ORIGINAL

PUBLIC

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

In the Matter of REALCOMP II, LTD. a corporation	Docket No. 9320

MOTION OF RESPONDENT REALCOMP II, LTD. FOR PARTIAL STAY OF ORDER PENDING APPEAL

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes

Other Sources

Pursuant to 16 C.F.R. § 3.56, respondent Realcomp II, Ltd. ("Realcomp") respectfully moves for a partial stay of the October 30, 2009, Final Order ("Order") of the Federal Trade Commission ("Commission") until the final disposition of Realcomp's appeals in the federal courts.

INTRODUCTION

The Order was issued upon the Commission's opinion dated October 30, 2009 ("Opinion"), holding that Realcomp's maintenance and enforcement of its "Website Policy" and "Search Function Policy" (hereinafter, the "Realcomp Policies") constituted an unreasonable restraint of trade prohibited by Section 1 of the Sherman Act and, accordingly, constituted an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act.

The Opinion reversed the Initial Decision by Chief Administrative Law Judge McGuire, who, after hearing live testimony predominantly elicited by Complaint Counsel and reviewing an extensive record, concluded that Complaint Counsel had failed to prove that the Realcomp Policies had or were likely to have any anticompetitive effect, and dismissed the Complaint. In reversing the Initial Decision, the Commission held, *inter alia*, that the Realcomp Policies fall into the realm of "inherently suspect" conduct that can be condemned without close inquiry into their actual effects on competition. The Commission further concluded that the record, in any event, contained evidence that the Realcomp Policies restrained competition by certain real estate brokers.

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 to enter into lawful listing agreements, including so-called "Exclusive Agency" agreements, with sellers of properties. The Order enumerates specific prohibited conduct, including a general prohibition on treating any type of listing in a "less advantageous" manner than any other

listing. Realcomp is required to modify its website operations to conform to the Order, to amend its rules and regulations in accordance with the Order, to provide each member with a copy of the Order, and to communicate directly with each Member to inform them of the amendments to Realcomp's rules and regulations, and to post the Order on its website, along with a statement directing any website user to the Order.[1]

As reflected in the Initial Decision and the briefing of this matter, in April, 2007, Realcomp repealed the Search Function Policy. It also repealed the definitional requirement that "Exclusive Right to Sell" listings be full-service brokerage agreements. Realcomp does not seek to stay the Order insofar as it would prohibit Realcomp from reversing those actions.

However, unless it is stayed, the Order otherwise will cause significant and irreparable harm to Realcomp even while Realcomp pursues its appeal of the significant legal issues and disputed interpretation of the facts of this case.

ARGUMENT

Under the Commission's rules, "[a]ny party subject to a cease and desist order under section 5 of the FTC Act ... may apply to the Commission for a stay of that order pending judicial review." 16 C.F.R. § 3.56(b). Realcomp will file a notice of appeal in this matter by January 8, 2010.

An applicant for a stay must address the following factors: (1) the likelihood of the applicant's success on appeal; (2) whether the applicant will suffer irreparable harm if a stay is not granted; (3) the degree of injury to other parties likely to result from the requested stay; and (4) why

[1] By statute, the Order will become effective 60 days after service, 15 U.S.C. § 45(g)(2). By the terms of the Order, compliance by Realcomp is required 30 days after the effective date. Service upon Realcomp was effected on November 9, 2009, and thus compliance by Realcomp is required no later than February 7, 2010.

the stay is in the public interest. *Id.* § 3.56(c).[2] These requirements track the four-factor test set out in *Washington Metropolitan Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977), which test the Commission cited approvingly prior to its codification in Rule 3.56. *See In re California Dental Association*, 1996 FTC LEXIS 277 at *2-3 (May 22, 1996). The four factors are not rigidly applied or weighed equally, and no one factor is determinative. *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987); *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995) (strength of one factor may outweigh "rather weak" arguments in other areas); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985) (factors are not prerequisites but are interrelated considerations that must be balanced together); *see also Holiday Tours*, 559 F.2d at 843-45 (granting stay notwithstanding movant's inability to prevail on one factor).

I. Realcomp Has Established a Material Likelihood of Success on Appeal

The burden upon a movant to establish a "likelihood" of success on appeal does not require that the movant prove that its success is more likely than not. *Holiday Tours*, 559 F.2d at 843 (rejecting the view that success is a mathematical exercise requiring proof of "50% plus probability"). As *Holiday Tours* explains and the Commission likewise has recognized, a request for stay would be futile if the initial decision-maker "could properly grant interim relief only on a prediction that it has rendered an erroneous decision." *Id.* at 844-45; *California Denta*, 1996 FTC LEXIS 277, *9. Thus, a court or agency may grant a stay "even though its own approach may be contrary to the movant's view of the merits." *Holiday Tours*, 559 F.2d at 843. To demonstrate a

[2] "Because complaint counsel represents the public interest in effective law enforcement," the Commission considers the third and fourth factors together as a single inquiry. *See In re Novartis Corp.*, 128 F.T.C. 233, 236; *California Dental*, 1996 FTC LEXIS 277, at *7.

likelihood of success on the merits, it is sufficient for the movant to show that its appeal involves serious and substantial questions going to the merits of the decision. *Six Clinics Holding Corp., II v. Cafcomp Systems*, 119 F.3d 393, 402 (6th Cir.1997).

A. The Contrary Findings of Chief Judge McGuire Are Evidence That Serious and Substantial Issues Exist for Appeal

The review of an agency decision for substantial evidence requires "a review of the record as a whole, which include[s] the ALJ's decision." *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 493 (1951). Realcomp prevailed in the proceedings before Chief Judge McGuire, who dismissed the Complaint.

The Courts of Appeals have recognized that, notwithstanding the deference due the Commission's findings under 15 U.S.C. § 45(c), those findings will be scrutinized more closely when the Commission has overruled, and substituted its findings for those of, its ALJ. *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), *cert denied*, 548 U.S. 919 (2006); *Thiret v. FTC*, 512 F.2d 176, 179 (10th Cir. 1975); *California Dental Association v. FTC*, 128 F.3d 720, 725 (9th Cir. 1997), *rev'd on other grounds*, 526 U.S. 756 (1990); *see also Detroit Auto Dealers Assn. v. FTC*, 955 F.2d 457, 466 (6th Cir.1992) (difference of opinion between Commission and ALJ demonstrates "complexity and difficulty" of the case); *ITT Continental Baking Co. v. FTC*, 532 F.2d 207, 219 (2d Cir. 1976); *American Cyanamid Co. v. FTC*, 363 F.2d 757, 772-73 (6th Cir. 1966). This is particularly so when the Commission has substituted its assessments of witness credibility for those of the ALJ, as the Commission effectively has done here. *Schering Plough*, 402 F.3d at 1069-71; *Universal Camera*, 340 U.S. at 487-88, 496.

These decisions demonstrate that the existence of a conflict between the findings and conclusions of the Commission and those of its Chief Administrative Law Judge itself is strong, if not conclusive, evidence that Realcomp's issues for appeal are in fact serious and substantial.

B. The Commission's Opinion Relies on a Disputed Legal Standard

As Realcomp will argue on appeal, the Opinion errs in treating the Realcomp Policies as "inherently suspect" conduct capable of condemnation under a "quick look" analysis under the standards articulated in *Polygram Holding*.[3] There is ample basis for Realcomp's position.

This case does not involve a naked restriction by members of an association about how each of them will do business, nor a restriction on what members of a joint venture will do outside the venture. Rather, it involves rules governing how an *admittedly efficient*[4] joint venture will operate. Significantly, the Realcomp Policies at issue are not – as the Opinion suggests – price restraints, a fact conceded at trial by Complaint Counsel.[5]

In the Opinion, the Commission has all but discarded well-established rule of reason principles for analysis of joint venture conduct in favor of, in effect, an expanded *per se* rule. The Commission's view is not the prevailing standard for Section 1 analysis of joint ventures.[6] The

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[3] *Polygram Holding, Inc.*, 136 FTC 310 (2003), *aff'd, PolyGram Holding, Inc. v. FTC*, 416 F.3d 329 (D.C. Cir. 2005).

[4] Opinion at 2.

[5] Tr. 1898-99.

[6] In the joint venture context, courts consider whether the restraint is "reasonably related to ... and no broader than necessary to effectuate" the venture's purpose. *SCFC ILC, Inc. v. Visa USA*, Inc., 36 F.3d 958, 970 (10th Cir. 1994); In *United States v. Realty Multi-List*, 629, F.2d 1351, 1367 (5th Cir. 1980) the court warned that "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.". Indeed, the Commission's own joint venture Guidelines do not describe an "inherently suspect" analytical framework. Federal Trade Commission & U.S. Department of Justice, *Antitrust Guidelines for Collaborations Among Competitors* (2000).

Polygram Holding approach to Section 1 analysis has been viewed skeptically or unfavorably in many circumstances by the Sixth Circuit and other Courts of Appeals,[7] and has been criticized by commentators.[8] This approach was abandoned by the Commission itself for seven years,[9] and has been unembraced for 20 years by the United States Department of Justice.[10]

As the Commission itself recognizes, Opinion at 7-8, Realcomp, as a multiple listing service, is a two-sided market platform with network effects. The Commission's conclusion that rules governing the operation of such a market may be condemned on a quick look is at odds with judicial views of the rule of reason. *See United States v. Visa USA Inc.*, 344 F.3d 229, 238 (2d Cir.

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[7] *See, e.g., Madison Square Garden, L.P. v. National Hockey League*, 270 F. App'x 56 (2d Cir. 2008) ("quick look" inappropriate to analyze ban on NHL team independent websites because "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.'"); *Craftsman Limousine v. Ford Motor Co.*, 491 F.3d 380, 388-393 (8th Cir.), cert. denied, 128 S.Ct. 654 (2007) (rejecting use of quick-look to analyze prohibition on certain limousine builders advertising in trade publications); *Expert Masonry, Inc. v. Boone County*, 440 F.3d 336, 343-44 (6th Cir. 2006) ("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"); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004) (an abbreviated or 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"); *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499 (4th Cir. 2002) (rejecting quick look analysis of carry-on luggage size restrictions where lower court had not considered the unique architecture of the airport and failed to recognize plausible procompetitive justifications for restriction); *Brookins v. International Motor Contest Assn.*, 219 F.3d 849, 854 (8th Cir. 2000) (auto racing body rules that allegedly precluded use of plaintiff's transmission 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) (analyzing NCAA rule limiting compensation of coaches under rule of reason); *Sullivan v. NFL*, 34 F.3d. 1091, 1102 (1st Cir. 1994) (certain restraints by joint ventures may render the joint activity more efficient).

[8] Kolasky, William and Richard Elliott, *The Federal Trade Commission's Three Tenors Decision: 'Qual due fiori a un solo stello'*, 19 ANTITRUST 50 (Spring 2004); *see also*, Meyer, D. and D. Ludwin, *Three Tenors and the Section 1 Analytical Framework*, 20 ANTITRUST 63 (Fall 2005); Keyte, J.A. and N.R. Stoll, *Markets? We Don't Need No Stinking Markets! The FTC and Market Definition*, 49 ANTITRUST BULL. 593 (Fall 2004)

[9] The Commission first applied the "inherently suspect" categorization in *Massachusetts Board of Registration in Optometry*, 110 F.T.C. 549 (1988), but abandoned that approach in *California Dental Association*, 121 F.T.C. 190 (1996), and it did not reappear until *Polygram Holding*.

[10] Even an authority relied upon by the Commission describes the truncated "inherently-suspect" analysis as a "murky and unclear" area of the law. *Detroit Auto Dealers Assn.*, 955 F.2d at 472.

2003). This case does not present circumstances in which one can legitimately determine effects "in the twinkling of an eye".[11]

The Supreme Court has held that the inquiry into competitive effects must be "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 from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental Association v. FTC*, 526 U.S. 756, 780-81 (1999). The Commission's analysis was not meet for this case, and presents a serious and substantial question for appeal.

C. The Commission's Opinion is Unsupported by the Evidence|

To the extent the Opinion purports to go beyond a quick look, the Commission was required to show "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. ..." *United States v. Visa USA Inc.*, 344 F.3d at 238. The evidence in this case does not support any such conclusion, as Judge McGuire found. The conflicting interpretations of the record in the Opinion and the Initial Decision evidence serious and substantial questions for review on appeal. Among the more significant of these issues are the following.[12]

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[11] *NCAA v. Bd. of Regents*, 468 U.S. at 109 n.39 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981)).

[12] It is, of course, unnecessary here to establish in full every basis Realcomp may have to challenge the Commission's view that its findings are supported by evidence. It is sufficient that there are meritorious grounds for such a challenge, and the examples given are legally significant and central to the matters in this case.

1. Purported Evidence of Anticompetitive Effects

The Opinion self-evidently devotes three times as much discussion to "indirect" evidence of anticompetitive effects as to "direct" evidence. Opinion at 35-43; 43-47. This demonstrates a critical shortcoming in the Commission's analysis. The direct evidence in this case (or, in some respects, the lack thereof) weighs in favor of the respondent, Realcomp. For example, 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 Realcomp Policies. All of the brokers who testified for Complaint Counsel admitted that their businesses are growing in the face of a difficult housing market.[13] No broker testified that the challenged policies prevented them from competing or prevented entry into the market.[14]

The Opinion also credits and relies heavily upon the testimony of Complaint Counsel's economic expert, Dr. Darrell Williams. Opinion at 44-47. The Opinion disregards extensive record evidence casting serious doubt on Dr. Williams' credibility and the validity of his conclusions.[15] In fact, Dr. Williams did not estimate *any* price or other effects directly attributable to the Realcomp Policies. He did not investigate whether sellers of residential properties who used discount listings on the Realcomp MLS received higher or lower sale prices for their properties.[16] Dr. Williams specifically testified that he did not analyze the effect of Realcomp's restrictions on the number of

[13] *See, e.g.*, Respondent's Proposed Findings of Fact and Conclusions of Law (July 31, 2007) (hereinafter, "RPF") ¶¶ 163, 164.

[14] It is true that one broker testified to the effect that he was forced by Realcomp's policies to exit the market. Beyond the fact that the thrust of this testimony was contradicted by every other broker called by Complaint Counsel, the witness' testimony itself revealed that incompetent management and increased competition from other discount brokers forced the witness from the Southeast Michigan market. *See* RPF ¶ 166(e).

[15] *E.g.*, RPF ¶¶ 148(b), 197, 201-210.

[16] RPF ¶232.

days that homes remain on the market before sale, or whether commission rates on full-service listings are higher when multiple listing services impose restrictions in the nature of the Realcomp Policies.[17] Dr. Williams' testimony was wholly insufficient to demonstrate that the Realcomp Policies caused measurable harm to price competition between traditional and non-traditional brokers, or to consumers (i.e., home buyers and sellers).

Indeed, Dr. Williams ultimately repudiated one of his own Exhibits, testified that he was inexpert in the statistical software used to produce the analyses to which he testified, and ultimately relied on a technical manual for the software that he had never seen prior to his testimony in an effort to rehabilitate himself.[18] Dr. William's testimony did not meet the legal standards for reliability,[19] and the Commission's reliance on that testimony is entitled to no deference upon appeal.

2. Efficiency Justifications

The testimony of the Commission's own expert, Dr. Williams, established that 20 percent of the sales of properties under Exclusive Agency listings occur without the involvement of a Realcomp cooperating broker.[20] Realcomp presented credible arguments that the Realcomp Policies address a free-riding problem and a bidding disadvantage for Realcomp members acting as cooperating brokers. The Initial Decision concluded that Realcomp's explanations of the Realcomp Policies were credible and not pretextual.

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[17] *Id.*

[18] Tr. 1724-28, 1741-42, 1756-60.

[19] *E.g., Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999); *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 (1993).

[20] Tr. 1651

The Commission's rejection of these arguments is based on a fundamental mischaracterization of the economics of the MLS. Realcomp was not created to help property owners who wish to procure their own buyers. As Judge McGuire correctly observed, home sellers who sign Exclusive Agency listing agreements (by definition) do not pay a cooperating broker commission if they find their own buyer – and therefore have an economic incentive to act as their own cooperating broker. This group of home sellers competes directly with Realcomp members on the cooperating broker side of the sale equation, and (but for the Realcomp Policies) would receive the benefits derived from Realcomp's advertising of properties on the Approved Websites, but make no payment to Realcomp for the services received.

Contrary to the Commission's view, Opinion at 29-32, it is irrelevant whether or not the Exclusive Agency listing broker pays dues to Realcomp. When an Exclusive Agency home seller receives the benefit of Realcomp's promotional services to find his or her own buyer in competition with cooperating brokers, the seller receives a benefit that is paid for in part by competing cooperating brokers. That is a free-riding benefit regardless of whether any listing brokers also paid for part of that benefit. The Commission's conclusion is wrong as a matter of economics and as a matter of fact.

With respect to the bidding disadvantage for buyers represented by cooperating brokers, the Opinion characterizes cooperating broker arrangements as an inefficiency, Opinion at 32 – a position seemingly at odds with the Commission's accepted premise that a multiple listing service is an efficient form of two-sided joint venture. The Commission ignores the fact that buyers who prefer to use a Realcomp member as a cooperating broker (and obtain the benefit of that broker's services) are the parties penalized by the bidding disadvantage. The Exclusive Agency home seller

has a persisting economic incentive to find his or her own, lower-cost buyer, but – bearing in mind that the Realcomp multiple listing service is a service for brokers and not home sellers – there is no rational reason for Realcomp members to facilitate a result in which their services are disadvantaged.

The Opinion's view of the efficiency justifications for the Realcomp Policies is diametrically opposed to that of Realcomp and Judge McGuire. The question is not whether the Commission agrees with Realcomp's interpretation, but whether Realcomp can assert serious and substantial grounds for appeal. On this topic, as in the foregoing areas of discussion, there are meritorious grounds for appeal.

II. Realcomp Will Suffer Irreparable Harm in the Absence of a Stay

At issue in this matter is the ability of Realcomp to establish different rules for different types of real estate listings based on the fact that its members have different preferences for those different products – that is, rules that promote the attractiveness of the platform to member brokers.[21]

The Opinion affirms that an MLS is an efficient form of joint venture that benefits consumers. The MLS is a "platform" for which there are two types of users – in this case, 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...." Opinion at 8. The Realcomp Policies promote the attractiveness of that platform by limiting a form of free-riding by home sellers

[21] As noted, the Realcomp MLS is organized and operates to provide services to its member brokers, and not directly to consumers. Consumers cannot access the MLS, and only limited information is made available to the general public through the IDX feeds, which are the subject of the Realcomp Website Policy.

who act as their own cooperating broker, and by enhancing the incentives of cooperating brokers to show and promote exclusive agency-listed properties to their buyer-clients.[22]

A party demonstrates irreparable injury where an order would cause marketplace confusion and loss of goodwill, and where costly steps would have to be taken to restore prior market conditions if the order is reversed on appeal. *California Dental*, 1996 FTC LEXIS 277 at *7. A party may suffer irreparable harm through a loss of reputation and business opportunities. *Register.com, Inc. v. Verio, Inc.* 356 F.3d 393, 404 (2d Cir. 2004); *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). These conditions will exist for Realcomp in the absence of a stay. Realcomp's resources will be used to advertise properties from which Realcomp members will derive no opportunity to compete for sales or commissions. The Realcomp membership will be subsidizing home sellers who compete with them. Lost sales opportunities cannot be warehoused and put back in inventory at a later date, and the injury to Realcomp's members is incapable of objective determination.[23]

Further, the value and goodwill of Realcomp will be impaired through the inevitable confusion resulting from changing the MLS operating rules twice if the Order is not stayed but Realcomp prevails on appeal. Realcomp also will incur programming and system testing costs to comply with the Order, as well as notification costs, and will incur them twice as well. Individual

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[22] As discussed, the Commission disputes the efficiencies attributed to the Realcomp Policies, and that dispute itself is a material issue for appeal. For purposes of ascertaining the harm that would result in the absence of a stay, however, the Commission must presume that its decision was *incorrect. Cf. Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319, 1319 (1994) (Rehnquist, C.J., in chambers) (listing as one criterion for stay pending appeal "a likelihood of irreparable harm, assuming the correctness of the applicant's position, if the judgment is not stayed").

[23] *See Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19-20 (1st Cir. 1996) (vendor selling items primarily on wedding registries would be irreparably damaged from "lost sales of other registry items, alienation of future registrants, and harm to its reputation"); *Collier v. Airtite, Inc.*, 1988 WL 96363 *1 (N.D. Ill. Sept. 15, 1988) (irreparable harm exists where "there is no way to calculate the number of prospective customers who may select an alternative [product]").

members of Realcomp will be separately affected because, in order to preserve the marketing objectives of the Website Policy, they will need to modify their individual brokerage websites to filter exclusive agency listings (which they can lawfully do), and they will be put to this expense twice as well if the Order is not stayed. There is, of course, no compensation for any of these costs to respondents who prevail in governmental enforcement actions.[24]

With respect to the mandated restriction of the Website Policy, if the Order is not stayed and Realcomp ultimately prevails, Realcomp and its members will have been restrained in the exercise of their commercial speech in violation of their First Amendment rights. Certain commercial speech, particularly that which informs economic decision-making, is subject to First Amendment protection. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976). The loss of First Amendment rights, even for minimal periods of time, may constitute irreparable injury sufficient to support granting a stay, and particularly so if the harm is actually threatened and a probability of success on the merits has been demonstrated. *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Such is the case here.

Finally, as we discuss below, there is scant reason to believe that a stay will impair any public or private interest and, accordingly, the balance of harms tips in favor of maintaining the status quo and counsels in favor of granting the stay.

III. Staying the Order Will Harm Neither the Public Interest Nor Other Parties

At root, the Commission's Order holds that the challenged Realcomp Policies have impaired the ability of certain discount or limited service brokers to compete against traditional full-service

[24] *Finer Foods, Inc. v. U.S. Dept. of Agriculture,* 274 F.3d 1137, 1140 (7th Cir. 2001).

brokers. However, as discussed above, the record contains extensive and essentially uncontroverted testimony by the brokers who testified for the Commission that they have prospered economically notwithstanding the putative hindrance upon their ability to market their listings. Likewise, as noted, no broker credibly testified that the challenged policies prevented them from competing or prevented entry into the market.

Because harm to consumers is alleged by the Commission to flow directly from the effects of the Realcomp Policies on the activities of discount brokers, the testimony of those brokers is persuasive, if not conclusive, evidence that neither private parties nor the public interest will be harmed if a stay is granted. We note again that Complaint Counsel's expert, Dr. Williams, offered no estimation of adverse price or output effects on consumers flowing from the Realcomp Policies. Whatever effects the Commission believes in theory might flow from the Realcomp Policies, the evidence in the case indicates that the risks of actual harm during the pendency of appeal are speculative and in all probability non-existent.

Moreover, the length of time elapsed in the decision of this matter would contradict any argument that an immediate cessation of the challenged Realcomp Policies is necessary to avert public or private harm. The Commission's Order is dated 1,076 days after the Complaint filed against Realcomp, and 597 days after appeal of Judge McGuire's Initial Decision was heard by the Commission.[25] The Realcomp Policies at issue in this Motion remained in force throughout this period (as noted, the Search Function Policy, which is not at issue in this Motion, was repealed in

[25] The Complaint in this matter was filed October 10, 2006. The evidentiary portion of trial concluded on June 28, 2007, and closing arguments were presented on September 6, 2007. Judge McGuire's Initial Decision was rendered on December 11, 2007. The appeal to the Commission was argued on April 1, 2008, and the Commission's Opinion and Order were handed down on October 30, 2009, with service effected on the respondent on November 9, 2009.

2007) and the Commission did not seek to enjoin their continued enforcement during the pendency of proceedings.[26] While we are of course respectful of the Commission's deliberative process, the lengthy and unhurried decisional timeline in this matter belies any thought that the public interest cannot tolerate further delay for a well-grounded appeal.[27]

[26] The 1,076 days for decision makes this case by far the most protracted adjudication in the Commission's recent history, surpassing even *Rambus* (which was decided in 825 days notwithstanding that it was argued twice) and *Evanston Northwestern* (655 days), both of which presented arguably more complex factual records than this matter.

[27] *See Fabrication Enterprises, Inc. v. The Hygienic Corp.*, 64 F.3d 53, 61-62 (2d Cir. 1995) (noting that unwarranted delay in seeking relief may undercut claims of irreparable injury).

CONCLUSION

For the reasons set forth above, Respondent Realcomp II, Ltd. requests that the Commission stay in part its order of October 10, 2009, during the pendency of appeals in the federal courts. A proposed order is attached hereto as Exhibit A.

Respectfully submitted,

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December 8, 2009

Exhibit A

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
Pamela Jones Harbour
William E. Kovacic
J. Thomas Rosch

In the Matter of **REALCOMP II, LTD.** **a corporation**	**Docket No. 9320**

ORDER GRATING APPLICATION FOR STAY OF ORDER PENDING APPEAL

Upon consideration of respondent Realcomp II. Ltd.'s application to stay enforcement of the Commission's order, issued October 10, 2007,

IT IS ORDERED that enforcement of the Commission's Final Order of October 10, 2007, other than paragraph 5 of Part II thereof, be stayed upon the filing of a timely petition for review of the Order in an appropriate court of appeals pursuant to 15 U.S.C § 45(c). This stay shall remain effective until the expiration of all periods for petitions for rehearing, rehearing en banc or *certiorari*, or until final disposition of all such petitions and any proceedings initiated by a grant of such a petition.

Certificate of Service

I hereby certify that on this 8th day of December, 2009, I caused an original and twelve paper copies of the foregoing Motion of Respondent Realcomp II, Ltd. for Partial Stay of Order Pending Appeal to be served by hand delivery to:

The Commissioners
U.S. Federal Trade Commission
Via Office of the Secretary, Room H-135
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

and

Donald S. Clark, Esq., Secretary
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

and one copy of the foregoing Motion of Respondent Realcomp II, Ltd. for Partial Stay of Order Pending Appeal to be served by electronic transmission and overnight courier to:

Peggy Bayer Femenalla
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