

**ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDERS  
TO AID PUBLIC COMMENT**  
*In the Matter of Tops Markets LLC, File No. 101-0074, Docket No. C-4295*

**I. Introduction and Background**

The Federal Trade Commission (“Commission”) has accepted for public comment, and subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Morgan Stanley Capital Partners V U.S. Holdco LLC (“Holdco”), its subsidiary, Tops Markets LLC (“Tops”), and The Penn Traffic Company (“Penn Traffic”), (collectively “Respondents”), that is designed to remedy the anticompetitive effects that would otherwise result from Tops’ acquisition of the supermarket assets of Penn Traffic. The proposed Consent Agreement requires divestiture of seven Penn Traffic supermarkets and related assets to a Commission-approved buyer.

On November 18, 2009, Penn Traffic filed for Chapter 11 bankruptcy. Through the expedited bankruptcy proceeding, Tops sought to acquire substantially all of Penn Traffic’s assets, including its 79 supermarkets in New York, Pennsylvania, Vermont, and New Hampshire (the “Acquisition”). The purchase price for the Acquisition was \$85 million. In addition, Tops agreed to assume from Penn Traffic approximately \$70 million in liabilities and claims. Because the only remaining bidder for the supermarkets was a liquidator, the Acquisition represented the only opportunity to avoid mass closing of the Penn Traffic supermarkets.

In light of the extremely tight deadlines inherent in the bankruptcy proceeding, and in an effort to avoid mass liquidation of 79 supermarkets in more than 50 metropolitan areas, Commission staff crafted a remedy that would permit timely consummation of the Acquisition while preserving the Commission’s ability to obtain full relief to cure the anticompetitive harm that the Acquisition w

The proposed Complaint alleges that the agreement among Respondents for the sale of the Penn Traffic assets to Tops constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that the Acquisition constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by lessening competition in connection with the retail sale of food and other grocery products in supermarkets.

## **II. The Parties**

Tops is a New York limited liability company with its office and principal place of business in Williamsville, New York. Prior to the Acquisition, Tops owned and operated 71 supermarkets in New York and Pennsylvania, all under the Tops banner. In addition, five supermarkets are owned and operated by franchisees under the Tops banner. Tops is a subsidiary of Holdco, a Delaware limited liability company with its office and principal place of business in New York, New York.

Penn Traffic is a Delaware corporation headquartered in Syracuse, New York. Prior to the Acquisition, Penn Traffic operated 79 supermarkets in New York, Pennsylvania, Vermont, and New Hampshire under the following banners: Bi-Lo, P&C Foods (“P&C”), and Quality Markets.

## **III. The Proposed Complaint**

As outlined in the proposed Complaint, the relevant product market in which to analyze the Acquisition is the retail sale of food and other grocery products in supermarkets. Supermarkets are full-line grocery stores that carry a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, shelf-stable food and beverage products, staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids. The hallmark of supermarkets is that they offer consumers the convenience of one-stop shopping for food and grocery products. To achieve this, supermarkets typically carry more than 10,000 different products and have at least 10,000 square feet of selling space.

As alleged in the proposed Complaint, supermarkets compete principally with other supermarkets and base their prices primarily on the prices of food and grocery products sold in other supermarkets. Other types of retail stores, including neighborhood “mom & pop” grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores (*e.g.*, ALDI, Save-A-Lot), and mass merchants, do not, individually or collectively, effectively constrain the prices of food and grocery products in supermarkets because they do not offer a supermarket’s distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. Although stores such as limited assortment stores do sell food and certain other grocery items, they do not offer the breadth of services and products sold at supermarkets and thus do not provide an effective constraint on prices in

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supermarkets. The evidence and the Commission's conclusions on these issues are consistent with its prior supermarket investigations.

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respective locations; (2) create a viable and effective competitor that is independent of the Respondents in the operation of supermarkets in the relevant geographic markets; and (3) remedy the lessening of competition that has resulted from the Acquisition.

To achieve the above goals, the proposed Consent Agreement requires the divestiture of seven Penn Traffic supermarkets, together with their related assets, to a Commission-approved buyer at no minimum price within ninety (90) days of the Decision and Order becoming final. Tops and Holdco must secure all third-party consents and waivers necessary to facilitate the divestitures and to allow the Commission-approved buyer(s) to continue the operation of the Penn Traffic stores as supermarkets at their respective locations. As set forth in the Consent Orders, the stores to be divested are located in Bath, NY; Cortland, NY; Ithaca, NY (two stores); Lockport, NY; and Sayre, PA (two stores). In the event Respondents do not meet their obligations to divest the Penn Traffic assets, the Commission may appoint a divestiture trustee to divest the assets in a manner consistent with the Decision and Order and subject to Commission approval.

Until all of the Penn Traffic assets are divested, the Consent Orders further require Respondents to maintain the viability, competitiveness, and marketability of the seven Penn Traffic supermarkets and related assets. This includes keeping the supermarkets open for business, performing routine maintenance, providing appropriate marketing and advertising, maintaining inventory levels at the stores, and using best efforts to preserve relationships with suppliers, distributors, customers, and employees. The Consent Agreement provides that the Commission may appoint an interim monitor whose principal duties are to ensure that Tops complies with its obligations under the Consent Orders. The Commission has appointed John J. MacIntyre, a former Penn Traffic employee with more than thirty years of experience in the supermarket industry, as interim monitor.

## **V. Opportunity for P**