ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER TO AID PUBLIC COMMENT

In the Matter of West Penn Multi-List, Inc., File No. 0810167

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.

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

[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

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 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

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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.

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.

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 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.

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

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[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.").

[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).

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 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.