

The Commission having thereafter considered the matter and having determined that it had reason to believe that the Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent 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 prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Tops is a limited liability company 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 6363 Main Street, Williamsville, New York 14221.
2. Respondent Penn Traffic is a corporation organized, existing and doing business under and by virtue of the laws of state of Delaware, with its office and principal place of business located at 1200 State Fair Boulevard, Syracuse, New York 13221.
3. Respondent Holdco is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1585 Broadway, Floor 29, New York, New York 10036.
4. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.
ork 10036.

- O. “Interim Monitor” means any monitor appointed pursuant to Paragraph V of this Order or Paragraph III of the related Order to Maintain Assets.
- P. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- Q. “Order Date” means the date that this Decision and Order becomes final.
- R. “Penn Traffic Supermarket Business Assets” means all Respondents’ rights, title and interest in and to all assets used in, and or reserved for use in, the Penn Traffic Supermarket Businesses to the extent legally transferable, including, without limitation:
1. all real property;
 2. all leasehold interests;
 3. all equipment and fixtures;
 4. all Governmental Approvals;
 5. at the relevant Acquirer’s option, all Trademarks for transitional purposes of up to one (1) year from the Closing Date;
 6. at the relevant Acquirer’s option, all Trade Dress for transitional purposes of up to one (1) year from the Closing Date;
 7. at the relevant Acquirer’

Respondents completely to divest themselves of information that, in content, also relates to businesses that Respondent Tops is not required to divest pursuant to this Order.

- S. “Penn Traffic Supermarket Business(es)” means the business of operating a Supermarket at the locations identified in Schedule A to this Order, including, without limitation, the distribution, marketing, promotion and sale of all products and services offered at such locations.
- T. “Relevant Geographic Market(s)” means each of the geographic markets identified in the Complaint as Relevant Geographic Markets.
- U. “Remedial Agreement(s)” means the following:
 - 1. any agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer) that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Penn Traffic Supermarket Business Assets and that has been approved by the Commission to accomplish the requirements ~~of the~~

- X. "Trade Dress" means the current trade dress of products marketed or sold at the Penn Traffic Supermarket Businesses including, without limitation, product packaging, and the lettering of the product trade name or brand name that are or were owned by Respondent Penn Traffic and that were used in or are used in the Penn Traffic Supermarket Businesses.
- Y. "Trademark(s)" means all proprietary names or designations, trademarks (whether registered or unregistered), service marks (whether registered or unregistered), trade names, product names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Penn Traffic Supermarket Businesses that are or were owned by Respondent Penn Traffic and that were used in, or are used in, the Penn Traffic Supermarket Businesses.
- Z. "Third Party(ies)" means any Entity other than the following: Respondents or the Acquirer for the particular Penn Traffic Supermarket Business Assets.

II.

IT IS FURTHER ORDERED that:

- A. Not later than ninety (90) days after the Order Date, Respondent Tops shall divest the Penn Traffic Supermarket Business Assets, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers in a manner that receives the prior approval of the Commission.
- B. Respondents shall secure all consents and waivers from all Third Parties (including, without limitation, all landlords) that are necessary to permit Respondent Tops to divest the Penn Traffic Supermarket Business Assets to the relevant Acquirer(s), and/or to permit such Acquirer(s) to continue the operations of the Penn Traffic Supermarket Businesses at the respective locations;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.
- C. For a period of one (1) year from the Closing Date, Respondents shall, not interfere with the hiring or employing by the Acquirer of the particular Penn Traffic Supermarket Business of the related Supermarket Employees, and shall remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Supermarket Employee who receives a written offer of employment from such Acquirer;

provided, however, that this Paragraph shall not prohibit Respondents from continuing to employ any Supermarket Employee under the ter

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket, within six (6) months prior to the date of such proposed acquisition, in the Relevant Geographic Markets; or
- B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in the Relevant Geographic Markets;

provided, howev

Monitor within ten (10) days after notice by the staff of the Commission to Respondent Tops of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent Tops shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monit

- G. Respondent Tops shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

- H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by each Respondent, and any reports submitted by the Acquirer with respect to the performance of each Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders.

- I. Respondents may require the Interim Monitor and eaD(I)Tj6nde141800 0.0000 TD(deTj6.7200 0.0000 TD

VI.

IT IS FURTHER ORDERED that:

- A. If Respondent Tops has not fully complied with the obligations to divest, assign, grant, license, transfer, deliver or otherwise convey the Penn Traffic Supermarket Business Assets as required by this Order, the Commission may appoint a trustee

subject to the prior approval of the Commission. If, however, at the end of the one (1) year period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times;

3. subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the Penn Traffic Supermarket Business Assets and to any other relevant information, as the Divestiture Trustee may request. Respondent Tops shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;
4. the Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Top's absolute and unconditional obligation to divest expeditiously and at no minimum price. The divestiture shall be made in the manner and to an Acquirer(s) as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Entity, and if the Commission determines to approve more than one such acquiring Entity, the Divestiture Trustee shall divest to the acquiring Entity selected by Respondent Tops from among those approved by the Commission; and, *provided further, however*, that Respondent Tops shall select such Entity within five (5) days after receiving notification of the Commission's approval;
5. the Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Tops, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Tops, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees, the Commission shall pay to the Divestiture Trustee, within 30 days of the date of approval, the amount of the account, less any amounts previously paid to the Divestiture Trustee, in full. The Commission shall not be liable for any interest on the amount of the account, less any amounts previously paid to the Divestiture Trustee, if the Commission does not pay the amount of the account, less any amounts previously paid to the Divestiture Trustee, within 30 days of the date of approval. The Commission shall not be liable for any interest on the amount of the account, less any amounts previously paid to the Divestiture Trustee, if the Commission does not pay the amount of the account, less any amounts previously paid to the Divestiture Trustee, within 30 days of the date of approval.

of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee;

7. the Divestiture Trustee shall have no obligation or authority to operate or maintain the Penn Traffic Supermarket Business Assets; *provided, however*, that the Divestiture Trustee appointed pursuant to this Paragraph may be the same Entity appointed as Interim Monitor pursuant to the relevant provisions of the Order to Maintain Assets in this matter;
 8. the Divestiture Trustee shall report in writing to Respondent Tops and to the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture; and
 9. Respondent Tops may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- E. If the Commission determines that a Divestiture Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Divestiture Trustee in the same manner as provided in this Paragraph.
- F. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

VII.

IT IS FURTHER ORDERED that:

- A. Not later than thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II.A. and III of this Order, Respondents shall submit to the Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II.A. and III of this Order. Respondents sha

copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

- B. One (1) year from the Order Date, annually for the next nine (9) years on the anniversary of the Order Date, and at othe

X.

IT IS FURTHER ORDERED that:

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C.

XI.

IT IS FURTHER ORDERED that this Order shall terminate ten (10) years from the Order Date.

By the Commission.

Donald S. Clark
Secretary

SEAL:

ISSUED:

