---

**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**

---

# Reply Brief of Petitioner

---

Steven H. Lasher
Scott L. Mandel
Richard C. Kraus
FOSTER SWIFT COLLINS & SMITH PC
313 S. Washington Square
Lansing, Michigan 48933
(517) 371-8100

Robert W. McCann
DRINKER BIDDLE & REATH LLP
1500 K Street, N.W., Suite 1100
Washington, D.C. 20005
(202) 842-8800

Lead Counsel for Petitioner

May 20, 2010

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## Cases

**Other Authorities**



## LEGEND FOR RECORD CITATIONS

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

RPF = Respondent's Proposed Findings of Fact

Tr = Transcript of testimony before the Administrative Law Judge

## SUMMARY OF REPLY ARGUMENT

Lacking a workable definition of "inherently suspect" conduct, the Commission requests the Court to defer to its ability to know such conduct when it sees it. The Commission continues to assert, without reasonable basis, that Realcomp's Website Policy is "inherently suspect" and to cherry-pick the record in order to conclude that the Website Policy is an unreasonable restraint of trade. The Commission's analysis is legally incorrect and fails substantial evidence review, even under its version of a full rule of reason. The Website Policy advances an efficiency interest of the multiple listing service ("MLS") joint venture and, in any event, had no actual or confidently predictable adverse effect on competition.

## ARGUMENT

### I. The Commission's findings and conclusions are subject to closer scrutiny given its rejection and disregard of contrary findings by the administrative law judge.

The Commission correctly cites *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951), for the principle that disagreement between an agency and the administrative law judge does not *change* the substantial evidence standard of review. Resp. Br. 16. However, such a disagreement significantly *affects* the review.

*Universal Camera* recognizes "that evidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the

witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." *Id.* The ALJ's findings must be "considered along with the consistency and inherent probability of testimony," especially when questions of credibility are significant in the particular case. *W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 870 (6th Cir. 1995). In addition, the relevance of disagreement between an agency and ALJ is not strictly limited to fact-finding. *In re Detroit Auto Dealers' Assn*, 955 F.2d 457, 469 (6th Cir. 1992), requires a reviewing court to "carefully scrutinize the Commission's determinations of fact, *and therefore its conclusions based upon those facts*" when the Commission overrules the ALJ. (emphasis added). "While the ALJ may have no 'policy' authority, deference is still ordinarily due to the frontline adjudicator in applying general standards to particular facts." *Wood v. Dep't of Labor*, 112 F.3d 592, 597 (1st Cir. 1997) (citing *Universal Camera*).

Closer examination is appropriate here. Judge McGuire considered, carefully and in extensive detail, the testimonial and documentary evidence in this matter, and concluded the evidence did not support the complaint. Although Judge McGuire did not make express findings as to credibility, it is inarguable that he – but not the Commission – had the opportunity to observe, for example, the Commission's economic expert as he struggled to explain an exhibit (on which the

Commission crucially relies) that he neither created nor understood. Pet. Br. 36-41.

In its Opinion, the Commission went to significant length to discredit its Chief Administrative Law Judge's knowledge of the law and ability to interpret economic evidence. *See, e.g.*, OP at 4, n.4-Appx 10 ("[W]e conclude that many of the ALJ's conclusions are inconsistent with governing law, established antitrust policy, or economic logic"), 22-Appx 28 (citing *The ALJ Fiasco*, a 30-year-old paper by then-Professor Antonin Scalia), and 44-Appx 50 ("This conclusion appears to reflect an inadequate grounding on the ALJ's part in some of the technical matters for which adjudicators at an expert agency charged with handling competition matters should be expected to develop expertise."). That it was not merely sufficient to disagree with the ALJ's conclusions is a telling insight into the Commission's desire that the Court not look too closely at the findings of fact and the conclusions drawn from the evidence by the ALJ.[1]

[1] As part of its explanation for rejecting the ALJ's conclusion that the Commission's expert's economic analysis was "unpersuasive" and "had little probative value" in demonstrating adverse competitive effect, the Commission summarily rejected 118 separate findings, comprising 28 pages of the Initial Decision by a footnoted parenthetical comment, *i.e.*, "inferences and conclusions regarding the economic and econometric evidence mischaracterized as 'findings of fact.'" OP 44, n. 45-Appx 50. A review of those findings, IDF 482-600-Appx 122-136, discloses a detailed and accurate review of the substance of the expert witnesses' testimony.

In addition to this case, the Commission has brought eight proceedings in the last 10 years resulting in initial decision by ALJs. In all but two of those cases, the ALJ upheld the complaint, the Commission affirmed and its decision (if appealed) was upheld on appeal.[2] In the two instances in which the ALJ ruled for the respondent and dismissed the complaint, the Commission reversed but – in both instances – the Court of Appeals declined to uphold the Commission's decision.[3] Thus, it is presumptuous for the Commission to suggest that the ALJ's assessment of the evidence is entitled to no consideration.

## II. Realcomp established plausible efficiency justifications for the Website Policy.

The Commission argues that Realcomp's "free-rider" and "bidding disadvantage" arguments are erroneous as a matter of law. OP 29-34-Appx 35-40; Resp. Br. 53-54, 60. Although entitled to "some deference," the Commission's legal analysis and conclusions are given plenary review. *Detroit Auto Dealers*, 955 F.2d at 461.

---

[2] *Chicago Bridge & Iron Co. N.V. v. FTC.*, 534 F.3d 410 (5th Cir. 2008); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346 (5th Cir. 2008); *Evanston Northwestern Healthcare Corp.*, FTC Docket No. 9315 (2007); *Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 404 (2005), *petition for review denied*, 199 Fed. Appx. 410 (6th Cir. 2006); *Telebrands Corp. v. FTC*, 457 F.3d 354 (4th Cir. 2006); *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

[3] *Schering Plough Corp. v. FTC*, 402 F.3d 1156 (11th Cir. 2005); *Rambus, Inc. v. FTC*, 522 F.3d 456 (D.C. Cir. 2008).

The Commission also argues that these explanations are not plausible. Resp. Br. 56-58, 61. However, the Supreme Court has made clear that plausibility is a more liberal standard than the Commission acknowledges. Specifically, plausibility is not defined by whether the challenged restrictions *are* procompetitive, but whether they *could be. California Dental Ass'n. v. FTC*, 526 U.S. 756, 778 (1999).

### A. The Website Policy is reasonably ancillary to the MLS joint venture.

The Commission cites *Major League Baseball Properties, Inc. v. Salvino*, for the proposition that, "under the doctrine of ancillary restraints, when a challenged restraint is not reasonably necessary to achieve any of the efficiency-enhancing purposes of a joint venture, it will be evaluated apart from the rest of the venture." 542 F.3d 290, 338 (2d Cir.2008) (Sotomayor, J., concurring). However, the Commission – having presumed the Website Policy inherently suspect – never focused on the question of "reasonableness."

The Commission's own guidelines state that "[an] agreement may be 'reasonably necessary' without being essential." Federal Trade Commission and Department of Justice, *Antitrust Guidelines for Collaboration Among Competitors* § 3.36(b) (2000) ("*Guidelines*"). Thus, by its own standards, the Commission is wrong when it asserts that the relevant question is whether the Website Policy must

be necessary to "match buyers and sellers." Resp. Br. 34. It is enough that the Policy makes the MLS more attractive to its users, whether or not it is essential to operate the MLS. This view is confirmed by Judge Sotomayor's concurrence in *Salvino*, rejecting the plaintiff's argument that Major League Baseball's pooled merchandise licensing arrangement was not essential to the successful conduct of a professional baseball league. Judge Sotomayor observed that a challenged restraint need not be essential, but rather only "reasonably ancillary to the legitimate cooperative aspects of the venture." *Id.* at 340, n.11 (Sotomayor, J., concurring).

The *Guidelines* go on to state, "However, if the participants could have achieved or could achieve similar efficiencies by practical, significantly less restrictive means, then the Agencies conclude that the relevant agreement is not reasonably necessary to their achievement." *Guidelines*, § 3.36(b). The Commission has never broached this question here, choosing instead to simply reject Realcomp's efficiency arguments. Significantly, however, whether a restraint is disproportionate to the harm it seeks to remedy is a question appropriately analyzed under the rule of reason. *Craftsmen Limousine, Inc. v. Ford Motor Company*, 363 F.3d 761, 776 (8th Cir. 2004) (citing *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997)).

### B. The Commission erred by failing to recognize the actual free-rider problem addressed by Realcomp's Website Policy.

The Commission reasserts its erroneous conclusion that no free-riding problem existed from disseminating Exclusive Agency ("EA") listings to certain public websites because brokers using EA listings paid the same dues to Realcomp as brokers using Exclusive Right to Sell ("ERTS") listings. Stated differently, the Commission maintains that a listing broker's customer who has paid indirectly for *any* use of the MLS has then paid for *all* uses of the MLS. As Realcomp explained in its initial brief, a home seller with an EA listing is both the potential client of a cooperating broker and a competitor of cooperating brokers. As a result, an EA seller has an incentive to extract, at no additional cost, the benefits that the MLS also provides to cooperating brokers to serve the seller's separate interest as a potential competitor of those cooperating brokers. Pet Br. 50-54. This incentive creates a free-rider problem.[4]

[4] In *Salvino*, the court recognized that Major League Baseball's pooled licensing arrangement addressed a *bona fide* free-rider problem because one team could benefit disproportionately from selling its merchandise independently from the rest of the league, notwithstanding that each team would receive some compensation from licensing its own merchandise. 542 F.3d at 305, 333. Judge Sotomayor agreed that a free-rider problem existed "if one of the Clubs is able to benefit disproportionately from the actions of Major League Baseball or other Clubs in the licensing of [team] products." *Id.* at 340. (Sotomayor, J., concurring)

This type of free-riding finds analogies in other areas of commerce. For example, most theatrical movies released on DVD are sold with a licensing statement restricting use for private entertainment and prohibiting use for commercial purposes. The license is a "rule" (like the Website Policy) that prohibits the purchaser from free-riding on the lower-cost private (retail) distribution system in order to compete with the seller's commercial distribution opportunities. It is of no consequence that the purchaser paid something, *i.e.*, the retail price, to the seller because the purchaser has not paid for the additional benefit of commercial use. Here, the EA home seller has paid the listing broker to engage Realcomp to promote the property to cooperating brokers and their homebuyer clients, but has not paid Realcomp to use the MLS to advance the discrete commercial interest in competing with member cooperating brokers. That seller's listing broker has paid only the same dues to Realcomp as a broker whose customers are not competing with cooperating brokers.[5]

[5] The Commission contends that Realcomp's free-riding argument is fallacious because, when an unrepresented buyer is the successful bidder, no cooperating broker receives a Commission under either an ERTS or EA contract. Resp.Br. 58. Here again, the Commission is mistaken. The free-riding problem is not tied to whether a cooperating broker is paid in a particular transaction, but whether the Realcomp MLS will give free public website advertising to EA sellers who are acting as their own (non-member) cooperating brokers. ERTS sellers, by definition, do not compete with Realcomp members who are acting as cooperating brokers.

### C. The Website Policy addresses a cognizable bidding disadvantage.

The Commission recognizes that the Website Policy "may in fact help reduce a so-called bidding disadvantage between a buyer who retains a cooperating broker and a buyer who opts to go it alone," but argues that such a result is not legally cognizable because the disadvantage is a "market efficiency" protected by the antitrust laws. Resp. Br. 59-60. Taken to its logical conclusion, this would mean that the most efficient market would be one in which all buyers were unrepresented by brokers. But in reality, real estate markets depend on the services of brokers.

Elsewhere, the Commission acknowledges that multiple listing services create "major contributions to improvements in the economic performance of the real estate sector" and are "generally acknowledged to be a superior platform for matching home buyers and sellers." OP 2-Appx 8. In other words, MLSs enhance market efficiency. The efficiency of the MLS is enhanced if cooperating brokers who are members of the MLS have equally good incentives to show both EA-listed properties and ERTS-listed properties. Eliminating the bidding disadvantage restores cooperating brokers' incentives to show EA-listed properties, and as a result brings more broker-assisted buyers to the table. Pet. Br. 58-59. In other

words, the Website Policy enhances the efficiency of the platform, which in turn enhances the efficiency of the market.

The Commission is simply trying to have it both ways. Elimination of the bidding disadvantage is a plausible and cognizable efficiency.

**III. A truncated rule of reason analysis is not appropriate in this case.**

The Commission devotes more than half of its argument to the assertion that the Website Policy should be condemned on its face. This argument is explained in two versions – with and without an assessment of market power – but the conclusion reached under each version fundamentally relies on characterizing the conduct rather than proving anticompetitive effects. Neither version is appropriate here.

The Commission erroneously suggests that applying a quick look analysis to this case is unremarkable and consistent with prior decisions. However, the few cases short-cutting the rule-of-reason involve agreements among competitors regarding the terms of their competition with one another, which closely resemble other practices condemned under *per se* standards. In contrast, Realcomp's Policies govern access and use of venture-provided facilities and resources, and do not affect how its members compete among themselves.

The judicial reluctance to base liability on a quick look is justified. By abandoning the full rule of reason, the truncated approach inverts the burden of

proof. Rather than requiring a plaintiff to bear the initial burden to demonstrate actual anticompetitive effects, the abbreviated analysis requires the defendant to justify its practices. That burden-shifting occurs when a practice is characterized as "inherently suspect," a subjective evaluation made with no meaningful guidance from the case law. See, *California Dental*, 526 U.S. at 775 n.12 (caution required before shifting burden of proof based on theoretical claim of anticompetietive effects)

And, according to the Commission, that characterization can be made without consideration of market power or actual anticompetitive effect. Reallocating the burden of proof in this manner is case-determinative. To date, no defendant has been able to demonstrate sufficient (in the Commission's view) pro-competitive justification once a practice has been tagged as "inherently suspect."

The Commission's policy-driven determination to expand the quick-look analysis is questionable since Complaint Counsel expressly waived any reliance on that theory at oral argument, stating that its reliance on a full rule of reason analysis has "been clear from day one." Oral Argument Tr. p. 36-Appx 216.

The Commission's expansion is particularly unjustified when challenged practices involve new technologies and affect new business models. The real estate industry is experiencing a constant growth in Internet-based alternatives for reaching prospective buyers. IDF 448-451-Appx 118-119. In this dynamic

environment, there is no past judicial experience or current economic learning that leads to a "confident conclusion" about the "inherently suspect" nature of the Website Policy. *California Dental*, 526 U.S. at 781. That is particularly evident since non-traditional brokers – the competitors allegedly disadvantaged by Realcomp's policy – have instead been "thriving." ID 59-60-Appx 120-121.

### A. The Commission has not articulated a sufficient basis to deem the Website Policy "inherently suspect."

The Commission asserts that the Website Policy can be condemned in the absence of market power. Resp. Br. 22, 27-28. If the Commission's view were correct, the Website Policy would be presumptively unlawful even if Realcomp were but one of a hundred MLS's in Southeast Michigan and lacked any market power. But the absence of market power, by definition, would mean that the Policy could have no adverse effect on competition.[6] The Commission is pursuing a *de facto per se* rule for conduct that it challenges. But the Website Policy is not the type of naked restraint that qualifies for the harsh strictures of the *per se* rule.

[6] *See, e.g., Sanjuan v. American Bd. of Psychiatry and Neurology, Inc.* 40 F.3d 247, 251 (7th Cir. 1994) ("Substantial market power is an essential ingredient of every antitrust case under the Rule of Reason.")

Rather, the Policy regulates the operation of the MLS, and not the independent conduct of the brokers who are MLS members. Pet. Br. 16-19.[7]

Courts are instructed to be reluctant to adopt *per se* classifications where the economic impact of a challenged practice is not "immediately obvious." *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006). Under *California Dental*, a truncated analysis is appropriate only when a "*great likelihood* of anticompetitive effects can *easily* be ascertained." 526 U.S. at 770 (emphasis added). This requires that "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 from a quick (or at least quicker) look, in place of a more sedulous one." *Id.* at 780–81.

An abbreviated rule of reason, under any construct, is but a brief step removed from *per se* analysis. P. Areeda & H. Hovenkamp, *Antitrust Law* ¶1911a (1995). That reality requires the court to make a careful inquiry into the Commission's logic, even under a substantial evidence standard. *See Detroit Auto Dealers*, 955 F.2d at 470-71.

---

[7] By condemning the Website Policy regardless of the inference of anticompetitive effects derived from market power, the Commission tacitly acknowledges that it is engaging in a *de facto* rulemaking outside of the procedures specified by its authorizing statute, which it may not do. "An agency should not be able to impede judicial review, and indeed even political oversight, by disguising its policymaking as factfinding." *Allentown Mack Sales and Service, Inc. v. NLRB*, 522 U.S. 359, 376 (1998)

The Commission attempts to justify its inherently-suspect characterization on the basis that the Website Policy targeted "advertising" by discount brokers. Resp. Br. 25-26. The record does not support this assumption.

Realcomp does not exclude "discount" brokers from the MLS. It does not regulate how a broker may advertise, what types of services a broker may offer, or what price may be charged for a broker's services. Both "discount" and "traditional" brokers offer both EA and ERTS listings. All listings of all brokers appear on the MLS. Pet. Br. 10-11. Traditional brokers have more EA listings than discount brokers in the Realcomp service area, and EA listings of traditional brokers are equally subject to the Website Policy. *Id.* Because EA listings are not the sole, or even primary, province of discount brokers, the Commission's claim that the Website Policy "targets only low cost listings" is incorrect. Resp. Br. 26. The Commission's broad-brush and factually unsupported assumptions do not justify a "confident conclusion about the principal tendency" of the Website Policy, as required for inherently-suspect analysis. *California Dental*, 526 U.S. at 780-81.

Further, unlike the conduct in cases cited by the Commission, the Website Policy is not a naked restraint and does not regulate the conduct of MLS members outside of the MLS. The Commission's citation to *NCAA v. Board of Regents*, 468 U.S. 85 (1984) (limiting number and minimum price of televised games) and

*National Soc. of Professional Engineers v. United States*, 435 U.S. 679 (1978) (prohibiting competitive bidding) is misplaced. Resp. Br. 30. Neither case involves practices that are comparable or analogous to Realcomp's Website Policy. Neither supports the Commission's expansive application of the "inherently suspect" standard.

The Commission asserts that *Denny's Marina, Inc. v. Renfro Productions, Inc.*, 8 F.3d 1217 (7th Cir.1993), holds that policies singling out discounters for exclusion may be summarily condemned even when undertaken by a joint venture. Resp. Br. 27, 34. This is an incorrect reading of the case. The boat dealer's exclusion from a trade show resulted from an agreement among a trade association's members and the trade show's independent producer. The conduct had nothing to do with the trade association's operations or membership policies. 8 F.3d at 1219-1220. Because the exclusion was a naked restraint under any reading of the case, the conduct was held to be a *per se* violation. *Id.* at 1221-1222.

The Commission's view that the nature of conduct alone is sufficient for inherently suspect condemnation, without market power or proof of effects, is ill-suited for analyzing internal joint venture policies that do not regulate the separate conduct of individual members or discriminate with respect to membership

eligibility.[8] *Polygram Holding* is not contrary. The "inherently suspect" conduct was an "agreement between joint venturers to restrain price cutting and advertising with respect to products *not part of the joint venture.*" 416 F.3d at 37 (emphasis added).

### B. The Commission' truncated analysis also lacks a sufficient basis in the record.

The Commission asserts that it engaged in a more "searching" short-cut of the rule of reason by considering, as an alternative to the inherently suspect analysis, Realcomp's market power plus a showing of the "anticompetitive tendencies" of the conduct. Resp. Br. 36-37. Although the Commission substitutes a practice's "anticompetitive tendencies" for its "inherently suspect" nature, the definitional distinction drawn by the Commission is unclear. Nonetheless, the record again demonstrates the Commission's conclusions are baseless.

Courts have accepted a market power analysis as indirect evidence of competitive effects in some circumstances. However, a plaintiff seeking to use market power as a proxy for adverse effect must show some other ground for

[8] In *Salvino,* the MLB's centralized licensing arrangement required teams to pool and equally share licensing revenues. This was, in Judge Sotomayor's view, a *price-fixing* scheme. 542 F.3d at 335-37 (Sotomayor, J., concurring). Nonetheless, the majority ruled, and Judge Sotomayor concurred, that no *per se* or truncated analysis was appropriate to an analysis of the case. *Id.* at 334; *Id.* at 340 (Sotomayor, J., concurring).

believing that the challenged behavior could harm competition in the market, such as the inherent anticompetitive nature of the defendant's behavior or the structure of the inter-brand market. *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 97 (2d Cir. 1998); *Spanish Broadcasting System of Fla., Inc. v. Clear Channel Communications, Inc*., 376 F.3d 1065, 1073 (11th Cir. 2004).

The term "inherent," when used in this context, echoes the Supreme Court's admonition that a tribunal must be able to draw a "confident conclusion" about the character of conduct before applying an abbreviated rule of reason. *California Dental*, 526 U.S. at 781.[9] Consequently, courts require more than mere "anticompetitive tendencies." Thus, *Tops Markets* held that, even if the plaintiff had been able to prove market power, the evidence of "other grounds" did not establish that the restrictive covenant resulted in *higher prices* or *actual exclusion* from the market. 142 F.3d at 97. *See also, Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 239 F. Supp. 2d 180, 192 (D.R.I.2003). ("[M]arket power, alone, does not establish an antitrust violation. … [O]nce market power is proven, the nature, purpose, and duration of the restraint and its effect on

[9] "Inherent" is defined as "existing as an essential constituent or characteristic." The American Heritage Dictionary of the English Language, Fourth Edition (2009).

competition in the relevant market must be assessed."), *aff'd*, 373 F.3d 57 (1st Cir. 2004).

The Commission argues that the Website Policy bears a "close family resemblance" to advertising restrictions that have been condemned in other circumstances. Resp. Br. 39. As explained in Realcomp's initial brief, the cases do not support the Commission's theory of truncated scrutiny. Pet. Br. 16-23. [10]

Assuming, *arguendo*, that the Website Policy "resembles" a restraint on advertising, it does not follow that truncated analysis is appropriate. Notably, the Supreme Court declined to apply the Commission's truncated approach in *California Dental*, where the restriction on advertising directly concerned prices – a traditionally *per se* category. *Craftsmen Limousine*, a case involving restrictions on advertising in a trade publication, counsels that truncated analysis is inappropriate when the likelihood of adverse competitive effects is not obvious, and the restrictions could plausibly have procompetitive effects. 363 F.3d at 776.

[10] The Commission erroneously relies on *Morales v. Trans World Airlines*, 504 U.S. 374 (1992), and *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), for the proposition that "restrictions on advertising in ordinary markets like Realcomp's [pose] serious dangers to competition." Resp.Br. 32. *Morales* decided whether a state law compelling certain rate advertising was related to "prices" and therefore preempted by federal law. Although the Court cited antitrust precedent for the proposition that advertising of prices indeed relates to price, the decision is not about antitrust law and provides no help here. *Bates*, decided on First Amendment grounds, concerned a statewide prohibition of any form of advertising by an entire profession, which is hardly analogous to Realcomp's Policy.

And in the case bearing the closest family resemblance, *Madison Square Garden, L.P. v. National Hockey League*, 270 Fed. Appx. 56 (2d Cir. 2008), the court refused to short-cut the rule of reason when examining the NHL's restrictions on individual team websites, including website advertising, stating "[i]t is far from obvious that [the NHL's ban on independent websites] has no redeeming value." *Id.* at 58.

Nonetheless, for its evidence of anticompetitive "tendencies," the Commission relies primarily on the allegedly "high" cost to place listings on public websites independently of Realcomp. The record evidence is to the contrary. For example, brokers can place EA listings on Realtor.com by "dual-listing" the property with another MLS. The costs of dual-listing are nominal. IDF 436, 440, 442-443-Appx 117-118.[11]

The MLSs used by discount brokers to bypass Realcomp charge membership fees comparable to Realcomp's. IDF 442-Appx 117. Brokers can avoid even those modest dues by joining one of the seven MLSs that maintain data sharing arrangements with Realcomp. Members of those MLSs have their listings posted on the Realcomp MLS without joining Realcomp. IDF 436, 439-Appx 117.

[11] The Commission criticized the ALJ's finding for characterizing the costs as nominal "rather that simply stating the amount of such costs." OP 4 n.4-Appx 16. But the findings specifically list the fees for joining other MLS's and the time and costs for dual listings. IDF 442- 443-Appx 117-118

Likewise, labor costs associated with dual listing are nominal and recoverable. IDF 443-444-Appx 117-118. One broker pays an assistant $10 per hour to input and update dual listings, a task only requiring between forty minutes and two hours over a listing's entire lifespan. IDF 443-Appx 118.

Finally, other public real estate websites, not affected by the Website Policy, are growing in popularity and usage. Some are free of charge. IDF 445-446, 448-449-Appx 118. The Commission does not acknowledge this evidence or explain why it does not – at least – call into question the propriety of labeling the Website Policy as facially restrictive.

Evidence that competition has not been harmed and is in fact healthy negates any inference to be drawn from market power. *K.M.B. Warehouse Distributors, Inc. v. Walker Mfg. Co.*, 61 F.3d 123, 129 (2d Cir. 1995). Thus, in *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996), a case relied upon by the Commission, the physician's claim failed, in part, because he was able to establish a successful practice despite being excluded from the defendant's preferred provider network. *See also, Ryko Mfg. Co. v. Eden Services*, 823 F.2d 1215, 1234 (8th Cir. 1987).

The evidence in this case was that discount brokers in Southeast Michigan are "thriving." Pet. Br. 48-49. The record establishes, if nothing else, that the Commission's reliance on an indirect market power test was inappropriate.

## IV. The Commission's selective assessment of the econometric evidence is not entitled to deference.

The Commission argues that the Website Policy also fails a fuller rule of reason analysis because the anticompetitive tendencies are corroborated by econometric evidence. Resp. Br. 42. However, the Commission's selective rendition of the econometric evidence does not create the type of substantial evidence that "a reasonable mind might accept as adequate to support a conclusion." *Detroit Auto Dealers*, 955 F.2d at 461.

In its initial brief, Realcomp discussed in detail why the opinions offered by Dr. Williams, the Commission's expert, did not constitute substantial evidence. The responses asserted in the Commission's brief fail to change that conclusion.

### A. Dr. Williams' time-series analysis is unconvincing, as the Commission itself recognized.

The Commission argues that Dr. Williams' "time-series" analysis establishes an anticompetitive effect. Resp. Br. 43. Dr. Williams claimed that evidence of adverse effects from the Realcomp Policies could be found in his estimate that the average monthly share of new EA listings (*i.e.*, as a percentage of total new listings) declined from approximately 1.5% in January 2004 to approximately 0.7%, in October 2006. IDF 485-487-Appx 61. But Dr. Williams' observation does not explain *why* the decline occurred. Although the Commission tried to infer that the decline in EA listings was due to the Realcomp Policies, a bare time-series

analysis cannot isolate the effect of the Policies from the effects of the declining Southeast Michigan economy or, in fact, from any other factors influencing homeowners' choices among listing types during that period.

Indeed, the Commission itself observed, "In anticipation of this criticism, Dr. Williams had performed two studies [the "cross-sectional" studies] to compare Realcomp with MLSs in nine other Metropolitan Statistical Areas." OP 45-Appx 51.[12] Thus, the Commission and Dr. Williams both acknowledged that the failure to account for other economic factors was a critical flaw in the time-series analysis.[13]

Dr. Williams claimed that using the monthly average percent of new EA listings insulated his calculation from "market flux" because the percentage ratio of EA to ERTS listings should not change even if total listings decline. IDF 489-Appx 123. However, that assumption is neither intuitively true nor consistent with testimony from brokers and the Commission's own industry expert.

Dr. Williams admitted that he is not a real estate expert. Williams, Tr. 1280-Appx 205. Realcomp's witness, Kelly Sweeney, a Southeast Michigan broker with

[12] The cross-sectional studies were differently flawed. *See* Pet. Br. 27-29.

[13] Consequently, Realcomp's expert, Dr. Eisenstadt, and (in response) Dr. Williams relied principally on multivariate regression estimates to isolate the effects of MLS restrictions from other demographic and social factors that were thought to affect the prevalence of EA listings. Pet. Br. 29-30.

over 30 years of experience, testified that more sellers choose full service ERTS listings over EA listings in a declining economy such as Southeast Michigan (*i.e.*, a "buyers' market"), because they want and need the professional marketing services of a full-service broker. Sweeney, Tr. 1302-1304-Appx 208-210. Mr. Sweeney explained that EA listings are therefore more prevalent in strong markets (*i.e.*, "sellers' markets") such as California or Arizona. Sweeney, Tr. 1326-1327-Appx 211-212. The Commission's expert, Mr. Murray, also testified about the declining use of EA listings nationally. IDF 91-Appx 78. Although the Commission notes that limited service brokerages increased between 2003 and 2005, Resp. Br. 9, the Commission does not mention its expert's testimony that EA listings decreased from 15% to 8% nationally between 2005 and 2006, due to a softening of the housing market. Murray, Tr. 289 and Exhibit CX 535, p. 116-Appx 202 and 224.

Thus, the relative percentage of EA listings would be expected to decline over time in a distressed market such as Southeast Michigan. ID 106-Appx 167. Because Dr. Williams failed to consider the likely impact of market conditions, his time series analysis is not reliable evidence that the Realcomp Policies had any effect on the percentage of EA listings.

### B. The Commission failed to rehabilitate Dr. Williams' "benchmark" analysis.

The ALJ correctly identified a critical error in Dr. Williams' benchmark (cross-sectional) analysis – namely the dissimilarity of the comparison markets (MSAs) to Detroit. Pet. Br. 28-29. The ALJ observed that if Dr. Williams had correctly identified the factors that determine the prevalence of EA listings, "one would expect the EA shares of the Control MSAs to be very similar." Instead, the EA shares varied widely across Control MSAs. IDF 526-527-Appx 127.

The Commission argues that "even if the variables representing the selection criteria were perfect predictors of the share of EA listings, this would not mean that the EA share figures in each MSA would be the same because the values of those variables are not equal for each MSA." Resp. Br. 45-46.

But the fact that the values of the variables are not the same – or even similar – among the Control MSAs is precisely the point. If Dr. Williams had correctly identified all the factors significantly affecting the share of EA contracts *and* had chosen control markets based on the similarity of those factors, then "one would expect the EA shares of the Control MSAs to be very similar." IDF 526-Appx 127. Realcomp's expert, Dr. Eisenstadt, made the same point. RX 161, ¶12-Appx 233-234. The Commission's response is merely semantic misdirection. The attempt to stand this argument on its head must be rejected.

### C. The Commission has not provided a sound or reasonable basis for rejecting Realcomp's economic evidence.

Realcomp's expert, Dr. Eisenstadt, demonstrated that the Policies had no statistically significant effect on the prevalence of EA listings in the Detroit MSA. Pet. Br. 29-31; IDF 566-Appx 132, ID 112-114-Appx 173-175. The Commission contends, however, that Dr. Williams successfully rebutted Dr. Eisenstadt's economic evidence. The Commission relies on Dr. Williams' purported finding of a "multicollinearity" problem in Dr. Eisenstadt's selection of certain regression variables. Resp. Br. 49-51.

Dr. Eisenstadt determined that, for purposes of estimating the effects of restrictions like the Realcomp Policies on the prevalence of EA listings, certain independent variables should be measured at both the local (zip code or county) and metropolitan (MSA) levels, *i.e.*, because both neighborhood and metropolitan characteristics of home buyers and sellers may affect the choice between an EA and ERTS listing. IDF 560-563-Appx 131-132. Dr. Williams believed that the values of the MSA-level variables were highly correlated with the "Rule" variable (which measured the effect of MLS restrictions), and therefore he excluded all

MSA variables from his own analysis and obtained different results.[14] CX 560, ¶24-Appx 229; DX 12-4-Appx 231.

Dr. Williams' exclusion of the MSA-level variables was inappropriate. The Commission states that "Dr. Williams excluded those variables not because he judged them not 'pertinent,' but in order to avoid the multicollinearity problem." Resp. Br. 51. However, Dr. Williams relied specifically on Peter Kennedy's *A Guide to Econometrics* (4th ed., 1998), for his testimony concerning multicollinearity. That treatise states as follows:

> A popular means of avoiding the multicollinearity problem is by simply omitting one of the collinear variables. If the true coefficient of that variable in the equation being estimated is zero, this is a correct move. *If the true coefficient of that variable is not zero, however, a specification error is created. [Further], omitting a relevant variable causes estimates of the parameters of the remaining variables to be biased. Id.* at 188 (emphasis added).

Thus, according to the text on which he relied, Dr. Williams should have based his decision to exclude certain variables on a determination that their statistical coefficient values were zero (or close to zero) – in other words, a conclusion that they *were not "pertinent" to the share of EA contracts*. This is precisely the position that the Commission claims Dr. Williams was *not taking*, *i.e.*, that he did not exclude those variables because they were not pertinent. Resp.

[14] Dr. Williams had considerable difficulty explaining his multicollinearity analysis, to the point of incorrectly identifying his own exhibit. Pet. Br. 36-39.

Br. 51. The positions of both the Commission and Dr. Williams are contrary to the authoritative text on which they purportedly relied, which cautions that omitting pertinent variables inappropriately causes biased results.[15]

Dr. Williams' conclusions accordingly were rendered unreliable by his exclusion of pertinent variables. Dr. Eisenstadt's analysis thus remains the only credible economic evidence in this case.[16] The Commission was wrong to reject Dr. Eisenstadt's analysis.

[15] Dr. Williams' calculations omitting the MSA-level variables are explained in his June 14, 2007 Surrebuttal Report. CX 560, ¶¶16-20-Appx 226-228. Dr. Williams admitted that a trial exhibit from the report (DX 12-3-Appx 230) did not correctly present the information it purported to present. *See* Pet. Br. 36-38. Thus, Dr. Williams dropped the MSA variables from his equation on the premise that the values of those variables were highly correlated with the value of the Rule variable – but at the time he did so, he could not actually have known that to be true.

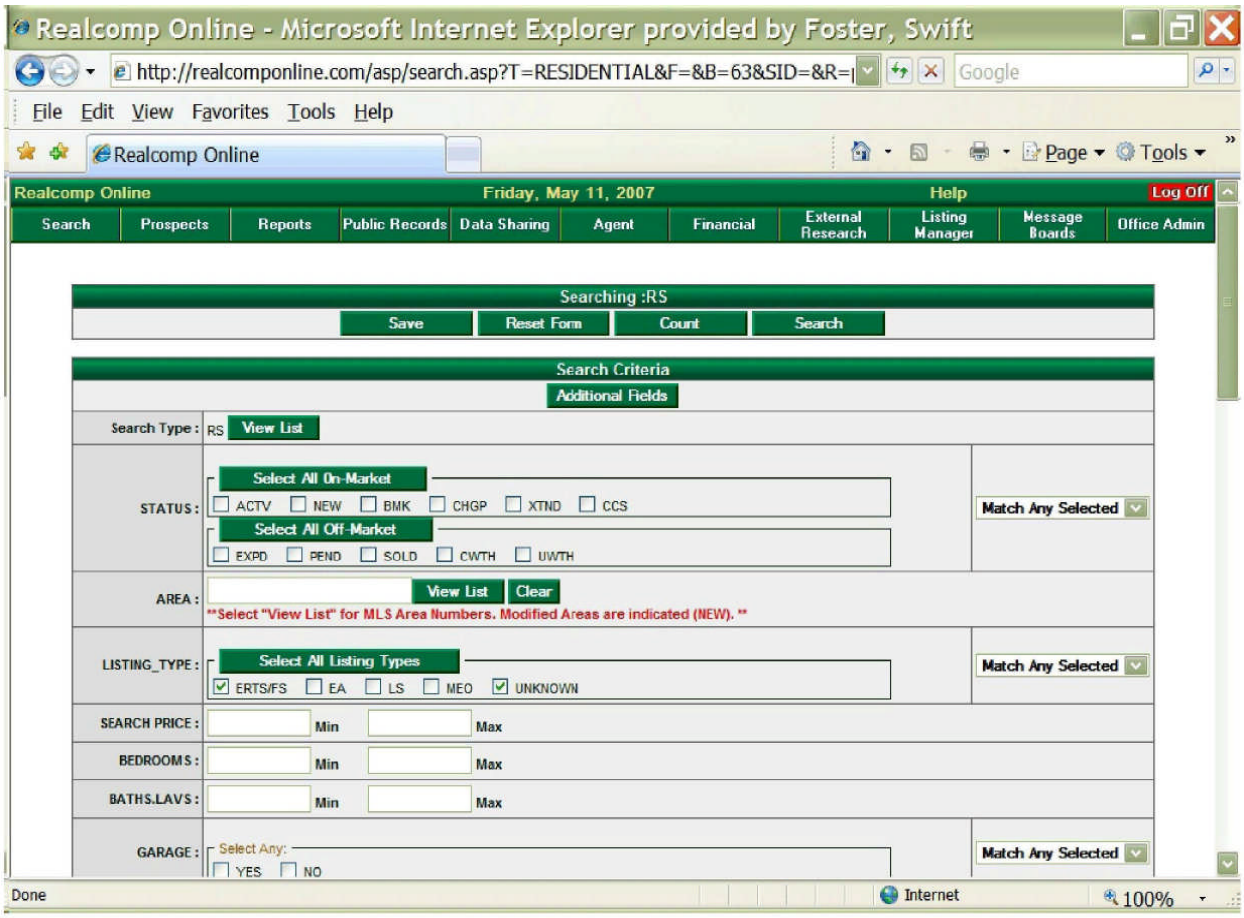
[16] The Commission argues that the credibility of Dr. Eisenstadt's work is undermined by his conclusion that the share of EA listings in the Detroit MSA is in fact higher than would have been expected based on the measured variables. The Commission mischaracterizes this conclusion as suggesting that a restriction on public website dissemination of EA listings somehow increased their usage. Resp.Br. 49, n.11. But the Commission misses the point, which is simply that, when using the independent variables the Commission's expert identified as affecting the share of EA contracts, the actual effect of the Realcomp Policies turned out to be less than Dr. Williams' variables predict. In short, Dr. Eisenstadt was simply observing that the "expected" reduction in the prevalence of EA listings did not, in fact, occur.

### D. The Commission's claim of an "exhaustive" rule of reason analysis is self-serving.

The Commission's strained and self-serving view of the evidence under its "full" rule of reason is further illustrated by its analysis of Realcomp's now-rescinded "Search Function Policy," under which the MLS search engine defaulted to ERTS and "unknown" listings. The ALJ concluded that brokers could easily override the Search Function's restriction. ID 95-Appx 156. The Commission characterizes the brokers' ability to change the search setting as "theoretical," and instead claims to have "examined the extensive evidence of what brokers actually do." Resp. Br. 40. This "extensive" evidence consisted of evidence of decreased viewing of EA listings on the MLS. OP 38-Appx 44; Resp. Br. 40-41. From that, the Commission "concluded that the policy had the effect of dramatically lowering the number of times EA listings were viewed by brokers and e-mailed to customers in comparison with ERTS listings." Resp. Br. 41. However, as with Dr. Williams' time-series analysis, the Commission relies only on inference and not any record evidence connecting the Search Function Policy with the decrease in viewing of EA listings. This inference is demonstrably unreasonable.

The following graphic is CX 159, the MLS search screen with the prior default setting. One click of the mouse in the "Listing_Type" box was all that was needed to select EA or all listings. IDF 367-Appx 108. Realcomp members are

necessarily computer literate. IDF 369-Appx 108. There is nothing "theoretical" about members' ability to easily search for and display all listings, or indeed, only EA listings.




The Commission's finding of an unreasonable restraint based upon its "exhaustive review" of the record is self serving. The decreased viewing of EA listings by members was more credibly attributed to Realcomp members' disinterest in dealing with those types of listings. Realcomp members were reluctant to show EA listings to their customers. EA listings created more work for brokers because they encountered problems dealing with unrepresented sellers who

tended to be unreliable in scheduling showings of homes and would not do the work expected of sellers in closing a transaction. CX 36 (Kage IH) at 36-37-Appx 218-219; CX 133, ¶56-Appx 221-222. See also Sweeney, Tr. 1358-Appx 213.

## V. The Commission ignored important empirical evidence.

The Commission's conclusion that Realcomp's restrictions constituted an unreasonable restraint of trade is empirically contradicted by its own broker witnesses. The ALJ observed that evidence of the brokers' prosperity "is clearly inconsistent with Complaint Counsel's theory that EA brokers have been competitively impaired by the Realcomp Website Policy. … The evidence clearly demonstrates that consumers have an abundant and broad range of services from which to choose, depending on their needs and financial abilities. ... [T]he evidentiary record indicates that Dr. Williams' theory that consumers are forced to substitute ERTS contracts for EA contracts and thereby pay substantially higher prices for brokerage services as a result of the Realcomp Policies is unfounded." ID 98-100-Appx 159-161.

The Commission made no effort to refute this evidence, but simply dismissed it with a conclusory footnote: "[T]he fact that some discount brokers are managing to compete … is irrelevant and has no bearing on the exclusionary impact of Realcomp's restrictive practices …" OP 41 n. 42-Appx 47. But such

testimony is hardly irrelevant, particularly when it comes from the Commission's own witnesses. *See, e.g.*, *Levine*, 72 F.3d at 1551.

The Commission's case is thus revealed to be one built entirely on inference, and its belief that the Realcomp Policies are "inherently suspect," rather than upon an examination of the facts. Fidelity to the record compels the conclusion that the Commission's *ipse dixit* approach fails under the substantial evidence standard.

## CONCLUSION

The Commission has not established an unreasonable restraint of trade under any version of the rule of reason. The antitrust laws are not intended to regulate *de minimis* effects on competition. *K.M.B. Warehouse Distributors*, 61 F.3d at 128. The Commission's Opinion should be reversed.

Respectfully submitted,

s/ Scott L. Mandel
Scott L. Mandel
FOSTER SWIFT COLLINS & SMITH PC
Attorney for Petitioner, Realcomp II, Ltd.
313 S. Washington Square
Lansing, Michigan 48933
(517) 371-8100

## 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 6,830 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

May 20, 2010

## CERTIFICATE OF SERVICE

I hereby certify that on May 20, 2010, I electronically filed the foregoing ***Petitioner's Reply 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.

s/ Scott L. Mandel
Scott L. Mandel (P33453)
Foster Swift, Collins & Smith, P.C.
313 S. Washington Square
Lansing, MI 48933
(517) 371-8185
smandel@fosterswift.com