

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

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

In the Matter of
WEST PENN MULTI-LIST, INC.,
a corporation.

Docket No. C-

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:

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

PARAGRAPH 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.

PARAGRAPH 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 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.

PARAGRAPH 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.

PARAGRAPH 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.

PARAGRAPH 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

PARAGRAPH 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

- (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

PARAGRAPH 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.

PARAGRAPH 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.

PARAGRAPH 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.

PARAGRAPH 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 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.

PARAGRAPH 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.

PARAGRAPH 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.

PARAGRAPH 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.

PARAGRAPH 14. Respondent adopted a rule that precludes the acceptance of any listings into the West Penn MLS other than Exclusive Right to Sell Listings (the “Exclusion Policy”). The Exclusion Policy excludes Exclusive Agency Listings from the West Penn MLS.

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

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

PARAGRAPH 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”).

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

PARAGRAPH 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

PARAGRAPH 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.

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

PARAGRAPH 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.

PARAGRAPH 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.

PARAGRAPH 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.

PARAGRAPH 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.

THE WEST PENN POLICIES HAVE NO EFFICIENCY BENEFIT

PARAGRAPH 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

PARAGRAPH 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.

PARAGRAPH 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.

PARAGRAPH 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.

PARAGRAPH 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.

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

By the Commission.

Donald S. Clark
Secretary