

Complaint

IN THE MATTER OF

WEST PENN MULTI-LIST, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket No. C-4247; File No. 081 0167**Complaint, February 13, 2009 – Decision, February 13, 2009*

This consent order addresses charges that West Penn engaged in a concerted refusal to deal except on specified terms with respect to a key input for the provision of real estate services. The respondent adopted rules and policies that limit the publication and marketing of certain sellers' properties, but not others, based solely on the terms of their respective listing contracts. The order prohibits the respondent from adopting or enforcing any rules or policies that deny or limit the ability of MLS participants to enter into Exclusive Agency Listings, or any other lawful listing agreements, with sellers of properties.

Participants

For the Commission: *Peggy Bayer Femenella and Joel Christie.*

For the Respondent: *Fred C. Jug. Jr., Brandt, Milnes & Rea.*

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 West Penn Multi-List, Inc. (hereinafter sometimes referred to as "Respondent" or "West Penn"), a corporation, has violated and is now violating the provisions of said 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:

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NATURE OF THE CASE

This matter concerns a corporation, owned by subscriber real estate brokers in Pittsburgh, Pennsylvania, that operates a Multiple Listing Service, which is designed to foster real estate brokerage services by sharing and publicizing information on properties for sale by customers of real estate brokers. West Penn has adopted rules and policies that limit the acceptance, publication and marketing of certain properties, based on the terms of the listing contract entered into between a real estate broker and the customer who wishes to sell a property. These rules discriminate against certain kinds of lawful contracts between listing real estate brokers and their customers, and lack any pro-competitive justification. These rules constitute an anticompetitive concerted refusal to deal except on specified terms with respect to key inputs for the provision of residential real estate brokerage services, and violate the antitrust laws.

RESPONDENT AND ITS SUBSCRIBERS

1. Respondent West Penn, Inc., is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business at 8980 Perry Highway, Pittsburgh, Pennsylvania 15237. The subscribers of Respondent are real estate brokers and other real estate professionals doing business in the Pittsburgh, Pennsylvania, metropolitan area and surrounding area, and are commonly referred to as “subscribers” of the Respondent.

2. Respondent is organized for the purpose of serving its subscribers’ interests, including their economic interests, by promoting, fostering, and advancing the real estate brokerage services industry in the Pittsburgh, Pennsylvania, metropolitan area and surrounding area. One of the primary functions of Respondent is the operation of the West Penn Multiple Listing Service (“MLS”). A MLS is a clearinghouse through which subscriber real estate brokerage firms regularly and systematically exchange information on listings of real estate properties and share commissions with

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subscribers who locate purchasers. When a property is listed on the West Penn MLS, it is made available to all subscribers of the MLS for the purpose of trying to match a buyer with a seller. Information about the property, including the asking price, address and property details, are made available to subscribers of the MLS so that a suitable buyer can be found.

3. Respondent has more than 6,800 real estate professionals as subscribers. The majority of West Penn's subscribers hold an active real estate license and are active in the real estate profession. All of the West Penn rules and policies are adopted by the West Penn Board of Directors, which is made up of competing real estate brokers.

4. The large majority of residential real estate brokerage professionals in the Pittsburgh, Pennsylvania, metropolitan area and surrounding area, are subscribers of West Penn. These professionals compete with one another to provide residential real estate brokerage services to consumers.

5. West Penn services the territory within the Pittsburgh, Pennsylvania metropolitan area, specifically Allegheny, Armstrong, Beaver, Butler, Washington, Westmoreland, Fayette, Greene, Clarion, Crawford, Indiana, Lawrence, Mercer and Somerset counties ("West Penn Service Area").

JURISDICTION

6. The acts and practices of Respondent, including the acts and practices alleged herein, have been or are in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act, as amended, and Respondent is subject to the jurisdiction of the Federal Trade Commission. Among other things, the aforesaid acts and practices:

- a. Affect the purchase and sale of real estate by persons moving into and out of the West Penn Service Area; and

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- b. Affect the transmission of real estate listing information to public real estate web sites that are intended for a national audience, including Realtor.com.

THE CHALLENGED CONDUCT

7. Respondent has restrained competition in the provision of residential real estate brokerage services by combining or conspiring with its subscribers or others, or by acting as a combination of its subscribers or others, to hinder unreasonably the ability of real estate brokers in the West Penn Service Area to offer residential real estate brokerage services on terms other than those contained in the traditional form of listing agreement known as an Exclusive Right to Sell Listing.

8. An Exclusive Right to Sell Listing is a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. An Exclusive Right to Sell Listing is the form of listing agreement traditionally used by listing brokers to provide full-service residential real estate brokerage services.

9. An alternative form of listing agreement to an Exclusive Right to Sell Listing is an Exclusive Agency Listing. An Exclusive Agency Listing is a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but reserves to the property owner or principal a right to sell the property without further assistance of the listing broker, in which case the listing broker is paid a reduced or no commission when the property is sold.

10. Exclusive Agency Listings are a means by which listing brokers can offer lower-cost, Unbundled Real Estate Brokerage Services to home sellers. Unbundled Real Estate Brokerage Services are lawful arrangements pursuant to which a listing broker

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will cause the property offered for sale to be listed on the MLS, but the listing broker will not provide some or all of the additional services offered by traditional real estate brokers, or will only offer such additional services as may be chosen from a menu of services for a fee.

11. Brokers offering Unbundled Real Estate Brokerage Services often provide home sellers with exposure of their listing through the MLS for a flat fee or reduced commission that is small compared to the full commission prices commonly charged by traditional brokers, often by entering into Exclusive Agency Listings that reserve to the home seller the right to sell the property without owing more to the listing broker.

12. To be listed in the MLS, a home seller must enter into a listing agreement with a listing real estate broker that is a subscriber of the MLS. The compensation paid by the home seller to the listing broker is determined by negotiation between the home seller and the listing broker. Whatever type of listing agreement is entered into between the home seller and the listing real estate broker, the MLS rules require that the home seller must offer to pay a commission to a cooperating real estate broker, known as a selling broker, who successfully secures a buyer for the property. If the home seller fails to pay a commission to a selling broker who secures a buyer for the property, the selling broker may recover the commission due from the listing agent, under rules and procedures established by the MLS.

13. Respondent, through its Board of Directors made up of competing brokers, adopted rules that dictate the contract terms that subscribing brokers must use in their listing contracts, and thwart competition by firms using alternative business models for real estate brokerage services in the West Penn Service Area: (1) Exclusion Policy; (2) Website Policy; and (3) 365 Day Policy.

14. Respondent adopted a rule that precludes the acceptance of any listings into the West Penn MLS other than Exclusive Right to

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Sell Listings (the “Exclusion Policy”). The Exclusion Policy excludes Exclusive Agency Listings from the West Penn MLS.

15. The Exclusion Policy also precludes any revisions, deletions, or amendments to the West Penn Exclusive Right to Sell contract.

16. Respondent enforces the Exclusion Policy by requiring all original listing contracts to be collected and retained by West Penn.

17. Respondent adopted a rule that prevents certain lawful residential property listings provided to West Penn, including Exclusive Agency Listings, from being transmitted to real estate web sites: “Information which can be downloaded and/or otherwise displayed, is limited to properties listed on an exclusive right to sell basis” (the “Website Policy”). The Website Policy specifically prevents information concerning Exclusive Agency Listings from being published on web sites approved by West Penn to receive information concerning properties listed on the West Penn MLS, including (1) the NAR-operated “Realtor.com” web site; and (2) West Penn-subscriber web sites (collectively, “Approved Websites”).

18. Respondent adopted a rule requiring listing contracts between a broker and a seller to be for 365 days (“365 Day Policy”).

19. West Penn actively enforces the Exclusion Policy, Website Policy, and 365 Day Policy by putting holds on listings that do not comply and implementing fines.

WEST PENN HAS MARKET POWER

20. The provision of residential real estate brokerage services to sellers and buyers of real property in the Pittsburgh, Pennsylvania metropolitan area and/or the West Penn Service Area is a relevant market.

21. The publication and sharing of information relating to residential real estate listings for the purpose of brokering residential

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real estate transactions is a key input to the provision of real estate brokerage services, and represents a relevant input market. Publication of listings through the West Penn MLS is generally considered by sellers, buyers and their brokers to be the fastest and most effective means of obtaining the broadest market exposure for property in the West Penn Service Area.

22. Participation in West Penn is a service that is necessary for the provision of effective residential real estate brokerage services to sellers and buyers of real property in the West Penn Service Area. Participation significantly increases the opportunities of brokerage firms to enter into listing agreements with residential property owners and to assist prospective buyers in obtaining properties that fit their needs, and significantly reduces the costs of obtaining up-to-date 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 in the West Penn Service Area.

23. Access to the Approved Websites is a service that is necessary for the provision of effective residential real estate brokerage services in the West Penn Service Area. Home buyers regularly use the Approved Websites to assist in their search for homes. The Approved Websites are the web sites most commonly used by home buyers in their home search. Many home buyers find the home that they ultimately purchase by searching on one or more Approved Websites.

24. The most efficient and, at least in some cases, the only means for West Penn subscribers to have their listed properties visible to the public on the Approved Websites is by having West Penn transmit those listings.

25. By virtue of industry-wide participation and control over the ability of real estate brokers to participate in the West Penn MLS and the ability of home sellers to publicize their homes for sale on the West Penn MLS and on the Approved Websites, West Penn has market power in the West Penn Service Area.

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**THE WEST PENN POLICIES HAVE NO EFFICIENCY
BENEFIT**

26. There are no cognizable and plausible efficiency justifications for the conduct that constitutes the violation alleged in this Complaint. Such conduct is not reasonably ancillary to the legitimate and beneficial objectives of the MLS.

VIOLATION

27. In adopting the policies and engaging in the Acts and Practices described herein, West Penn has combined or conspired with its subscribers or others, or acted as a combination or conspiracy of its subscribers or others, to restrain trade in the provision of residential real estate brokerage services within the Pittsburgh, Pennsylvania metropolitan area and/or the West Penn Service Area.

28. The acts and practices of West Penn described herein constitute an agreement that only listings based exclusively on traditional contract terms as dictated by West Penn will be placed in the West Penn MLS and the Approved Websites, and thereby eliminate certain forms of competition. The Acts and Practices have no cognizable and plausible efficiency justifications and are inherently suspect restraints of trade.

29. The purposes, capacities, tendencies, or effects of the policies, acts, or practices of West Penn and its subscribers as described herein have been and are unreasonably to restrain competition among brokers, and to injure consumers, in the market for provision of residential real estate brokerage services within the Pittsburgh, Pennsylvania metropolitan area and/or the West Penn Service Area.

30. The policies, acts, practices, and combinations or conspiracies described herein constitute unfair methods of competition in or affecting interstate commerce in violation of Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45.

Decision and Order

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this thirteenth day of February, 2009, issues its Complaint against Respondent West Penn Multi- List, Inc.

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of certain acts and practices of the West Penn Multi-List, Inc. hereinafter sometimes referred to as “Respondent” or “West Penn,” and Respondent having been furnished thereafter with a copy of the draft Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondent with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

Respondent, its attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Order (“Consent Agreement”), containing an admission by Respondent of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of the Consent 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 Respondent has violated the said Act, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent

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Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34 (2009), the Commission hereby makes the following jurisdictional findings and issues the following Order:

1. Respondent West Penn Multi-List, Inc. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Pennsylvania, with its office and principal place of business at 8980 Perry Highway, Pittsburgh, Pennsylvania 15237.
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:

- A. “Respondent” or “West Penn” shall mean West Penn Multi-List Inc., its Subscribers, managers, offices, predecessors, divisions and wholly or partially owned subsidiaries, affiliates, licensees of affiliates, partnerships, and joint ventures; and all the board of directors, owners, managers, directors, officers, employees, consultants, agents, and representatives of the foregoing. The terms “subsidiary,” “affiliate” and “joint venture” refer to any person in which there is partial or total ownership or control by West Penn, and is specifically meant to include West Penn MLS and/or each of the West Penn websites.
- B. The term “Subscribers” shall mean a Pennsylvania real estate broker or a certified Pennsylvania appraiser who is subscribing to the West Penn MLS.

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- C. “Multiple Listing Service” or “MLS” means a cooperative venture by which real estate brokers serving a common market area submit their listings to a central service which, in turn, distributes the information for the purpose of fostering cooperation in and facilitating real estate transactions.
- D. The term “West Penn MLS” means the West Penn MLS or any other MLS owned, operated or controlled, in whole or in part, directly or indirectly, by West Penn, and any of its predecessors, divisions and wholly or partially owned subsidiaries, affiliates, licensees of the affiliates, partnerships, and joint ventures, and all the directors, officers, members, participants, employees, consultants, agents, and representatives of the foregoing.
- E. “IDX” means the internet data exchange process that provides a means or mechanism for MLS listings to be integrated within a Website.
- F. “IDX Website” means a Website that is capable of integrating the IDX listing information within the Website.
- G. “Realtor.com” means the Website operated by the National Association of Realtors that allows the general public to search information concerning real estate listings downloaded from a variety of MLSs representing different geographic areas of the country, including but not limited to real estate listings from West Penn.
- H. “Approved Website” means a Website to which West Penn or West Penn MLS provides information concerning listings for publication including, but not limited to, West Penn Subscriber IDX Websites and Realtor.com.
- I. “Exclusive Right to Sell Listing” means a listing agreement under which the property owner or principal appoints a real estate broker as his or her exclusive agent for a designated

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period of time, to sell the property on the owner's stated terms, and agrees to pay the listing broker a commission when the property is sold, regardless of whether the buyer is found by the listing broker, the owner or another broker.

- J. "Exclusive Agency Listing" means a listing agreement under which the listing broker acts as an exclusive agent of the property owner or principal in the sale of a property, but also reserves to the property owner or principal a right to sell the property without assistance from a broker, in which case the listing broker is paid a reduced commission or no commission when the property is sold.
- K. "Services of the MLS" means the benefits and services provided by the MLS to assist West Penn Subscribers in selling, leasing and valuing property and/or brokering real estate transactions. With respect to real estate brokers or agents representing home sellers, Services of the MLS shall include, but are not limited to:
 - 1. having the property included among the listings in the MLS in a manner so that information concerning the listing is easily accessible by cooperating brokers; and
 - 2. having the property publicized to the general public through any means available to the MLS, including, but not limited to, information concerning the listing being made available on Realtor.com and IDX Websites.

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II.

IT IS FURTHER ORDERED that Respondent West Penn, its successors and assigns, and its 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 or Approved Websites in or affecting commerce, as “commerce” is defined in Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44, shall forthwith cease and desist from adopting or enforcing any policy, rule, practice or agreement to deny, restrict or interfere with the ability of West Penn Subscribers to enter into Exclusive Agency Listings or other lawful listing agreements with the sellers of properties, including but not limited to any policy, rule, practice or agreement to:

- A. prevent West Penn Subscribers from offering or accepting Exclusive Agency Listings;
- B. prevent West Penn Subscribers from cooperating with listing brokers or agents that offer or accept Exclusive Agency Listings;
- C. prevent West Penn Subscribers from publishing information concerning listings offered pursuant to Exclusive Agency Listings on Approved Websites;
- D. deny or restrict the Services of the MLS to Exclusive Agency Listings or other lawful listings in any way that such Services of the MLS are not denied or restricted to Exclusive Right to Sell Listings; and
- E. treat Exclusive Agency Listings, or any other lawful listings, in a less advantageous manner than Exclusive Right to Sell Listings, including but not limited to, any policy, rule or practice pertaining to the transmission, downloading, or displaying of information pertaining to such listings.

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Provided, however, that nothing herein shall prohibit the Respondent from adopting or enforcing any policy, rule, practice or agreement regarding subscription or participation requirements, payment of dues, administrative matters, or any other policy, rule, practice or agreement, that it can show is reasonably ancillary to the legitimate and beneficial objectives of the MLS.

III.

IT IS FURTHER ORDERED that Respondent shall cease and desist from collecting and retaining Subscriber listing agreements.

IV.

IT IS FURTHER ORDERED that Respondent shall not set the length of time for listing contracts, and will enable Subscribers and sellers to negotiate in accordance with Pennsylvania law.

V.

IT IS FURTHER ORDERED that Respondent shall, no later than thirty (30) days after the date this Order becomes final, amend its rules and regulations to conform to the provisions of this Order.

VI.

IT IS FURTHER ORDERED that, within ninety (90) days after the date this Order becomes final, Respondent shall (1) inform each West Penn Subscriber of the amendments to its rules and regulations to conform to the provisions of this Order; and (2) provide each West Penn Subscriber with a copy of this Order. Respondent shall transmit the rule change and Order by the means it uses to communicate with its members in the ordinary course of West Penn's business, which shall include, but not be limited to: (A) sending one or more emails with one or more statements that there has been a change to the rule and an Order, along with a link to the amended rule and the Order, to each West Penn Subscriber; and (B) placing on the publicly accessible West Penn Website

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(www.westpennmls.com) a statement that there has been a change to the rule and an Order, along with a link to the amended rule and the Order. Respondent shall modify its Website as described above no later than five (5) business days after the date the Order becomes final, and shall display such modifications for no less than ninety (90) days from the date this Order becomes final. The Order shall remain accessible through common search terms and archives on the Website for five (5) years from the date it becomes final.

VII.

IT IS FURTHER ORDERED that Respondent shall notify the 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 or any other proposed changes in the corporation which may affect compliance obligations arising out of the Order.

VIII.

IT IS FURTHER ORDERED that Respondent shall file a written report within six (6) months of the date this Order becomes final, and annually on the anniversary date of the original report for each of the five (5) years thereafter, and at such other times as the Commission may require by written notice to Respondent, setting forth in detail the manner and form in which it has complied with this Order.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on February 13, 2019.

By the Commission.

Analysis to Aid Public Comment

ANALYSIS OF CONSENT ORDER TO AID PUBLIC COMMENT

The Federal Trade Commission has accepted for public comment an agreement containing consent order with West Penn Multi-List, Inc. (“West Penn” or “Respondent”). Respondent operates a multiple listing service (“MLS”) that is designed to facilitate real estate transactions by sharing and publicizing information on properties for sale by customers of real estate brokers. The agreement settles charges that West Penn violated Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45, through particular acts and practices of the MLS. The proposed consent order has been placed on the public record for thirty (30) days to receive comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the agreement and the comments received, and will decide whether it should withdraw from the agreement or make the proposed order final.

The purpose of this analysis is to facilitate comment on the proposed consent order. This analysis does not constitute an official interpretation of the agreement and proposed order, and does not modify its terms in any way. Further, the proposed consent order has been entered into for settlement purposes only, and does not constitute an admission by proposed Respondent that it violated the law or that the facts alleged in the complaint against the Respondent (other than jurisdictional facts) are true.

I. The Respondent

West Penn is a Pennsylvania membership corporation that provides multiple listing services to real estate professionals based in the Pittsburgh metropolitan area and surrounding counties. It is owned by its membership, which comprises more than 6800 subscribers. Respondent serves the great majority of the residential real estate brokers in its service area, and is the sole MLS serving that area.

Analysis to Aid Public Comment

II. The Conduct Addressed by the Proposed Consent Order

In general, the conduct at issue in this matter is largely the same as the conduct addressed by the Commission in numerous other consent orders involving MLS restrictions that have been announced since 2006. A general discussion of industry background and the Commission's reasoning is contained in the Analysis to Aid Public Comment issued in connection with five of those consent orders in the "real estate sweep" announced in October 2006.¹ In particular, certain conduct by Respondent is similar to activity addressed in the Commission's consent order involving MiRealSource, Inc. ("MiRealSource"), announced in March 2007.²

A. The Respondent Has Market Power

West Penn serves residential real estate brokers in the Pittsburgh metropolitan area and surrounding counties in Pennsylvania. These professionals compete with one another to provide residential real estate brokerage services to consumers. Membership in West Penn is necessary for a broker to provide effective residential real estate brokerage services to sellers and buyers of real property in this area.

By virtue of broad industry participation and control over a key input,³ West Penn has market power in the provision of MLS services to professionals who provide residential real estate

¹ See <http://www.ftc.gov/os/caselist/0610268/0610268consentanalysis.pdf>. See also *In the Matter of Multiple Listing Service, Inc.*, FTC File No. 061-0090 (analysis of consent order in matter involving similar conduct by Milwaukee, Wisconsin area MLS), located at <http://www.ftc.gov/os/caselist/0610090/071212analysis.pdf>; *In the Matter of Austin Board of Realtors*, FTC File No. 051-0219 (analysis of consent order concerning Austin, Texas area MLS), located at <http://www.ftc.gov/os/caselist/0510219/0510219AustinBoardofRealtorsAnalysis.pdf>.

² *In the Matter of MiRealSource, Inc.*, Dkt. No. 9321.

³ As noted, the MLS provides valuable services for a broker assisting a seller as a listing broker, by offering a means of publicizing the property to other brokers and the public. For a broker assisting a buyer, it also offers unique and valuable services, including detailed information that is not shown on public web sites, which can help with house showings and otherwise facilitate home selections.

Analysis to Aid Public Comment

brokerage services to sellers and buyers of real property in the region it serves.

B. Respondent's Conduct

The complaint accompanying the proposed consent order alleges that Respondent has violated the FTC Act by adopting rules and policies that limit the publication and marketing of certain sellers' properties, but not others, based solely on the terms of their respective listing contracts. Listing contracts are the agreements by which property sellers obtain services from their chosen real estate brokers. As was the case with the other MLSs that agreed to consent orders with the Commission, the contract favored by Respondent here is known as an "Exclusive Right to Sell Listing," and is the kind of listing agreement traditionally used by listing brokers to provide the full range of residential real estate brokerage services. Among the contracts disfavored by the Respondent is the kind known as an "Exclusive Agency Listing," which brokers can use to offer limited brokerage services to home sellers in exchange for set fees or reduced commissions.

The challenged restrictions do not admit Exclusive Agency Listings and other non-traditional listings into the West Penn MLS system; that service is reserved for Exclusive Right to Sell listings only. In addition, the restrictions state that information about properties will not be supplied by the MLS to popular real estate web sites unless the listing contracts follow the traditional format approved by the Respondent. This policy, known as the "Web Site Policy," prevents properties with non-traditional listing contracts from being displayed on a broad range of public web sites, including the "Realtor.com" web site operated by the National Association of Realtors and web sites operated by brokers or brokerage firms that are MLS members. The conduct was collusive and exclusionary, because in agreeing to keep non-traditional listings off the MLS and from public web sites, the brokers enacting the rules were, in effect, agreeing among themselves to limit the manner in which they compete with one another, and withholding valuable benefits of the MLS from real estate brokers who did not go along.

Analysis to Aid Public Comment

In addition to the restrictions that disadvantage Exclusive Agency Listings, Respondent's rules also include a provision that requires brokers to submit their listing contracts to the MLS, which retains them on file for two years. The complaint alleges that the collection of listing contracts by Respondent allows West Penn to enforce its exclusion of Exclusive Agency Listings.

Furthermore, Respondent has established a default duration of one year for all listing contracts. In setting such a lengthy standard contract, the MLS has placed the burden on individual consumers to negotiate shorter terms or request early termination of their service agreements with listing brokers.

Respondent adopted each of the challenged rules and policies at some point after March 2006. On September 9, 2008, prior to agreeing to the proposed consent order and prior to the Commission's acceptance of the consent order and proposed complaint for public comment, the Board of Directors of West Penn voted to rescind the restrictions.

C. Competitive Effects of the Respondent's Rules and Policies

West Penn's rules and policies have discouraged its members from offering or accepting Exclusive Agency Listings. Thus, the restrictions impede the provision of unbundled brokerage services, and may make it more difficult and costly for home sellers to market their homes. Furthermore, the rules and policies have caused home sellers to switch away from Exclusive Agency Listings to other forms of listing agreements. By excluding Exclusive Agency Listings from the MLS and prohibiting them from being transmitted to popular real estate web sites, the West Penn restrictions have adverse effects on home sellers and home buyers. When home sellers switch to full-service listing agreements from Exclusive Agency Listings, they may be required to contract for more services than they desire, and miss opportunities to save money on brokerage fees. In particular, the rules deny home sellers choices for marketing their homes, and deny home buyers the chance to use the internet

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easily to see all of the houses listed by real estate brokers in the area, making their search less efficient.

Respondent's rules also deter listing brokers and home sellers from contracting for services for terms of less than 365 days. The complaint alleges that West Penn's rule requiring agreements to run for 365 days reduces certain forms of competition among brokers and thereby limits consumer choice. As courts have recognized, the competitive process can be subverted when a group of rivals agrees to restrict the terms on which individual firms will sell their products or services.⁴

D. There is No Competitive Efficiency Associated with the Challenged Practices

The Respondent's rules at issue here advance no legitimate procompetitive purpose. As was the case in the other real estate MLS matters resolved by consent orders since 2006, theoretical concerns about free-riding do not justify the restrictions adopted by the Respondent here. Exclusive Agency Listings are not a credible means for home buyers or sellers to bypass the use of the brokerage services that the MLS was created to promote, because a listing broker is always involved in an Exclusive Agency Listing. Moreover, other provisions in West Penn's rules ensure that when a cooperating broker – a broker who finds a buyer for the property – is involved in a transaction, he or she is compensated for the brokerage services provided. Finally, there are no plausible or cognizable efficiencies associated with the rules requiring (i) terms of 365 days for listing contracts, and (ii) collection of those contracts by Respondent.

⁴ See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 649-50 (1980) (condemning agreement to refrain from offering credit terms to buyers because it “extinguish[ed] one form of competition among the sellers”); *Detroit Automobile Dealers Association v. FTC*, 955 F.2d 457, 472 (6th Cir. 1992) (upholding the Commission's conclusion that concerted action by automobile dealerships to limit showroom hours of operation affected “a means of competition, and [therefore] such limitation may be an unreasonable restraint of trade.”).

Analysis to Aid Public Comment

III. The Proposed Consent Order

Despite the recent decision by Respondent's Board of Directors to remove the challenged restrictions, it is appropriate for the Commission to require the prospective relief in the proposed consent order. Such relief ensures that West Penn cannot revert to the old rules or policies, or engage in future variations of the challenged conduct. The conduct at issue in the current case is itself a variation of practices that have been the subject of past Commission orders; in the 1980s and 1990s, the Commission condemned the practices of several local MLS boards that had banned Exclusive Agency Listings entirely, and several consent orders were imposed.⁵

The proposed order is designed to ensure that Respondent does not misuse its market power, while preserving the procompetitive incentives of members to contribute to the joint venture operated by West Penn. The proposed order prohibits Respondent from adopting or enforcing any rules or policies that deny or limit the ability of MLS participants to enter into Exclusive Agency Listings, or any other lawful listing agreements, with sellers of properties. The proposed order includes examples of such practices, but the conduct it enjoins is not limited to those five enumerated examples. The proposed order also requires West Penn to stop collecting and retaining listing agreements, and prevents Respondent from setting the length of time for such agreements. In addition, the proposed order states that, within thirty days after it becomes final, Respondent shall have conformed its rules to the substantive provisions of the order. West Penn is further required to notify its

⁵ See, e.g., *In the Matter of Port Washington Real Estate Bd., Inc.*, 120 F.T.C. 882 (1995); *In the Matter of United Real Estate Brokers of Rockland, Ltd.*, 116 F.T.C. 972 (1993); *In the Matter of Am. Indus. Real Estate Assoc.*, Docket No. C 3449, 1993 WL 1thirty (30)09648 (F.T.C. July 6, 1993); *In the Matter of Puget Sound Multiple Listing Serv.*, Docket No. C 3390 (F.T.C. Aug. 2, 1990); *In the Matter of Bellingham Whatcom County Multiple Listing Bureau*, Docket No. C 3299 (F.T.C. Aug. 2, 1990); *In the Matter of Metro West Penn*, Docket No. C 3286, 1990 WL 10012611 (F.T.C. Apr. 18, 1990); *In the Matter of Multiple Listing Serv. of the Greater Michigan City Area, Inc.*, 106 F.T.C. 95 (1985); *In the Matter of Orange County Bd. of Realtors, Inc.*, 106 F.T.C. 88 (1985).

Analysis to Aid Public Comment

participants of the order through its usual business communications and its web site. The proposed order requires notification to the Commission of changes in the Respondent's structure, and periodic filings of written reports concerning compliance.

The proposed order applies to Respondent and entities it owns or controls, including any affiliated web site it operates. The order does not prohibit participants in the MLS, or other independent persons or entities that receive listing information from Respondent, from making independent decisions concerning the use or display of such listing information on participant or third-party web sites, consistent with any contractual obligations to Respondent. The proposed order will expire in 10 years.

Complaint

IN THE MATTER OF

**AMERICAN NATIONWIDE MORTGAGE
COMPANY, INC.**

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT,
SEC. 144 OF THE TRUTH IN LENDING ACT,
AND SECTION 226.24 OF REGULATION Z

*Docket C-4249; File No. 072 3168
Complaint, February 17, 2009 – Decision, February 17, 2009*

This consent order addresses alleged misrepresentations made by American Nationwide Mortgage Company, Inc., regarding home loans it advertised and made to consumers. The order prohibits the respondent from advertising a monthly payment amount unless it discloses, clearly and conspicuously, that the amount (1) applies only for a limited period of time, after which it will increase, (2) does not include the amount of interest that the consumer owes each month, and (3) is less than the monthly payment amount (including interest) that the consumer owes, with the difference added to the total loan balance. The order also prohibits the respondent from advertising a rate lower than the rate at which interest is accruing, regardless of what the rate is called. The order prohibits the respondent from misrepresenting the nature and/or extent of the variability of any loan rate or payment amount, including but not limited to (1) an interest rate or annual percentage rate (APR), (2) whether it is fixed rather than adjustable or adjustable rather than fixed, and (3) the anticipated duration of the fixed or variable interest rate or payment amount. In addition, the respondent is prohibited from advertising the amount of any payment, the number of payments or the period of repayment, or the amount of any finance charge, without disclosing, clearly and conspicuously, all of the terms required by the Truth in Lending Act and Regulation Z. The respondent is prohibited from stating a rate of finance charge without stating the rate as an APR. The order prohibits the respondent from failing to comply in any respect with the Truth in Lending Act or Regulation Z. The order requires the respondent to maintain all records that will demonstrate compliance with the order, and to distribute copies of the consent order to various principals, officers, directors, and managers, and all current and future employees, agents and representatives having responsibilities with respect to the subject matter of the order. The respondent is required to notify the Commission of any changes in its corporate structure that might affect compliance with this order and to file with the Commission one or more reports detailing compliance.