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Indeed, Dr. Williams ultimately repudiated one of his own Exhibits, testified that he was inexperienced 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.<sup>18</sup> Dr. William's testimony did not meet the legal standards for reliability,<sup>19</sup> 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.<sup>20</sup> 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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<sup>17</sup> *Id.*

<sup>18</sup> Tr. 1724-28, 1741-42, 1756-60.

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

<sup>20</sup> Tr. 1651







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.<sup>22</sup>

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 (6<sup>th</sup> 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.<sup>23</sup>

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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<sup>22</sup> 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").

<sup>23</sup> See *Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19-20 (1<sup>st</sup> 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.<sup>24</sup>

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

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<sup>24</sup> *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.<sup>25</sup> 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

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<sup>25</sup> 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.<sup>26</sup> 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.<sup>27</sup>

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<sup>26</sup> 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.

<sup>27</sup> 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).





