

ORIGINAL

PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION



In the Matter of)
REALCOMP II LTD.)
_____)

) Docket No. 9320
)
) Chief Administrative Law Judge
) Stephen J. McGuire
)

REPLY BRIEF OF RESPONDENT

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I.
INTRODUCTION:
This Case Is Not About Competition Between "Traditional" Brokers
and "Discount" Brokers

This case presents a straightforward question: Can Respondent Realcomp establish different rules for different "products" (i.e., types of real estate listings) when its members have differing preferences for the different products? That is all this case is about.

Nonetheless, the premise and pervasive theme of Complaint Counsel's opening brief is that the Realcomp Policies¹ impair competition between "traditional" and "non-traditional" (i.e., "discount" or "limited service") brokers. Complaint Counsel paints a picture in which "traditional" brokers conspired to raise their rival discount brokers' costs by disfavoring the listings of discount brokers on the MLS. This picture, however, fails to accurately portray the record, obscuring the nature of the Realcomp Policies and the difficulty that Complaint Counsel faces in constructing a causal link between those Policies and the alleged injury to competition.

The Realcomp Policies concern the marketing of Exclusive Agency ("EA") listings. They apply to EA listings offered by "traditional" brokers and to EA listings offered by "discount" brokers. Realcomp has never drawn distinctions in the enforcement of the Web Site Policy or the Search Function Policy based on the identity or business model of the listing broker, and Complaint Counsel has not maintained otherwise.

The picture Complaint Counsel seeks to draw is obliterated by the facts:

¹ References to the "Realcomp Policies" mean, collectively, the Web Site Policy and Search Function Policy as defined by stipulation in this case.

- "Discount" brokers in Southeast Michigan offer discounted (flat fee) Exclusive Right to Sell ("ERTS") listings (in addition to EA listings). (RPF ¶ 114).² These ERTS listings appear as ERTS listings on the Realcomp MLS. (RPF ¶ 114).
- In the Realcomp service area, discount brokers use ERTS listing contracts with great frequency, and on average at twice the rate of EA contracts. This ratio is about four times higher than in nearby Washtenaw County. (RCCPF ¶ 190).³
- "Traditional" brokers in Southeast Michigan offer EA Listings In addition to ERTS listings). These EA listings appear as EA listings on the Realcomp MLS. (RCCPF ¶ 190).
- On the Realcomp MLS, "traditional" brokers account for a significant proportion (as much as 60%) of the EA listings. (RCCPF ¶ 190).

And so, Complaint Counsel's picture ignores the fact that listing type does not really define the metes and bounds of competition between brokers with different business models. Likewise, Complaint Counsel is just wrong in arguing that putative reductions in the prevalence of EA listings are the same thing as reductions in the market share of discount brokers, a proposition for which no evidence exists in this record. (*See* Section II.C.5, *infra.*) The prevalence of flat-fee ERTS contracts and other business innovations by discount brokers is wholly consistent with Complaint Counsel's praise of "unbundled" brokerage services and wholly inconsistent with Complaint Counsel's theory of consumer harm. (*See* Section II.C.2, *infra.*) Indeed, the picture that finally emerges in this case is one of prosperity and growth for the discount brokers who testified on behalf of Complaint Counsel, even in a period of poor prospects for the Southeast Michigan real estate market. (*See* Section II.B.4, *infra.*)

Complaint Counsel has not met its burden, and this case should be dismissed.

² Citations to "RPF" refer to Respondent Realcomp II, Ltd.'s Proposed Findings of Fact and Conclusions of Law (July 31, 2007)

³ Citations to "RCCPF" refer to Respondent Realcomp II, Ltd.'s Reply to Complaint Counsel's Proposed Findings of Fact (August 17, 2007)

II.

ARGUMENT IN REPLY TO COMPLAINT COUNSEL'S OPENING BRIEF

A. The Evidence Does Not Support Complaint Counsel's Assertions That The Realcomp Policies Have Impaired Competition Between "Traditional" and "Discount" Brokers

1. **No Anticompetitive Motives May be Attributed to the Adoption of the Realcomp Policies**

In its opening brief, Complaint Counsel attempts to draw adverse inferences regarding the motives underlying the adoption of the Realcomp Policies from the history of those Policies. Complaint Counsel's Post-Trial Brief at 23-25. However, it bears noting that there is nothing whatsoever in the evidence cited by Complaint Counsel that directly states any such motive, and all of such evidence in fact can be understood to be entirely consistent with the evidence in this case regarding the free-riding problem attendant to publication of EA listings.⁴

As the Executive Director of Realcomp, Karen Kage, testified, Realcomp's Web Site Policy was adopted by its Board out of concern that homeowners using EA listings have an incentive to sell their homes without the assistance of a cooperating broker and avoid paying a commission; while Realtors®, in turn, were paying for the sites. (RPF ¶ 137). The Board felt that it was not in the best interests of its members, the Realtors®, to provide free advertising for home sellers who were negotiating their own deals. (RPF ¶ 137). Realcomp's Search Function Policy was designed to make its MLS easier for Realcomp users and improve efficiency. (RPF ¶ 138). Because 98% to 99% of listings on the Realcomp MLS were for ERTS, the default was set by the Search Function Policy to reflect the majority of listings. (RPF ¶ 138(a)). The Search

⁴ Ironically, Complaint Counsel has no problem inferring laudatory motives to the policies of other MLSs that did not differentiate between EA and ERTS listings during the relevant time (other MLSs have "no problem" sending EA listings to public websites). Complaint Counsel's Post-Trial Brief at 26. Of course, this ignores the active and well-publicized activity of the FTC during that time to investigate and challenge MLSs (such as Realcomp and its competitor, MiRealSource) which had differentiating policies, which may have influenced the decisions of other MLSs not to enact or continue differentiating policies.

Function Policy made it so that there was one less "click" of the mouse for the majority of users searching only for ERTS listings. (RPF ¶ 138(b)).

The efficiency-enhancing objectives of the Realcomp Policies are to minimize free riding by EA home sellers on cooperating brokers, to provide an incentive for cooperating brokers to show EA properties, and to attenuate the bidding disadvantage that home buyers who prefer to be represented by a broker have in attempting to acquire EA-listed properties. (RPF ¶ 139).

2. The Realcomp Policies Have Not Eliminated Consumer Choice

Complaint Counsel argues that the Realcomp Policies restricted the choices available to home sellers. Complaint Counsel's Post-Trial Brief at 26-27. But the evidence shows that consumers in the Realcomp Service Area indeed have many choices when it comes to brokerage services. The Southeastern Michigan real estate market is very competitive, (RPF ¶ 84), and is known nationally as being unique and extremely competitive. (RPF ¶ 85).

Complaint Counsel is incorrect to suggest that a buyer and seller cannot avoid paying a percentage commission to the listing agent under an Exclusive Right to Sell contract or that consumers in the Realcomp Service Area are required to purchase full service listings. Rather, flat fee ERTS listings are available in the Realcomp Service Area. (RCCPF ¶ 1242).

A flat fee ERTS listing requires an additional payment of as little as \$200 to the listing broker over and above the price of an EA listing purchased from the same discount broker. ((RPF ¶ 114; RCCPF ¶¶ 613, 1146, 1200, 1228). For example, Jeff Kermath, who owns AmeriSell, is a non-traditional (discount) broker who testified at trial for Complaint Counsel. Mr. Kermath's marketing materials demonstrate that for a flat-fee of \$699, a seller can have an

ERTS listing which reaches the Approved Web Sites at issue here: the IDX, Realtor.com and MoveInMichigan.com. (RCCPF ¶ 1146).

Indeed, flat-fee ERTS contracts appear to be more prevalent in the Realcomp Service Area, evidencing that the allegation of reduced availability of alternative brokerage arrangements in Realcomp's Service Area is untrue. (RPF ¶ 115).

In addition, Realcomp has eliminated what was referred to as the "minimum service requirement" for ERTS listings. (RCCPF ¶¶ 36, 829, 836). As a result, brokers can offer limited service ERTS listings and receive all the promotional benefits of full-service ERTS listings on the Realcomp MLS. (*Id.*). In any event, as described above, flat-fee ERTS listings, which do embody those additional services under Realcomp's prior definition of an ERTS listing, are available in the Realcomp Service Area for as little as \$200 more than EA Listings (RCCPF ¶¶ 613, 1200, 1228).

3. The Realcomp Policies Have Not Excluded EA Listings from Public Exposure

A significant theme of Complaint Counsel's case is the concept of "exposure" for residential real estate listings, and Complaint Counsel maintains that the Realcomp Web Site Policy limits the "exposure" of EA listings. Complaint Counsel's Post-Trial Brief at 27-29. However, with respect to the exposure of EA Listings in the Realcomp Service Area, the record demonstrates that 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 in this matter agree that the MLS is the most important form of Internet exposure. (RPF ¶ 98). Realcomp has never restricted Exclusive Agents from being listed on its MLS. (RPF ¶ 99). They ranked Realtor.com as being the second most important source of Internet exposure. (RPF ¶ 100).

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. (RPF ¶ 102). Realcomp has data sharing arrangements with seven MLSs in Southeastern Michigan. (RPF ¶ 103). Second, an Exclusive Agency property can be listed on Realtor.com by listing the property on another MLS that downloads Exclusive Agency Listings to Realtor.com. (RPF ¶ 105). Discount brokers have availed themselves of this means for having their EA listings placed on Realtor.com. (RPF ¶¶ 105, 106). The Record shows that limited service/discount brokers called by Complaint Counsel used the Ann Arbor, Shiawassee and Flint MLSs to list their EA listings on Realtor.com. (RPF ¶ 107). Discount brokers also can now have their listings sent to Realtor.com by placing them in MiRealSource in light of its Consent Decree with the FTC. (RPF ¶ 108). The costs associated with this type of dual-listing are nominal. (RPF ¶ 109). Those charges, as an example, are \$55 per month to be a member of the Ann Arbor MLS. (RPF ¶ 109(a)).

While some of the Exclusive Agents contended that there was a "time cost" associated with listing on more than one MLS (*i.e.*, to by-pass Realcomp), those costs are also nominal as it is estimated that the time associated with this dual entry can take from 40 minutes to 2 hours over the life of a listing and discount brokers pay anywhere from \$7 to \$20 per hour for data

