

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: Jon Leibowitz, Chairman
William E. Kovacic
J. Thomas Rosb
Edith Ramirez
Julie Brill

In the Matter of)	
)	
Tops Markets LLC,)	
a limited liability company,)	
)	
Morgan Stanley Capital Partners V U.S. Holdco LLC,)	Docket No. C-4295
a limited liability company,)	
)	
and)	
)	
The Penn Traffic Company,)	
a corporation.)	

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that Respondent Tops Markets LC ("Tops"), a subsidiary of Respondent Morgan Stanley Capital Partners V U.S. Holdco LLC ("Holdco"), and Respondent The Penn Traffic Company ("Penn Traffic"), a corporation, all subject to the jurisdiction of the Commission, entered into an agreement, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, pursuant to which Tops purchased certain assets of Penn Traffic, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. Respondent Tops

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. Tops is, and at all times relevant herein has been, engaged in the operation of supermarkets in the State of New York and the Commonwealth of Pennsylvania. Tops operates supermarkets under the Tops banner

3. Prior to its acquisition of substantially all Penn Traffic assets, Tops owned and operated 71 supermarkets in the United States. In addition, five supermarkets with the Tops banner are owned and operated by franchisees in the United States.

4. Tops is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce within the meaning of Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. Respondent Holdco

5. 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 39, New York, New York 10036.

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was approximately \$85 million. In addition, Tops agreed to the assumption of liabilities and the reduction of approximately \$70 million in claims.

12. On or about January 29, 2010, Respondents Tops, Holdco and Penn Traffic closed on the acquisition. The acquisition was conducted pursuant to a fast-track bankruptcy proceeding.

V. Nature of Trade and Commerce

13. For purposes of this complaint, the term "supermarket" means a full-line grocery store that carries 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, including fresh fruits and vegetables, shelf-stable food and beverage products, including canned and other types of packaged products, staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids.

14. Supermarkets provide a distinct set of products and services and offer consumers convenient one-stop shopping for food and grocery products. Supermarkets typically carry more than 10,000 different stock-keeping units, as well as a deep inventory of those items. In order to accommodate the large number of food and non-food products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

15. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at other supermarkets. Supermarkets do not regularly conduct price checks on food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores.

16. Retail stores other than supermarkets that sell food and grocery products, including neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores, and mass merchants, do not, individually or collectively, effectively constrain prices at supermarkets. Those retail stores 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. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to start shopping elsewhere, or significantly increase grocery purchases elsewhere in response to a small price increase by supermarkets.

VI. Relevant Product Market

17. The relevant line of commerce in which to analyze the acquisition is the retail sale of food and other grocery products in supermarkets.

VII. Relevant Geographic Markets

18. The relevant geographic markets in which to analyze the likely competitive effects

(c) by increasing the likelihood of successful coordinated interaction among the remaining firms.

22. The ultimate effect of the acquisition would be to increase the likelihood that prices of food and other grocery products would rise above competitive levels, or that there would be a decrease in the quality or selection of food, other grocery products, or services.

XI. Violations Charged

23. The agreement described in Paragraph 11 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the acquisition described in Paragraph 12 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.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this fourth day of August, 2010, issues its complaint against said Respondents

By the Commission.

Donald S. Clark
Secretary

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