

Complaint

120 F.T.C.

IN THE MATTER OF

PORT WASHINGTON REAL ESTATE BOARD, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-3625. Complaint, Nov. 6, 1995--Decision, Nov. 6, 1995*

This consent order prohibits, among other things, a New York brokerage service from restricting the use of exclusive agency listings, fixing commission splits between listing and selling brokers, restricting or prohibiting members from holding open houses or using "For Sale" signs, restricting brokers from advertising free services to property owners, and excluding from membership brokers who do not operate a full-time office in the territory served by the Board's multiple listing service.

Appearances

For the Commission: *Alan B. Loughnan, Michael J. Bloom and William Baer.*

For the respondent: *Stephen Limmer, Schiffmacher, Cullen, Farrell & Limmer, Port Washington, N.Y.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act (15 U.S.C. 41 *et seq.*), and by virtue of the authority vested in it by said Act, the Federal Trade Commission, having reason to believe that Port Washington Real Estate Board, Inc. (hereinafter "PWREB" or "respondent"), a corporation, has violated the provisions of Section 5 of the Federal Trade Commission Act, and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues this complaint stating its charges as follows:

PARAGRAPH 1. As used in this complaint:

(1) *"Multiple listing service"* means a clearinghouse through which member real estate brokerage firms exchange information on listings of real estate properties and share commissions with other members.

(2) "*PWREB's service area*" means the territory within which PWREB provides its multiple listing service.

(3) "*Broker*" means any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(4) "*Member*" means any real estate broker that is entitled to participate in a multiple listing service offered by PWREB.

(5) "*Applicant*" means any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker within the State of New York, and who has applied individually or on behalf of his or her firm for membership in respondent's multiple listing service.

(6) "*Listing broker*" means any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(7) "*Listing agreement*" means any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(8) "*Selling broker*" means any broker, other than the listing broker, who locates the purchaser for a listed property.

(9) "*Exclusive agency listing*" means any listing under which a property owner appoints a broker as exclusive agent for the sale of the property at an agreed commission, but reserves the right to sell the property personally to a direct purchaser (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed.

(10) "*Open house*" means making a particular property available at a designated time for view by the public, potential buyers, or real estate brokers, without prior arrangement or appointment.

PAR. 2. PWREB is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business located at Port Washington Real Estate Board, Port Washington, NY.

PAR. 3. PWREB is and has been at all times relevant to this complaint a corporation organized for its own profit or for the profit of its members within the meaning of Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. 44.

PAR. 4. In the course and conduct of their businesses and through the policies, acts, and practices described in paragraphs twelve through sixteen below, PWREB and its members are in or affect commerce, as "commerce" is defined in the Federal Trade Commission Act.

PAR. 5. PWREB is, and for some time has been, providing a multiple listing service for member real estate brokerage firms in and around Port Washington, New York.

PAR. 6. PWREB's member firms are owned and operated by real estate brokers who, for a commission, provide the service of bringing together purchasers and sellers of residential real estate located within PWREB's service area, as well as other services designed to facilitate sales of such properties. Each PWREB member agrees to submit all of its exclusive listings pertaining to sales of residential real estate located within PWREB's service area for publication to the entire membership of the multiple listing service, and to share commissions with those member firms that successfully locate purchasers for properties it has listed. Only members may participate in the multiple listing service.

PAR. 7. Membership in PWREB's multiple listing service provides valuable competitive advantages in the brokering of residential real estate sales in PWREB's service area. Membership significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners, and significantly reduces the costs of obtaining current and comprehensive information on listings and sales. The realization of these opportunities and efficiencies is important for brokers to compete effectively in the provision of residential real estate brokerage services within PWREB's Service Area.

PAR. 8. Publication of listings on PWREB's multiple listing service generally is considered by sellers and brokers to be the fastest and most effective means of obtaining the broadest market exposure for residential property in PWREB's service area.

PAR. 9. PWREB's multiple listing service is the predominant multiple listing service in its service area. PWREB currently has about 18 member brokers. PWREB's membership includes most of the active residential real estate brokerage firms located in PWREB's service area. Annual sales of real estate listings published on PWREB's multiple listing service approach \$100 million dollars.

PAR. 10. Except to the extent that competition has been restrained as described herein, PWREB members are and have been in competition among themselves in the provision of residential real estate brokerage services within PWREB's service area.

PAR. 11. In adopting the policies and engaging in the practices described in paragraphs twelve through sixteen below, PWREB has been and is acting as a combination of its members, or in conspiracy with some of its members, to restrain trade in the provision of residential real estate brokerage services in PWREB's service area.

PAR. 12. The rules governing PWREB and its multiple listing service have provided that a listing broker may not retain any portion of a commission paid by a property owner on an exclusive agency listing that is sold by a different selling broker.

PAR. 13. The rules governing PWREB and its multiple listing service have prohibited members from holding open houses.

PAR. 14. The rules governing PWREB and its multiple listing service have prohibited members from using permanently affixed real estate signs on residential properties or using signs for house inspections attended by brokers and salespeople, and homeowners. Such rules have also prohibited display of a member's name or telephone number on permanent signs placed by homeowners.

PAR. 15. The rules governing PWREB and its multiple listing service have prohibited members from offering free services to property owners.

PAR. 16. PWREB has required as a condition of membership in PWREB and its multiple listing service that each applicant operate and maintain an office within PWREB's service area staffed and open for at least 40 hours per week.

PAR. 17. The purpose, capacity, tendency or effect of the combination or conspiracy described in paragraphs twelve through sixteen above has been, and continues to be, to restrain competition among brokers and to injure competition by, among other things:

(1) Discouraging or inhibiting brokers from accepting exclusive agency listings or similar contractual terms, such as terms that allow the property owner to pay a reduced commission or no commission if the owner sells the property other than through a broker, thereby restraining competition among brokers based on their willingness to offer or accept different contract terms that may be attractive and beneficial to consumers;

- (2) Substantially reducing the ability of residential property owners to compete with real estate brokers in locating purchasers;
- (3) Depriving property owners of the competitive advantages of negotiating with the listing broker an agreement to hold open houses;
- (4) Depriving property owners of the competitive advantages of negotiating with the listing broker an agreement to hold open houses;
- (5) Depriving property owners of the competitive advantages of negotiating with the listing broker an agreement to provide other services free of charge to the property owner;
- (6) Impeding new membership in PWREB's MLS by part-time or less-than-full-time real estate brokers, thus impeding entry into the residential real estate business in PWREB's service area;
- (7) Restraining competition from brokerage firms located outside the service area of PWREB's MLS.

PAR. 18. The policies, acts, practices, and combinations or conspiracies described above constitute unfair methods of competition or unfair acts or practices in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45.

The alleged conduct may continue or recur in the absence of the relief requested.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the New York Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act; and

The respondent, its attorneys, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, or that the facts as alleged in such complaint, other than jurisdictional facts, are true and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Act, and that a complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comments filed thereafter by interested persons pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Port Washington Real Estate Board, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of New York, with its office and principal place of business at: care of Charles Walker, President of Charles E. Hyde Agency, 277 Main Street, Port Washington, New York.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for the purposes of this order, the following definitions shall apply:

(1) "*PWREB*" means the Port Washington Real Estate Board, Inc., or any affiliated or successor organization comprised of real estate brokers doing business in PWREB's service area which operates a multiple listing service.

(2) "*Multiple listing service*" means a clearinghouse through which member real estate brokerage firms exchange information on listings of real estate properties and share commissions with other members.

(3) "*PWREB's service area*" means the territory within which PWREB provides its multiple listing service.

(4) "*Broker*" means any person, firm, or corporation that, for another and for a fee or commission, lists for sale, sells, exchanges, or offers or attempts to negotiate a sale, exchange, or purchase of an estate or interest in real estate.

(5) "*Member*" means any real estate broker that is entitled to participate in a multiple listing service offered by PWREB.

(6) "*Applicant*" means any owner or co-owner of a real estate brokerage firm who is duly licensed as a real estate broker by the State of New York, and who has applied individually or on behalf of his or her firm for membership in PWREB's multiple listing service.

(7) "*Listing broker*" means any broker who lists a real estate property with a multiple listing service pursuant to a listing agreement with the property owner.

(8) "*Listing agreement*" means any agreement between a real estate broker and a property owner for the provision of real estate brokerage services.

(9) "*Selling broker*" means any broker, other than the listing broker, who locates the purchaser for a listed property.

(10) "*Exclusive agency listing*" means any listing under which a property owner appoints a broker as exclusive agent for the sale or lease of the property at an agreed commission, but reserves the right to sell the property personally to a direct purchaser (one not procured in any way through the efforts of any broker) at an agreed reduction in the commission or with no commission owed to the agent broker.

(11) "*Exclusive right to sell listing*" means any listing under which a property owner contracts to pay the broker an agreed commission if the property is sold, whether the purchaser is procured by the broker or any other person, including the property owner.

(12) "*Open house*" means making a particular property available at a designated time for view by the public, potential buyers, or real estate brokers, without prior arrangement or appointment.

II.

It is further ordered, That respondent PWREB, its successors and assigns, and its directors, officers, committees, agents, representatives, and employees, directly or indirectly, or through any corporation, subsidiary, division, or other device, in connection with the operation of a multiple listing service in or affecting commerce, as "commerce" is defined in the Federal Trade Commission Act, shall

forthwith cease and desist from adopting, maintaining, or enforcing any rule, policy, or practice or taking any other action that has the purpose or effect of:

(A) Restricting or interfering with (1) any broker's offering or accepting any exclusive agency listing; or (2) the publication on a PWREB multiple listing service of any exclusive agency listing submitted by a member; provided, however, that nothing contained in this subpart shall preclude respondent from (a) including a simple designation, such as a code or symbol, that a published listing is an exclusive agency listing; or (b) applying reasonable terms and conditions equally applicable to the publication of any listing, whether an exclusive agency listing or an exclusive right to sell listing.

(B) Suggesting or fixing any rate, range, or amount of any division or split of commission or other fees between any listing broker and any selling broker, or restricting any property owner's participation in the determination of the division or split of commission or other fees between any listing broker and any selling broker.

(C) Restricting or interfering with the ability of member brokers or homeowners to hold open houses or to place signs on any property; provided, however, that nothing contained in this subpart shall preclude PWREB from requiring its members to comply with local ordinances governing open houses or use of signs.

(D) Restricting or interfering with the ability of member brokers to advertise free services to property owners.

(E) Conditioning membership in or use of a multiple listing service operated by PWREB on any applicant or member operating or maintaining a full-time office, or on such applicant or member operating or maintaining an office in PWREB's service area; provided, however, that nothing contained in this subpart shall prohibit respondent from adopting or enforcing any reasonable and nondiscriminatory policy to assure that its members are actively engaged in real estate brokerage and that listings published on respondent's multiple listing service are adequately serviced.

III.

It is further ordered, That respondent PWREB shall:

(A) Within thirty (30) days after this order becomes final, furnish an announcement in the form shown in Appendix A to each member of PWREB or a multiple listing service operated by PWREB.

(B) Within sixty (60) days after this order becomes final, amend its by-laws, rules and regulations, and other of its materials to conform to the provisions of this order and provide each member of PWREB or a multiple listing service operated by PWREB with a copy of the amended by-laws, rules and regulations, and other materials.

(C) For a period of three (3) years after this order becomes final, furnish an announcement in the form shown in Appendix A to any new member, applicant, or any person who inquires about possible membership in PWREB or its multiple listing service, within thirty (30) days after such person's initial application or inquiry.

IV.

It is further ordered, That respondent PWREB shall:

(A) Within ninety (90) days after this order becomes final, submit a verified written report to the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

(B) In addition to the report required by paragraph IV(A), annually for a period of three (3) years on or before the anniversary date on which this order becomes final, and at such other times as the Federal Trade Commission or its staff may by written notice to respondent require, file a verified written report with the Federal Trade Commission setting forth in detail the manner and form in which respondent has complied and is complying with this order.

(C) For a period of five (5) years after this order becomes final, maintain and make available to the Commission staff for inspection and copying, upon reasonable notice, all documents that relate to the manner and form in which respondent has complied with this order.

(D) Notify the Federal Trade Commission at least thirty (30) days prior to any proposed change in respondent, such as dissolution,

assignment, or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries, or any other change in respondent that may affect compliance obligations arising out of this order.

V.

It is further ordered, That this order shall terminate on November 6, 2015.

APPENDIX A

[Date]

[Respondent's Letterhead]

The Federal Trade Commission has conducted an investigation into certain rules and practices of the multiple listing service ("MLS") operated by the Port Washington Real Estate Board ("PWREB") that have been alleged to be unlawful restraints of trade. To avoid litigation, PWREB has entered into a consent agreement. The agreement is not an admission the PWREB or any of its members has violated any law. For your information, PWREB is prohibited from the following practices in connection with the operation of an MLS.

1. Restricting or interfering with any broker's offering or accepting an exclusive agency listing, or limiting the publication on the MLS of any exclusive agency listing entered into by an MLS member.
2. Requiring or fixing the rate, range or amount of any split or division of a commission or other fees between a listing broker and a selling broker, or restricting any property owner's participation in the determination of the split or division of any commission or other fees between the listing and selling brokers.
3. Restricting or interfering with the ability of member brokers or homeowners to conduct open houses or to place signs on property.
4. Restricting or interfering with the ability of member brokers to advertise free services to homeowners.

5. Requiring as a condition of membership in its MLS that a member or applicant for membership operate an office full-time or engage in real estate brokerage full-time in PWREB's service area.

President
Port Washington Real
Estate Board, Inc.

IN THE MATTER OF

NATIONAL DIETARY RESEARCH, INC., ET AL.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SECS. 5 AND 12 OF THE FEDERAL TRADE COMMISSION ACT*Docket 9263. Complaint, Nov. 9, 1993--Decision, Nov. 7, 1995*

This consent order prohibits, among other things, two Florida-based corporations and their owner from making claims regarding weight loss, hunger reduction, calorie absorption, cholesterol reduction, effects on cellulite or body measurements, or any other health benefits of any product or program they advertise or sell, unless the respondents possess competent and reliable scientific evidence to substantiate the claims. Also, the consent order prohibits the respondents from misrepresenting test results, from representing that any advertisement is something other than a paid advertisement, and from representing that an endorsement is typical of the experience of consumers who use the product, unless the claim is substantiated. In addition, the consent order requires the respondents to pay \$100,000 to the Commission.

Appearances

For the Commission: *Joel Winston, Richard Cleland, C. Lee Peeler and Joan Bernstein.*

For the respondents: *Roger Furey, Arter & Hadden, Washington, D.C. and Donovan Conwell, Fowler, White, Gillen, Boggs, Villareal & Banker, Tampa, FL.*

COMPLAINT

The Federal Trade Commission, having reason to believe that National Dietary Research, a corporation, The William H. Morris Company, a corporation, and William H. Morris, individually and as the sole officer of said corporations ("respondents"), have violated Sections 5(a) and 12 of the Federal Trade Commission Act (15 U.S.C. 45 (a) and 52), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, alleges:

PARAGRAPH 1. (a) Respondent National Dietary Research is a Florida corporation, with its principal office or place of business located at 1377 K Street, N.W., Suite 553, Washington, D.C.