriminatorily prevented from advertising their listings. In fact, this is not true. The rule at issue in *Cantor* was a "level playing field" rule. It required all brokers who were members of the MLS to use only MLS-branded yard signs, to the exclusion of signs branded by the specific brokerage (*e.g.*, "Century 21"). The court observed the MLS "virtually conceded" that the intent and purpose of this rule were to remove the competitive brand name advantage that some MLS members might have over other members. 568 F. Supp. at 430. The purpose of the challenged rule was not to disadvantage certain types of listings – the requirement to use an MLS-branded yard sign applied to all listings equally. Brokers in the MLS were free to advertise their listings, including by the use of yard signs. The competitive problem existed because those yard signs could not be branded by the individual brokerage. The opinion simply does not stand for the Commission's proposition.

F. Other Liability Theories of the Commission Lack Support in the Record as a Whole.

The Commission argues that Realcomp's website policy, by reducing the demand for EA contracts, also reduces the downward competitive pressure on commission rates that traditional brokers earn from ERTS contracts. However, no evidence in the record supports that conclusion. This argument rests on the assumption that the supply curve of ERTS contract services is rising over the relevant range: if it is not, a reduction in the demand for those services will not reduce the price. However, the Commission does not provide any evidence concerning supply elasticity or, in the absence of that, evidence that ERTS contracts cost less in geographic markets (*e.g.*, Denver) where the share of homes offered under non-traditional (*e.g.*, EA or for-sale-by-owner) contracts is high relative to those (e.g., Detroit) where it is low. Instead, the Commission simply observes, OP 46-Appx 52, that it is difficult to prove that an anticompetitive policy leads to a substantial loss of competition, and concludes that the ambiguity supports its conclusion.

Significantly, the record contains extensive and essentially uncontroverted testimony by the brokers upon whose testimony the Commission otherwise relies that their businesses have prospered economically notwithstanding the purported effects of the Website Policy. All of the brokers who testified for Complaint

Counsel admitted that their businesses are growing in the face of a difficult housing market. ID F465-F468-Appx 120.

Judge McGuire specifically found that "despite Michigan's economic downturn, agents offering Exclusive Agency listings are thriving in southeast Michigan." ID 59-Appx 120. His conclusions were detailed and specific based on the evidence presented and an assessment of its credibility: "The totality of the evidence in this case, empirical and otherwise, establishes that Realcomp's Website Policy, despite its anticompetitive nature, has not resulted in measurably significant competitive effects." ID 121-122-Appx 182-183.

The Commission asserts that this evidence is unpersuasive, opining that these same brokers might have had more business but for the Website Policy. OP 41, n. 42-Appx 47. However, this opinion merely assumes its own conclusion and is based on no record facts whatsoever. The brokers' testimony that they have not been harmed is compelling, and the Commission cannot avoid it by simply imagining a different world.

IV. The Website Policy Promotes the Efficient Operation of the Realcomp MLS.

The ultimate burden of proof remained on the Commission to establish that the Website Policy is anticompetitive. Only upon meeting that burden would the burden shift to Realcomp to provide a procompetitive justification for the

challenged restraint. Assuming Realcomp could demonstrate one or more procompetitive justifications, the burden would then shift back to the Commission to prove either that the challenged restraint is not reasonably necessary to achieve the procompetitive justifications or that those objectives may be achieved in a manner less restrictive of free competition. *Visa*, 344 F.3d at 238.

Realcomp offered several procompetitive justifications for the Website Policy. The Website Policy reduces free-riding that otherwise would occur by EA home sellers and also eliminates the bidding disadvantage faced by home buyers who are represented by a Realcomp broker. The ALJ, having heard the evidence, found this reasoning to be a plausible basis for the Website Policy. ID 121-122-Appx 182-183.[12]

A. The Website Policy Reduces Free Riding

Free-riding is the diversion of value from a business rival's efforts without payment. *Chicago Professional Sports Ltd. Partnership v. NBA*, 961 F.2d 667, 674-75 (7th Cir. 1992). As the Commission observes, OP 29-Appx 35, control of

[12] If the record establishes that the efficiencies exist, they are not rendered less beneficial by the Commission's questioning whether Realcomp overtly considered such efficiencies when the policies were adopted, OP 29, n. 23-Appx 35, or may have had what the Commission views as anticompetitive motives OP 32, n. 28-Appx 38. Those questions are irrelevant to whether the proffered efficiencies are plausible. *See* United States Department of Justice and Federal Trade Commission *Antitrust Guidelines For Collaborations Among Competitors* ¶ 3.36 *(2000)* (omitting any consideration of such factors in discussing efficiency justifications).

free riding is an accepted justification for cooperation in antitrust jurisprudence. *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 762-63 (1984).

The Realcomp MLS was not created to help property owners who wish to procure their own buyers. As Judge McGuire correctly found, home sellers who sign EA listing agreements do not pay a cooperating broker commission when they find their own buyer, and therefore, they have an incentive to act as their own cooperating broker. IDF 608-611-Appx 137; ID 121-Appx 182. EA home sellers thus compete directly with Realcomp cooperating brokers. IDF 608-Appx 137. They have the ability to find their own buyer directly *and* (in effect) to receive the compensation payable to a cooperating broker (*i.e.*, by keeping the cooperating broker's commission for themselves). IDF 606-Appx 137.

All cooperating brokers pay dues to Realcomp, in contrast to an EA home seller who pays no dues to Realcomp. The dues paid by *both* listing and cooperating brokers support the operation of the MLS. In effect, a home seller who uses an EA contract to find his/her own buyer directly and thereby act as his/her own cooperating agent seeks all of the benefits from being a Realcomp member – including the distribution of his/her EA property listing to certain websites – without paying any membership dues to Realcomp.

This is a classic form of free-riding and it is not less so simply because that home seller's listing agent happens to pay dues to Realcomp. The home seller with

an EA listing who wants all of the website benefits from acting as his/her own cooperating agent is free riding on dues-paying Realcomp cooperating agents rather than listing agents. Thus, even though the listing broker in an EA transaction may pay dues, Realcomp receives no payment for any services it provides to the EA home seller who is acting as his/her own cooperating broker. IDF 608-Appx 137.

By excluding EA listings from the selected website feeds, the Website Policy protects Realcomp-member cooperating brokers from having to subsidize the cost that property owners would otherwise incur to procure buyers who do not use cooperating brokers. IDF 610-Appx 137. Realcomp members should not have to subsidize or otherwise facilitate transactions that directly conflict with Realcomp members' business purposes. IDF 611-Appx 137. Put another way, Realcomp's Website Policy protects Realcomp from providing "free advertising" to home sellers that do not intend or expect to use the services of certain Realcomp members who fund the MLS.

The Commission's expert, Dr. Williams, testified that 80% of EA properties are sold to buyers represented by cooperating brokers. Williams, Tr. 1651. Accordingly, twenty percent of the time, EA properties are sold without the involvement of a Realcomp cooperating broker. IDF 616-Appx 138. This testimony establishes the presence of a legitimate free-rider problem.

In rejecting Realcomp's free rider defense, the Commission argues that no free-riding occurs because home sellers who use EA listings pay fees to their listing brokers, and their listing brokers in turn pay dues and fees to Realcomp. OP 30-Appx 36.

The Commission's explanation is erroneous when considered in light of the record as a whole. The statement that home sellers pay fees to their listing brokers who pay dues to Realcomp, while true, misleadingly assumes that listing brokers' membership fees cover all of Realcomp's costs. Those costs are, in fact, shared by listing and cooperating brokers because the latter also benefit from MLS services and pay dues. Property owners who use EA contracts to sell homes and who find buyers on their own free ride because they effectively pay a smaller share of the cost of providing MLS services than do either property owners who use ERTS contracts or those who use EA contracts and find a buyer through a cooperating broker.

Realcomp provides website feeds voluntarily – it is under no compulsion to feed listings to any particular website. Realcomp could discontinue this service without violating any antitrust law. It is indisputable that Realcomp's website feeds are a by-product of the MLS database, which exists to promote business relationships between and among member brokers. Because the Website policy encourages or allows Realcomp to provide a valuable internet services to home

sellers and buyers, then by reducing the free riding which would occur without these restrictions, Realcomp's Website Policy is output enhancing.

As noted, EA listings allow a home owner both to sell to a buyer who does not use a cooperating Realcomp broker and thereby avoid paying the cooperating broker commission while, at the same time, allow for the possibility that a cooperating broker will secure a buyer for the property (in which case a cooperating broker's commission will be paid).. Thus, a home seller with an EA listing wears two hats – one as the potential client of a cooperating broker and one as the potential competitor of cooperating brokers. The potential competitor has a distinct economic reason – the avoidance of a cooperating broker commission – to prefer the competitor garb. That home seller also has an incentive to extract the benefits of the MLS, to which the home seller has access as a potential client, to serve his interest as a potential competitor.[13] This is an additional value diverted from the business of competing brokers, beyond the value for which the home

[13] The Opinion states that a listing broker is willing to sign an EA listing agreement for a lower fee "because he knows that improved technology – the Internet – causes many buyers to come forward on their own, obviating the need for some of the services for which either he or a cooperating broker used to get paid…" OP 31-Appx 37. This statement implicitly confirms the premise of the free-riding problem and further supports the conclusion that an EA home seller is not seeking to list on the MLS to obtain the interaction of listing and cooperating brokers, but rather for the free website feeds. It is also notable that the "technology" to which the Commission refers is the Internet as a whole, and not the few websites populated by Realcomp.

seller paid as a prospective client of a cooperating broker. This is a form of free-riding.

The Opinion concludes, in effect, that home sellers with EA contracts who compete with cooperating brokers to find buyers are entitled, without additional payment, to obtain the promotional services of Realcomp to reach buyers who are not represented by Realcomp member-brokers. However, the Commission does not attempt to explain why sellers with EA contracts who compete with cooperating brokers and find their own buyers should pay nothing for services for which cooperating brokers are charged. Alternatively, viewed from a different perspective, the Commission does not explain why dues-paying cooperating brokers should pay some of the cost of distributing information to buyers who do not want to use their services. In reality, the "explanation" lies in the fact that the record as a whole supports Realcomp's argument and is inconsistent with the Commission's of the free rider issue.

The Commission's analytical problem evidences an objective well beyond assessing the competitive implications of the Website Policy. Given that Realcomp charges membership fees for its services to cooperating brokers as well as to listing brokers, sellers with EA contracts who find their own buyers (*i.e.*, who act as their own cooperating broker), reasonably could be expected to pay an additional fee of some kind for Realcomp's promotional services. However, any

alternative to the Website Policy that Realcomp theoretically might pursue would appear to be prohibited by the Commission's Order, paragraph II.5 of which prohibits the adoption of any rule that treats EA listings in a "less advantageous" manner than ERTS listings. The Commission's broad remedy highlights the shortcomings of the Commission's free-rider analysis.

B. The Website Policy Eliminates a Bidding Disadvantage.

Realcomp also asserts that the Website Policy ameliorates the bidding disadvantage faced by a buyer who is represented by a cooperating broker. The bidding disadvantage exists because if a buyer represented by a cooperating broker makes the same dollar offer for a home as a buyer who is not represented by a cooperating broker (an "unassisted buyer"), the homeowner will choose the unassisted buyer in order to avoid paying the cooperating broker's commission.

The Commission accepts this argument in substance, ("An EA seller has a preference for a buyer not bound to a cooperating broker, because the same nominal sale price will yield a higher net price," OP 32-Appx 38, but dismisses the related efficiency defense as "implausible," OP 31-Appx 37, because "eliminating the so-called 'bidding disadvantage' does not allow Realcomp or its members to 'increase output, or improve product quality, service or innovation.'" OP 33-Appx 39 (citations omitted). The Commission's arguments in support of its conclusions are conjectural and lack support in the record.

The Commission asserts that Realcomp's argument is implausible because listing brokers with ERTS contracts are more likely to find buyers for properties than are homeowners with EA contracts, and, therefore, cooperating brokers have even less incentive to show ERTS properties than EA properties. OP 31-Appx 37. This suggestion, offered without any record support whatsoever, is misleading – and its implied conclusion therefore wrong – for two reasons.

First, it ignores the main element of Realcomp's efficiency argument. Since there is no reason for a home seller to prefer a bid from a buyer represented by the listing broker over a buyer represented by a cooperating broker (*i.e.*, the home seller will pay the same commission either way), the cooperating broker's client faces no inherent bidding disadvantage for an ERTS-listed property. Second, the argument fails to distinguish between the services a broker can provide as a listing broker and as a cooperating broker. The Commission does not explain why a broker serving in both capacities for one property has more incentive, or is more likely, to find a buyer for that property than for other properties that the broker is not also listing. And indeed there is no evidence in the record to support any such explanation. Further, the Commission's argument leads to the conclusion that home sellers can expect *listing* brokers to make more effort to sell their homes if they use ERTS rather than EA contracts. But that conclusion negates the

Commission's argument that consumers are better off using discount brokers who offer EA contracts.

The bidding disadvantage faced by buyers who use cooperating brokers reduces the incentives those brokers have to show their clients homes listed under EA contracts, *i.e.*, because the probability of submitting a winning bid, and hence the expectation of earning a commission for the effort, is lower. Thus, cooperating brokers have less incentive to show those properties than properties listed under ERTS contracts. To the extent it reduces the exposure of properties under EA contracts to unassisted buyers, the Website Policy partially restores cooperating brokers' incentives to show those properties by reducing the likelihood that they will be outbid by unassisted buyers, thus increasing the quality of the service they provide both to their clients and to the EA home owner. This is a cognizable efficiency benefit.

The Commission says that this is not so because "Insofar as buyers bid against each other for a home, they compete with each other. The antitrust laws protect that competition, and the fact that one competitor (*i.e.*, one with no cooperating broker) may have a cost advantage over another does not make the competition unfair. To the contrary, it is regarded as an efficiency to which the low cost competitor is entitled." OP 32-Appx 38. This misconstrues Realcomp's bidding disadvantage argument which focuses not on fairness to the buyer, but on

the cooperating broker's incentives. The Commission appears to argue that bringing more bidders to the table, *i.e.*, by enhancing incentives for cooperating brokers to show EA-listed properties to their clients, is antithetical to competition. But the Commission cites no evidence that this is so, and it intuitively is not.

The Commission's failure to grasp the essence of the bidding disadvantage argument is evidenced by the fact that the Commission mistakenly attributes Realcomp's claim that cooperating brokers have less incentive to show properties listed under EA contracts to the free-rider argument rather than to the bidding-disadvantage argument. OP 30-31-Appx 36-37. Realcomp's free-rider argument simply makes the point that absent the Website Policy, Realcomp would be providing the same services to a home seller with an EA contract that it provides to a home seller with an ERTS contract, even though Realcomp's members, who pay for those services, can expect to receive less compensation from the homeowner with an EA contract. The free-rider argument does not imply that cooperating brokers have less incentive to show properties under EA contracts than those under ERTS contracts. On the other hand, the bidding disadvantage faced by cooperating brokers when they show EA-listed properties does reduce incentives to show those properties.

Further, the Commission's mode of analysis, which treats the efficiency arguments in isolation, allows the Commission to make inconsistent statements

elsewhere. For example, the Opinion states that EA brokers bring in more listings (per broker), which should be more attractive to the MLS. OP 14, n. 10-Appx 20. That may be a true statement considered in isolation. However, if such listings lead to a "bidding disadvantage" when disseminated through the website feed – which as noted the Commission accepted as fact – then more such listings would not be equally attractive to all users of the MLS, and therefore are not as valuable to the MLS as a platform. Further, member dues to Realcomp are not assessed on a per-listing basis but instead are calculated on an individual agent basis and brokerage basis. IDF 176-Appx 76; CX 133-40-41 ¶59. Hence, unless a discount broker utilizing predominantly EA contracts employed more individual agents, it is hard to imagine how more listings per broker advantage either the Realcomp MLS or other Realcomp cooperating brokers. In any event, the Commission makes no effort to develop this point by way of any evidence.

In sum, the Commission's rejection of Realcomp's efficiency arguments rests on unsupported assertions and is contrary to the facts in the record as a whole.

CONCLUSION

The Commission's Opinion, insofar as it purports to condemn the Website Policy under an "inherently suspect" analysis is erroneous as a matter of law. The Commission's rule of reason analysis is unsupported by substantial evidence when the record is considered as a whole. Accordingly, the Opinion should be reversed

and the Order vacated (except as to paragraph 5 of Part II, which Realcomp does not contest).

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(C), the undersigned counsel hereby certifies that the attached brief, including headings, footnotes and quotations, and excluding the corporate disclosure statement, tables of contents and authorities, and the statement with respect to oral argument, contains 13,717 words, as counted in Microsoft Word 2003, and is therefore in compliance with F.R.A.P. 32(a)(7)(B).

s/ Scott L. Mandel
Scott L. Mandel

Dated: February 9, 2010

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2010, I electronically filed the foregoing ***Petitioner's Brief*** with the Clerk of the Court using the ECF System which will send notification of such filing to all parties of record if they are registered users, or if they are not, by placing a true and correct copy in the United States Mail, postage prepaid, to their address of record.

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