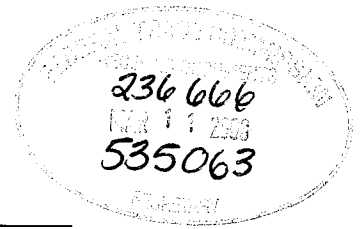


ORIGINAL



UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

DOCKET NO. 9320

PUBLIC VERSION

IN THE MATTER OF
REALCOMP II LTD.

REPLY BRIEF OF COUNSEL SUPPORTING THE COMPLAINT

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Dated: March 11, 2008

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DAVID A. BELSLEY, ET AL., REGRESSION DIAGNOSTICS: IDENTIFYING INFLUENTIAL DATA AND COLLINEARITY (1980)	26
Dennis W. Carlton & Steve C. Salop, <i>You Keep Knocking But You Can't Come In: Evaluating Restrictions on Access to Input Joint Ventures</i> , 9 Harv. J. L. & Tech. 319 (1996)	29
KONG CHU, PRINCIPLES OF ECONOMETRICS (1968)	28

Federal Trade Commission Staff Report, <i>The Residential Real Estate Brokerage Industry</i> (December 1983)	17
Federal Trade Commission & U.S. Department of Justice, <i>Antitrust Guidelines for Collaborations Among Competitors Guidelines</i> (2000)	30
Federal Trade Commission & U.S. Department of Justice, <i>Competition in the Real Estate Brokerage Industry</i> (April 2007)	15, 17
DOMADAR N. GUJARATI, <i>BASIC ECONOMETRICS</i> (3d ed. 1995)	26
HENRY S. HARRISON, <i>ILLUSTRATED DICTIONARY OF REAL ESTATE AND APPRAISAL</i> (1983)	11
PETER KENNEDY, <i>A GUIDE TO ECONOMETRICS</i> (4th ed. 1998)	23, 25
Letter from Hon. Deborah Platt Majoras, Chairman of FTC, and R. Hewitt Pate, Assistant Attorney General, to the Honorable Alan Sanborn, Chairman of the Committee on Economic Development, Small Business & Regulatory Reform (Oct. 18, 2005)	19
DENNIS S. TOSH, JR., <i>HANDBOOK OF REAL ESTATE TERMS</i> (1992)	11
EDWARD R. TUFTE, <i>THE VISUAL DISPLAY OF QUANTITATIVE INFORMATION</i> (2d ed. 2001)	22
ALEXANDER VON EYE & CHRISTOF SHUSTER, <i>REGRESSION ANALYSIS FOR SOCIAL SCIENCES</i> (1998)	26

I. INTRODUCTION

Complaint Counsel detailed in their opening brief the key facts. EA listings offer consumers a contingent discount on brokerage commissions. ERTS listings, by contrast, do not. They require sellers to pay the full commission regardless of whether a cooperating broker is involved. To be effective and valuable to consumers, listings must obtain exposure on key websites and through the MLS. Realcomp, a combination of competitors with market power, imposed Policies (the Website and Search Function Policies) that limit the exposure of EA listings. The Policies exclude these listings from three of the top four categories of real estate websites. They also discriminate against these listings within the MLS. These competitors imposed the Policies because EA listings offer a contingent discount. The Policies therefore penalize the use of EA listings and the discounting they represent. They also withhold from consumers a product they desire: EA listings with full exposure through the Realcomp MLS.

Realcomp nonetheless claims that it should be free to continue these practices. According to Realcomp, concerted action by competing brokers with market power that penalizes discounting and withholds from the market a product that consumers desire is not enough to show a violation of Section 5. Realcomp claims that the Commission may only condemn these practices if it employs a “full-blown” rule of reason analysis and finds direct evidence of actual anticompetitive effects. Realcomp’s argument that Complaint Counsel failed to meet their burden is wrong on the facts and wrong on the law.

Realcomp is wrong on the facts. There is ample direct evidence of anticompetitive effects. Realcomp just misses it. The evidence shows that the Policies caused consumers to

switch to ERTS listings. Realcomp admits this, but fails to grasp the significance. Realcomp believes that because brokers can offer discounts on ERTS listings, these listings are a full substitute for EA listings. But that is not true. Only EA listings offer the ability to avoid paying the offer of compensation (typically 3%). Realcomp required consumers to purchase a set of minimum services with all ERTS listings. And even Realcomp admits that ERTS listings are more expensive. The switch therefore shows actual anticompetitive effects. All of Realcomp's arguments about data, statistics, and regression analyses therefore miss the big picture – the Policies reduce the effectiveness and use of EA listings and thereby restrain important forms of competition.

Realcomp is also wrong on the law. The point of the rule of reason is to determine the principal tendency of a restraint. Direct proof of actual effects is one means of showing this. But indirect evidence is also sufficient, *viz.*, a showing that defendants possess market power and that the character of the restraint tends to restrict competition. Realcomp simply cannot dodge the impact of the indirect evidence. A rule of reason analysis – whether “full,” “traditional,” “abbreviated,” or any other label – demonstrates that Realcomp's Policies are anticompetitive. They are not justified, and the Commission should enjoin Realcomp from denying consumers the benefits of competition.

II. ARGUMENT

Realcomp invokes *Chicago Board of Trade* to insist that the Commission put on blinders and focus only on direct evidence of actual effects. But that case makes it clear that the rule of reason requires consideration of the complete picture – “the facts peculiar to the business to

which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint; and its effect actual or probable.” (RAB at 55 (quoting *Board of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238-39 (1918)).¹ That is precisely the analysis Complaint Counsel present here.

The complete picture shows that the principal tendency of the Policies is to restrict, not enhance, competition. The facts peculiar to the business – the context – show that EA listings represent important forms of competition. EA listings deliver discounting and unbundled services. Before the Policies were imposed, EA listings and ERTS listings both enjoyed full exposure through the Realcomp MLS. Through the concerted action of competing real estate brokers, however, Realcomp denies to EA listings the full value and range of MLS services.

Realcomp’s market power and the anticompetitive nature of the Policies demonstrate probable anticompetitive effects. This is especially important because the Commission is concerned with the restraint’s likely effects going forward. It is also sufficient under the rule of reason. Nevertheless, this inference is confirmed by abundant evidence of actual effects.

A. Realcomp Fails to Rebut the Anticompetitive Character of the Policies

Realcomp concedes that the Policies were implemented by a combination of competitors with market power, but insists that this is of little consequence. According to Realcomp, market

¹ The following abbreviations are used throughout:

ID	Initial Decision
IDF	Initial Decision Finding
CAB	Complaint Counsel’s Appeal Brief
CCPF	Complaint Counsel’s Proposed Findings
CCRF	Complaint Counsel’s Response to Realcomp’s Proposed Findings
RAB	Respondents Answering Brief (on appeal)
RPF	Respondent’s Proposed Findings
RRPF	Respondent’s Reply to Complaint Counsel’s Proposed Findings

power has no bearing on the question of whether there are anticompetitive effects: “the requirement for proof of market power can be obviated by evidence of actual anticompetitive effects, not the other way around.” (RAB at 53). This is flat wrong. It is black letter law that market power combined with the nature of the restraint shows anticompetitive effects. *See, e.g.,* ABA ANTITRUST SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 65 (6th ed. 2007); ABA ANTITRUST SECTION OF ANTITRUST LAW, MONOGRAPH NO. 23, THE RULE OF REASON 161-63 (1999) (even if there is “no observable effect of a restraint on competition,” proof of market power and nature of restraint is enough to show anticompetitive effects under the rule of reason). The cases stating this proposition are legion.² Realcomp cannot sidestep the significance of its concession. The issue then is whether the nature of the Policies is anticompetitive.

1. Realcomp Fails to Rebut the Fact That By Punishing Discounting, the Policies Come Close to a Form of Price-Fixing

The anticompetitive tendency of the Policies is apparent. Realcomp never denies that EA listings offer a contingent discount, *i.e.*, reducing the listing broker’s commission if no cooperating broker is used in the transaction. Nor does it deny that the Policies target EA listings because of this form of discounting. (RRPF 771; CX 89; RAB at 56-59). It does not dispute that

² *See, e.g., FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 459 (1986) (market power is a “surrogate” for competitive effects); *Brookins v. Intern. Motor Contest Assn.*, 219 F.3d 849, 852 (8th Cir. 2000) (“Injury to competition requires proof either of market power in a relevant market, or of an actual adverse effect on competition.”); *Tops Markets, Inc. v. Quality Markets, Inc.*, 142 F.3d 90, 96 (2d Cir. 1998) (antitrust plaintiff has “two independent means by which to satisfy the adverse-effect requirement,” namely, direct proof of “actual adverse effect on competition” or indirect proof of “sufficient market power to cause an adverse effect on competition”); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) (“plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects”); *Levine v. Central Florida Medical Affiliates, Inc.*, 72 F.3d 1538, 1551 (11th Cir. 1996); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993).

the Policies penalize the use of EA listings (only the severity of this penalty). In fact, Realcomp explicitly recognizes that the Policies make EA listings less valuable to consumers. (RAB at 57-59 (Policies are designed to reduce incidence of contingent discount)). Nor can Realcomp deny that the Policies withhold from consumers a particular product – EA listings that are fully disseminated through the Realcomp MLS. That is simply a fact.

a. Punishing Discounting is Anticompetitive, No Matter Who Offers the Discount

Instead of dealing with these facts, Realcomp claims that this case is “not about competition between full service and discount brokers,” because its expert supposedly found that traditional brokers “account for as much as 60% of EA listings on the Realcomp MLS.” (RAB at 6, 20). This statement is false. Realcomp’s expert only found that eight “non-traditional brokerages who operate statewide” account for “approximately 40 percent of the limited service property listings in Realcomp.” (CX 133-014 & n.31 (cited in RPPF 190)). He did not, however, make any finding regarding the remaining 60%. There is no evidence in the record that any traditional broker uses EA listings. To the contrary, every traditional, full service broker that testified acknowledged using only ERTS listings. (RPPF 189; *see also* CX 40 (Elya, Dep. at 57 (only uses ERTS)); CX 43 (Hardy, Dep. at 58) (Century 21 brokerage uses only ERTS); CX 38 (Gleason, Dep. at 37) (SKBK brokerage uses only ERTS); CX 39 (Taylor, Dep. at 18 (only uses ERTS; EA use not in business model)).

More important, it misses the point. EA listings are an important form of competition regardless of who offers them. If traditional brokers offer EA listings, that is discounting too. This case is not about discount brokers *per se*, though the evidence shows discount brokers use

EA listings and put price pressure on traditional broker commissions. (RRPF 221-26; IDF 99-101). It is about the ability of consumers to obtain the competitive benefits of EA listings. Realcomp's boast that "[a]ll participants in the Realcomp MLS are equally subject to the Realcomp Policies" therefore confirms the anticompetitive effect of the Policies; they impact all of the nearly 14,000 Realcomp members. The fact that the Policies are an "equal opportunity," market-wide punishment for discounting makes them more, not less, anticompetitive.

b. Realcomp's Efforts to Distinguish the Case Law is Unavailing

Realcomp misunderstands the significance of the case law cited by Complaint Counsel. For instance, Realcomp distinguishes *Denny's Marina* as a "secondary boycott held to constitute *per se* unlawful price-fixing." (RAB at 47). But the point of the case is that conduct punishing discounting (in that case denial of access to two trade shows) is anticompetitive. *Denny's Marina, Inc. v. Renfro Prods., Inc.*, 8 F.3d 1217, 1221 (7th Cir. 1993). The Realcomp Policies have the same character; they punish a form of discounting. *See also United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961) (punishing discounting by picketing and withholding supplies anticompetitive).³ The fact that the Policies are implemented by a potentially procompetitive collaboration – an MLS – may save them from *per se* condemnation, but it does not change the character of the restraint.

Similarly, Realcomp attempts to distinguish *Indiana Federation of Dentists (IFD)* because of the "naked character of the restraint" that did not involve a potentially procompetitive collaboration. (RAB at 7 n.4). But this distinction makes no difference. The Court in *IFD* held

³ Realcomp's attempt to distinguish *Gasoline Retailers* because Realcomp did not enforce its agreement through these means is unavailing. Realcomp enforced its Policies; the method of enforcement is irrelevant to the issues in this case.

