

Complaint

IN THE MATTER OF

WAL-MART STORES, INC., ET AL.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT*Docket C-4066; File No. 0210090**Complaint, November 20, 2002--Decision, February 27, 2003*

This consent order addresses the acquisition by Respondent Wal-Mart Stores, Inc. – a global food and general merchandise retailer headquartered in Arkansas – of Respondent Supermercados Amigo Inc., headquartered in San Juan, Puerto Rico, and the largest supermarket chain in Puerto Rico in terms of dollar sales. The order, among other things, requires the respondents to divest four Supermercados Amigo supermarkets – in Cidra, Ponce, Manati, and Vega Baja, Puerto Rico – to Supermercados Maximo, Inc. (headquartered in Hato Rey, Puerto Rico) or to another acquirer approved by the Commission. The order also requires the respondents to maintain the viability of the four supermarkets pending their divestiture. In addition, the order prohibits the respondents for ten years from acquiring – without providing the Commission with prior notice – any supermarket, supercenter, or club store, or any interest in any supermarket, supercenter, or club store located in the municipalities that include Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, and Vega Baja, Puerto Rico.

Participants

For the Commission: *Michael J. Bloom, Susan E. Raitt, Barbara Anthony, D. Bruce Hoffman, Joseph Eckhaus, Roberta S. Baruch, Alan A. Fisher, Charrisa P. Wellford and Mary T. Coleman.*

For the Respondents: *Peter Standish, Theodore Bolema, and Fiona Schaeffer, Weil Gotshal & Manges, Anthony George, Wal-Mart Stores, Inc., and William Berkowitz and Stephen Brook, Bingham McCutchen LLP.*

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Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by

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said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondent Wal-Mart Stores, Inc. ("Wal-Mart") has entered into an agreement to acquire 100% of the outstanding voting securities of respondent Supermercados Amigo, Inc. ("Amigo"), all subject to the jurisdiction of the Commission, in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, that such acquisition, if consummated, would violate 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, and that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

Wal-Mart Stores, Inc.

PARAGRAPH ONE: Respondent Wal-Mart is a corporation 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 702 Southwest 8th Street, Bentonville, Arkansas 72716.

PARAGRAPH TWO: Respondent Wal-Mart, through Wal-Mart Puerto Rico, Inc., its wholly-owned subsidiary, is, and at all times relevant hereto has been, engaged in the sale of general merchandise and food and grocery items in Puerto Rico. Wal-Mart and its wholly-owned subsidiary operate eighteen stores in Puerto Rico under the Wal-Mart and SAM's Clubs trade names, including nine traditional Wal-Mart discount stores, eight Club Stores, and one Supercenter. Wal-Mart had substantial sales in Puerto Rico in the fiscal year ending January 31, 2001.

PARAGRAPH THREE: Respondent Wal-Mart is, and at all times relevant hereto has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

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Supermercados Amigo, Inc.

PARAGRAPH FOUR: Respondent Amigo is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its office and principal place of business located at Mercado Central Zona Portuaria, Edificio A-1, Puerto Nuevo, San Juan, Puerto Rico 00920.

PARAGRAPH FIVE: Respondent Amigo is, and at all times relevant hereto has been, engaged in the operation of supermarkets in Puerto Rico. Amigo operates thirty-six supermarkets under the Amigo trade name. Amigo had substantial sales in Puerto Rico in the fiscal year ending September 30, 2001.

PARAGRAPH SIX: Respondent Amigo is, and at all times relevant hereto has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

The Acquisition

PARAGRAPH SEVEN: On or about February 5, 2002, Wal-Mart Puerto Rico, Inc., W-M Puerto Rico Acquisition Corp., a Delaware corporation and a wholly-owned subsidiary of Wal-Mart, Amigo, and Steven C. Lausell, as stockholders' representative, entered into a Merger Agreement. Pursuant to this Merger Agreement, Wal-Mart will acquire all of the outstanding voting securities of Amigo by merger of W-M Puerto Rico Acquisition with and into Amigo, with Amigo continuing as the surviving corporation. As a result of the merger, Wal-Mart will hold 100% of the voting securities of Amigo.

Trade and Commerce

PARAGRAPH EIGHT: The relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition described herein is the retail sale of food and grocery products in stores that carry a

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wide selection and deep inventory of food and grocery products in a variety of brands and sizes, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit. Thus, stores in the relevant line of commerce have substantial offerings in each of the following product categories: 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, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

PARAGRAPH NINE: In Puerto Rico, full-service supermarkets, “supercenters” (which are co-located full-service supermarkets and mass merchandise outlets), and “club stores” (which are stores that offer a wide selection and deep inventory of food and grocery products and general merchandise—often in large-sized packages or in packages of two or more conventional-sized items—to businesses and individuals that have purchased club memberships) offer a distinctive set of products and services that enables them to compete in the relevant line of commerce described in Paragraph Eight above.

PARAGRAPH TEN: In Puerto Rico, a substantial portion of retail purchasers regard full-service supermarkets, supercenters, and club stores as reasonably interchangeable for the purpose of purchasing substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

PARAGRAPH ELEVEN: In Puerto Rico, full-service supermarkets, supercenters, and club stores compete primarily with each other. Operators of full-service supermarkets, supercenters, and club stores in Puerto Rico often price-check and modify the prices of their food and grocery products based on the prices of food and grocery products at nearby full-service supermarkets, supercenters, and club stores. They do not often price-check and modify the prices of food and grocery products based on the prices at other types of stores. In

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Puerto Rico, most consumers shopping for food and grocery products at full-service supermarkets, supercenters, and club stores are not likely to shop at other types of stores in response to a small price increase by full-service supermarkets, supercenters, and club stores.

PARAGRAPH TWELVE: In Puerto Rico, retail stores other than full-service supermarkets, supercenters, and club stores, such as limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), military commissaries, and mass merchandise outlets (including those with pantries not offering a wide selection and deep inventory of food and grocery products), do not effectively constrain prices in the relevant line of commerce described in Paragraph Eight above. In Puerto Rico, none of these stores offers a full-service supermarket's, supercenter's, or club store's distinct set of products and services that enables a retail customer to engage in one-stop shopping for food and grocery products.

PARAGRAPH THIRTEEN: The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition described herein are the areas of Puerto Rico in and near Cayey and Cidra (the "Cayey" market), Ponce and Juana Diaz (the "Ponce" market), and Barceloneta, Manati, and Vega Baja (the "Manati" market).

Market Structure

PARAGRAPH FOURTEEN: The Cayey, Ponce, and Manati markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as the "HHI") or by two-firm and four-firm concentration ratios. The acquisition would substantially increase concentration in each such market. The post-acquisition HHI in the Cayey market would increase 1,056 points, from 2,500 to 3,556; in the Ponce market it would increase 603 points, from 1,912 to 2,515; and in the Manati market it would increase 1,782 points, from 2,173 to 3,955. In the Cayey market, Wal-Mart and Amigo would have a combined market share greater

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than 47%; in the Ponce market, the parties' combined market share would exceed 38%; and in the Manati market, the combined market share would be greater than 59%.

Entry Conditions

PARAGRAPH FIFTEEN: Entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant markets.

Actual Competition

PARAGRAPH SIXTEEN: Wal-Mart Supercenters and/or SAM's Clubs are, or are about to become, actual and direct competitors of Amigo Supermarkets in the Cayey, Ponce, and Manati markets.

Effects

PARAGRAPH SEVENTEEN: The effect of the acquisition, if consummated, may be substantially to lessen competition in the relevant line of commerce in the relevant sections of the United States in 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, in the following ways, among others:

- a. by eliminating direct competition between the Wal-Mart Supercenters and SAM's Clubs owned or controlled by Wal-Mart and supermarkets owned or controlled by Amigo;
- b. by increasing the likelihood that the combined Wal-Mart/Amigo will unilaterally exercise market power; and
- c. by increasing the likelihood of, or facilitating, collusion or coordinated interaction,

each of which increases the likelihood that the prices of food, groceries, or services will increase, and the quality and selection of food, groceries or services will decrease, in the relevant sections of the United States.

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Violations Charged

PARAGRAPH EIGHTEEN: The Merger Agreement dated as of February 5, 2002 among Wal-Mart Puerto Rico, Inc., W-M Puerto Rico Acquisition Corp., Supermercados Amigo, Inc., and Steven C. Lausell, violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the proposed acquisition, if consummated, would violate 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 twentieth day of November, 2002, issues its complaint against said respondents.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition of 100% of the outstanding voting securities of Respondent Supermercados Amigo, Inc. by Respondent Wal-Mart Stores, Inc., hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations 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; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that 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, and having duly considered the comments received pursuant to Commission Rule 2.34, 16 C.F.R. § 2.34 (2003), now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

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1. Respondent Wal-Mart Stores, Inc. is a corporation 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 702 Southwest 8th Street, Bentonville, Arkansas 72716.
2. Respondent Supermercados Amigo, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its office and principal place of business located at Mercado Central Zona Portuaria, Edificio A-1, Puerto Nuevo, San Juan, Puerto Rico 00920.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “Wal-Mart” means Wal-Mart Stores, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Wal-Mart Stores, Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Amigo” means Supermercados Amigo, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Supermercados Amigo, Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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C. “Respondents” means Wal-Mart and Amigo, individually and collectively.

D. “Acquisition” means Wal-Mart’s proposed acquisition of the outstanding voting securities of Amigo pursuant to the “Merger Agreement Dated as of February 5, 2002 among Wal-Mart Puerto Rico, Inc., W-M Puerto Rico Acquisition Corp., Supermercados Amigo, Inc. and Steven C. Lausell, as the Stockholder Representative.”

E. “Assets To Be Divested” means the Cidra Assets, the Ponce Assets and the Manati-Vega Baja Assets.

F. “Business Day” means any day excluding Saturday, Sunday and any United States federal holiday.

G. “Commission-approved Acquirer” means any entity approved by the Commission to acquire any or all of the Assets To Be Divested pursuant to this Order.

H. “Divestiture Agreement” means any agreement between the Respondents and a Commission-approved Acquirer (or a trustee appointed pursuant to Paragraph III. of this Order and a Commission-approved Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order. The term “Divestiture Agreement” includes, as appropriate, the Purchaser Agreement.

I. “Divestiture Trustee(s)” means any person or entity appointed by the Commission pursuant to Paragraph III. of the Decision and Order to act as a trustee in this matter.

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J. “Purchaser” means Supermercados Maximo, Inc., a corporation organized, existing and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its offices and principal place of business located at Popular Center, Suite 1822, Hato Rey, Puerto Rico 00918.

K. “Purchaser Agreement” means the “Asset Purchase Agreement Dated as of November 12, 2002 among Supermercados Amigo, Inc., Supermercados Maximo, Inc. and Wal-Mart Puerto Rico, Inc.,” and all amendments, exhibits, attachments, related agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.

L. “Cidra Assets” means the Supermarket currently operated by Respondent Amigo under the Amigo trade name located at the intersection of State Road 787 and State Road 172, Barrio Bayamon, Cidra, Puerto Rico 00739, and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at that location, but shall not include those assets consisting of or pertaining to any of the Respondents’ trademarks, trade dress, service marks, or trade names. Provided, however, the inventory of consumer goods and merchandise owned by the Respondents for sale in the ordinary course of the Supermarket business may be excluded from the divestiture at the option of the Commission-approved Acquirer.

M. “Ponce Assets” means the Supermarket currently operated by Respondent Amigo under the Amigo trade name located at Carretera #2 Kilometer 257.04, Barrio Canas, Ponce, Puerto Rico 00731, and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at that location, but shall not include those assets consisting of or pertaining to any of the Respondents’ trademarks, trade dress, service marks, or trade names. Provided,

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however, the inventory of consumer goods and merchandise owned by the Respondents for sale in the ordinary course of the Supermarket business may be excluded from the divestiture at the option of the Commission-approved Acquirer.

N. “Manati-Vega Baja Assets” mean the Supermarkets currently operated by Respondent Amigo under the Amigo trade name located at Carretera 149 and Carretera 668, Hacia Morovis, Centro Comercial Plaza Monaco, Urbanación Jardines de Monaco, Manati, Puerto Rico 00674, and Carretera Estatal 2 Kilometer 39.5, Centro Comercial Las Vegas, Vega Baja, Puerto Rico 00693, and all assets, leases, properties, government permits (to the extent transferable), customer lists, businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at those locations, but shall not include those assets consisting of or pertaining to any of the Respondents’ trademarks, trade dress, service marks, or trade names. Provided, however, the inventory of consumer goods and merchandise owned by the Respondents for sale in the ordinary course of the Supermarket business may be excluded from the divestiture at the option of the Commission-approved Acquirer.

O. “Supermarket” means any store that offers a Wide Selection and Deep Inventory of Food and Grocery Products, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

P. “Supercenter” means any Supermarket that is co-located with a mass merchandise outlet.

Q. “Club Store” means any store that offers a Wide Selection and Deep Inventory of Food and Grocery Products and general merchandise—in large-sized packages or in packages of two or more conventional-sized items—to businesses and individuals that have purchased club memberships, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

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R. “Wide Selection and Deep Inventory of Food and Grocery Products” means substantial offerings in each of the following product categories: 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, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

S. “Third Party Consents” means all consents from any person other than the Respondents, including all landlords, that are necessary to effect the complete transfer to the Commission-approved Acquirer(s) of the Assets To Be Divested.

II.**IT IS FURTHER ORDERED** that:

A. Not later than ten (10) Business Days after the date on which the Acquisition is consummated, Respondents shall divest, absolutely and in good faith, the Cidra Assets, Ponce Assets, and Manati-Vega Baja Assets, as ongoing businesses to Purchaser pursuant to and in accordance with the Purchaser Agreement (which agreement shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), and such agreement, if approved by the Commission, is incorporated by reference into this Order and made part hereof as non-public Appendix I. Any failure by Respondents to comply with all terms of any Divestiture Agreement related to the Cidra Assets, Ponce Assets, or Manati-Vega Baja Assets shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Cidra Assets, Ponce Assets, or Manati-Vega Baja Assets to Purchaser pursuant to the Purchaser Agreement prior to the date this Order becomes final, and if, at the time the

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Commission determines to make this Order final, the Commission notifies Respondents that Purchaser is not an acceptable purchaser of the Cidra Assets, Ponce Assets, or Manati-Vega Baja Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Purchaser and shall divest the Cidra Assets, Ponce Assets, and Manati-Vega Baja Assets within three (3) months of the date the Order becomes final, absolutely and in good faith, at no minimum price, to a Commission-approved Acquirer and only in a manner that receives the prior approval of the Commission.

B. Respondents shall obtain all required Third Party Consents prior to the closing of the Divestiture Agreement pursuant to which the Assets To Be Divested are divested to a Commission-approved Acquirer.

C. Any Divestiture Agreement between Respondents (or a trustee appointed pursuant to Paragraph III. of this Order) and a Commission-approved Acquirer of the Assets To Be Divested that has been approved by the Commission shall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of such Divestiture Agreement shall constitute a failure to comply with this Order.

D. The purpose of the divestitures is to ensure the continuation of the Cidra Assets, the Ponce Assets and the Manati-Vega Baja Assets as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition alleged in the Commission's Complaint.

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III.**IT IS FURTHER ORDERED** that:

A. If Respondents have not fully complied with the obligations specified in Paragraph II. of this Order, the Commission may appoint a trustee or trustees to divest the relevant Assets To Be Divested pursuant to Paragraph II. in a manner that satisfies the requirements of Paragraph II. The Commission may appoint a different Divestiture Trustee to accomplish each of the divestitures required in Paragraph II. In the event that the Commission or the Attorney General brings an action pursuant to § 5(*I*) of the Federal Trade Commission Act, 15 U.S.C. § 45(*I*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(*I*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

B. If a Divestiture Trustee is appointed by the Commission or a court pursuant to Paragraph III.A. of this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:

1. The Commission shall select the Divestiture Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. The Divestiture Trustee shall be a person with experience and expertise in acquisitions and divestitures. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Divestiture

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

2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to divest the relevant assets that are required by this Order to be divested.
3. Within ten (10) days after appointment of the Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed Divestiture Trustee, of the court, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture(s) required by the Order.
4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph III.B.3. to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission, or, in the case of a court-appointed Divestiture Trustee, by the court; provided, however, the Commission may extend the divestiture period only two (2) times.
5. The Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities relating to the relevant assets that are required to be divested by this Order or to any other relevant

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information, as the Divestiture Trustee may request. Respondents 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(s). 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.

6. The Divestiture Trustee shall use his or her best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents' absolute and unconditional obligation to divest at no minimum price. The divestiture(s) shall be made in the manner and to a Commission-approved Acquirer 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 Respondents from among those approved by the Commission; provided further, however, that Respondents shall select such entity within five (5) Business Days of receiving notification of the Commission's approval.
7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, 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 Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and

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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(s) and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of the Respondents, and the Divestiture Trustee's power shall be terminated. The compensation of the Divestiture Trustee shall be based at least in significant part on a commission arrangement contingent on the divestiture of all of the Assets To Be Divested.

8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out 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 misfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.
9. If the Divestiture Trustee ceases to act or fails to act diligently, a substitute Divestiture Trustee shall be appointed in the same manner as provided in Paragraph III.A. of this Order.
10. The Commission or, in the case of a court-appointed 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(s) required by this Order.

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11. In the event that the Divestiture Trustee determines that he or she is unable to divest the relevant Assets To Be Divested pursuant to the relevant Paragraph(s) in a manner that preserves their marketability, viability and competitiveness and ensures their continued use as Supermarket businesses, the Divestiture Trustee may divest such additional assets related to the relevant Supermarket businesses of the Respondents and effect such arrangements as are necessary to satisfy the requirements of this Order.
12. The Divestiture Trustee shall have no obligation or authority to operate or maintain the Assets To Be Divested.
13. The Divestiture Trustee shall report in writing to Respondents and the Commission every sixty (60) days concerning the Divestiture Trustee's efforts to accomplish the divestiture(s).
14. Respondents may require the Divestiture Trustee to sign a customary confidentiality agreement; provided, however, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final, Respondents shall not, directly or indirectly, through subsidiaries, partnerships or otherwise, without providing advance written notification to the Commission:

- A. Acquire any ownership or leasehold interest in any facility that has operated as a Supermarket, Supercenter, or Club Store within six (6) months prior to the date of such

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proposed acquisition in the municipalities of Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, or Vega Baja in Puerto Rico.

B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, Supercenter, or Club Store or owned any interest in or operated any Supermarket, Supercenter, or Club Store within six (6) months prior to such proposed acquisition in the municipalities of Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, or Vega Baja in Puerto Rico.

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondents or the acquisition or leasing of a facility that has not operated as a Supermarket, Supercenter, or Club Store within six (6) months prior to Respondents' offer to purchase or lease such facility.

Said notification shall be given on the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, and shall be prepared and transmitted in accordance with the requirements of that part, except that no filing fee will be required for any such notification, notification shall be filed with the Secretary of the Commission, notification need not be made to the United States Department of Justice, and notification is required only of Respondents and not of any other party to the transaction. Respondents shall provide the notification to the Commission at least thirty (30) days prior to consummating any such transaction (hereinafter referred to as the "first waiting period"). If, within the first waiting period, representatives of the Commission make a written request for additional information or documentary material (within the meaning of 16 C.F.R. § 803.20), Respondents shall not consummate the transaction until

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thirty (30) days after substantially complying with such request. Early termination of the waiting periods in this Paragraph may be requested and, where appropriate, granted by letter from the Bureau of Competition. Provided, however, that prior notification shall not be required by this Paragraph for a transaction for which notification is required to be made, and has been made, pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a.

V.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final, Respondents shall neither enter into nor enforce any agreement that restricts the ability of any person (as defined in Section 1(a) of the Clayton Act, 15 U.S.C. § 12(a)) that acquires any Supermarket, Supercenter, or Club Store, any leasehold interest in any Supermarket, Supercenter, or Club Store, or any interest in any retail location used as a Supermarket, Supercenter, or Club Store on or after January 1, 2002, in the municipalities of Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, or Vega Baja in Puerto Rico, to operate a Supermarket, Supercenter, or Club Store at that site if such Supermarket, Supercenter, or Club Store was formerly owned or operated by Respondents.

VI.

IT IS FURTHER ORDERED that:

A. Within thirty (30) days after the date this Order becomes final and every thirty (30) days thereafter until the Respondents have fully complied with the provisions of Paragraphs II. 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. and III. of this Order. Respondents shall include in their reports, among other things

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that are required from time to time, a full description of the efforts being made to comply with Paragraphs II. and III. of this Order, including a description of all substantive contacts or negotiations for the divestitures and the identity of all parties contacted. Respondents shall include in their reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning completing the obligations; and

B. One (1) year from the date this Order becomes final, annually for the next nine (9) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

VII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents, such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order.

VIII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representative of the Commission:

A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and

Decision and Order

copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order; and

B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

CONFIDENTIAL APPENDIX I

[Redacted from Public Record Version]

Order

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition of 100% of the outstanding voting securities of Respondent Supermercados Amigo, Inc. (“Amigo”) by Respondent Wal-Mart Stores, Inc. (“Wal-Mart”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft Complaint that the Bureau of Competition presented to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations 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; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing the proposed Decision and Order, an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place the Consent Agreement on the public record for a period of thirty (30) days, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

1. Respondent Wal-Mart is a corporation organized, existing and doing business under and by virtue of the laws of the State of

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Delaware, with its office and principal place of business located at 702 Southwest 8th Street, Bentonville, Arkansas 72716.

2. Respondent Amigo is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Puerto Rico, with its office and principal place of business located at Mercado Central Zona Portuaria, Edificio A-1, Puerto Nuevo, San Juan, Puerto Rico 00920.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the definitions used in the Consent Agreement and the attached Decision and Order shall apply. In addition, “Supermarket To Be Maintained” means any Supermarket business identified as a part of the Assets To Be Divested.

II.

IT IS FURTHER ORDERED that:

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or deterioration of the Assets To Be Divested, nor shall they cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber or otherwise impair the viability, marketability or competitiveness of the Assets To Be Divested. Respondents shall comply with the terms of this Paragraph until such time as Respondents have divested the Assets To Be Divested pursuant to the terms of

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the attached Decision and Order. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course and in accordance with past practice (including regular repair and maintenance efforts) and shall use reasonable best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the ordinary course of business and in accordance with past practice.

- B. Respondents shall not terminate the operation of any Supermarket To Be Maintained. Respondents shall continue to maintain the inventory of each Supermarket To Be Maintained at levels and selections (e.g., stock-keeping units) consistent with those maintained by such Respondent(s) at such Supermarket in the ordinary course of business consistent with past practice. Respondents shall use best efforts to keep the organization and properties of each Supermarket To Be Maintained intact, including current business operations, physical facilities, working conditions, and a work force of equivalent size, training, and expertise associated with the Supermarket. Included in the above obligations, Respondents shall, without limitation:
1. maintain operations and departments, and not reduce hours, at each Supermarket To Be Maintained;
 2. not transfer inventory from any Supermarket To Be Maintained, other than in the ordinary course of business consistent with past practice;
 3. make any payment required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with any Supermarket To Be Maintained, in each case in a manner consistent with past practice;

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4. maintain the books and records of each Supermarket To Be Maintained;
5. not display any signs or conduct any advertising (e.g., direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations at a Supermarket To Be Maintained to another location, or that indicates a Supermarket To Be Maintained will close;
6. not conduct any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any Supermarket To Be Maintained; and
7. not change or modify in any material respect the existing advertising practices, programs and policies for any Supermarket To Be Maintained, other than changes in the ordinary course of business consistent with past practice for Supermarkets of the Respondents not being closed or relocated.

III.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Maintain Assets.

IV.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representatives of the Commission:

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- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities, and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order to Maintain Assets; and
- B. Upon five (5) days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

V.

IT IS FURTHER ORDERED that this Order to Maintain Assets shall terminate on the earlier of:

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. With respect to each Supermarket To Be Maintained, the day after Respondents' completion of the divestiture of Assets to Be Divested related to such Supermarket, as described in and required by the attached Decision and Order.

Provided, however, that if the Commission, pursuant to Paragraph II.A. or II.B. of the Decision and Order, requires the Respondents to rescind any or all of the divestitures contemplated by the Purchaser Agreement, then, upon rescission, the requirements of this Order shall again be in effect with respect to the relevant Assets To Be Divested until the day after Respondents' completion of the divestiture(s) of the relevant Assets To Be Divested, as described in and required by the attached Decision and Order.

Analysis

**Analysis of the Complaint and Proposed Decision and Order
to Aid Public Comment****I. Introduction**

The Federal Trade Commission (“Commission”) has accepted for public comment from Wal-Mart Stores, Inc. (“Wal-Mart”) and Supermercados Amigo, Inc. (“Amigo”) (collectively, “the Proposed Respondents”) an Agreement Containing Consent Orders (“the proposed consent order”). The Proposed Respondents have also reviewed the complaint issued by the Commission. The proposed consent order is designed to remedy likely anticompetitive effects arising from Wal-Mart’s proposed acquisition of all of the outstanding voting stock of Amigo.

II. Description of the Parties and the Proposed Acquisition

Wal-Mart is a global food and general merchandise retailer headquartered in Arkansas. The company operates or services approximately 4,200 stores in the United States, Europe, Latin America, and Asia and had sales of over \$191 billion in 2001. In the Commonwealth of Puerto Rico, Wal-Mart, through its subsidiary Wal-Mart Puerto Rico, Inc., operates nine traditional Wal-Mart Stores, one Wal-Mart Supercenter, and eight SAM’s Clubs.

Amigo, headquartered in San Juan, Puerto Rico, is the largest supermarket chain in Puerto Rico in terms of dollar sales. With annual sales in 2001 of approximately \$542 million, Amigo operates 36 supermarkets under the Amigo trade name in Puerto Rico.

On February 5, 2002, Wal-Mart and Amigo signed an agreement whereby Wal-Mart will purchase all of the outstanding voting securities of Amigo through the merger of W-M Puerto Rico Acquisition Corp., an indirect wholly owned subsidiary of Wal-Mart, with and into Amigo. Amigo will continue as the surviving

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corporation. As a result of the merger, Wal-Mart will hold 100% of the voting securities of Amigo.

III. The Complaint

The complaint alleges that the relevant line of commerce (*i.e.*, the product market) in which to analyze the acquisition is the retail sale of food and grocery products in stores that carry a wide selection and deep inventory of food and grocery products in a variety of brands and sizes, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit. Thus, stores in the relevant line of commerce have substantial offerings in each of the following product categories: 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, which may include salt, sugar, flour, sauces, spices, coffee, and tea; and other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, and health and beauty aids.

Unlike prior supermarket investigations by the Commission, this investigation involves geographic markets in Puerto Rico. The evidence obtained in our investigation indicated that the markets at issue here have characteristics that support a broader relevant product market than those identified in past supermarket investigations by the Commission. There are approximately 250 supermarkets across Puerto Rico, with the majority located in the San Juan metropolitan area. There are numerous small and mid-sized supermarket chains throughout the island, and in general, competition appears robust. In Puerto Rico, full-service supermarkets, “supercenters” (which are co-located full-service supermarkets and mass merchandise outlets), and “club stores” (which are stores that offer a wide selection and deep inventory of food and grocery products and general merchandise—often in large-sized packages or in packages of two or more conventional-

Analysis

sized items—to businesses and individuals that have purchased club memberships) offer a distinct set of products and services that enables them to compete in the relevant line of commerce described above. Information provided by several club store and supermarket operators in Puerto Rico indicates that many Puerto Rico consumers regard club stores as apt substitutes for supermarkets. A substantial portion of retail purchasers in Puerto Rico regard full-service supermarkets, supercenters, and club stores as reasonably interchangeable for the purpose of purchasing substantially all of their weekly food and grocery shopping requirements in a single shopping visit.

In Puerto Rico, full-service supermarkets, supercenters, and club stores compete primarily with each other. Supermarkets in Puerto Rico compete with club stores in a variety of ways. Operators of Puerto Rico full-service supermarkets, supercenters, and club stores often price-check and modify the prices of their food and grocery products based on the prices of food and grocery products at nearby full-service supermarkets, supercenters, and club stores. They do not often price-check and modify the prices of food and grocery products based on the prices at other types of stores, such as limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), military commissaries, and mass merchandise outlets (including those with pantries not offering a wide selection and deep inventory of food and grocery products). In Puerto Rico, most consumers shopping for food and grocery products at full-service supermarkets, supercenters, and club stores are not likely to shop at other types of stores in response to a small price increase by full-service supermarkets, supercenters, and club stores.

Many supermarket operators lose substantial sales when club stores open near to their own stores, and some engage in aggressive promotions in the weeks before and following the opening of a club store to blunt that sales loss. Some have remodeled stores in advance of their plans so as to ward off defections to club stores. Some have reacted to competition from club stores by adding additional multi-packs to their product

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offering and enhancing customer service. At the same time, club stores in Puerto Rico have introduced increased numbers of conventional package configurations. Ordinary-course-of-business documents of supermarket operators often refer to club stores as substantial competitors.

Studies also provide support for the inclusion of club stores in the relevant product market. For example, a 2001 study, based on “extensive in-home interviews among female heads of household . . . throughout the island,” found that 37% of the subjects spontaneously mentioned SAM’s Club when asked to identify a supermarket or food retailer that operates in Puerto Rico. The “brand awareness” of the four leading supermarket operators (and especially Amigo (with 72%) and Pueblo (with 58%)), was substantially greater than that of SAM’s Club (with 37%), but the smaller Puerto Rico supermarket chains such as Ralph’s (with 6%), Supermercado Del Este (5%), and Plaza Gigante (5%) had significantly less brand awareness among Puerto Rico consumers. That same study found that 5% of interviewees reported that SAM’s Club was their “regular store” for their “large grocery shopping of the month.” That is comparable to or greater than the numbers reported for Mr. Special (6%), Supermercado Del Este (3%), and Ralph’s (4%). These findings are consistent with those of a recurring consumer survey conducted by the Puerto Rico food retailing trade association. The 2001 study found that 13% of consumers identified club stores as the place where they make their main food purchases.

In Puerto Rico, retail stores other than full-service supermarkets, supercenters, and club stores, such as limited assortment stores, convenience stores, specialty food stores (*e.g.*, seafood markets, bakeries, etc.), military commissaries, and mass merchandise outlets (including those with pantries not offering a wide selection and deep inventory of food and grocery products), do not effectively constrain prices in the relevant line of commerce as described above. In Puerto Rico, none of these stores offers a full-service supermarket's, supercenter's, or club store's distinct set of

Analysis

products and services that enables a retail customer to engage in one-stop shopping for food and grocery products.

Ample testimonial and documentary evidence indicates that a significant portion of Puerto Rico consumers use full-service supermarkets and club stores interchangeably. Accordingly, the relevant product market within which to assess the effects in Puerto Rico of the proposed transaction is a market consisting of full-service supermarkets, supercenters, and retail sales of supermarket-type items at club stores, or in general, stores that carry and offer at retail a wide selection and deep inventory of food and grocery products in a variety of brands and sizes, enabling consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit. The determination that club stores are included in the relevant product market in this proceeding does not, of course, determine what the relevant product market will be in future supermarket investigations by the Commission.

The complaint alleges that the relevant sections of the United States (*i.e.*, the geographic markets) in which there are competitive problems related to the acquisition are the areas of Puerto Rico in and near Cayey and Cidra (the “Cayey” market), Ponce and Juana Diaz (the “Ponce” market), and Barceloneta, Manati, and Vega Baja (the “Manati” market). The Cayey, Ponce, and Manati markets are highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as the “HHI”) or by two-firm and four-firm concentration ratios.¹ The post-acquisition HHI in the Cayey market would increase 1,056 points, from 2,500 to 3,556; in the Ponce market it would increase 603 points, from 1,912 to 2,515; and in the Manati market, taking into account a Wal-Mart supercenter that will open shortly, it would increase 1,782 points, from 2,173 to 3,955. In the Cayey market, Wal-Mart and Amigo would have a combined market share greater than 47%; in the Ponce market, the parties’ combined market share would exceed 38%; and in the Manati market, the combined market share would be greater than 59%.

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The complaint further alleges that entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the relevant geographic markets.

The complaint also alleges that Wal-Mart's acquisition of all of the outstanding voting securities of Amigo, if consummated, may substantially lessen competition in the relevant line of commerce in the relevant markets in 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 eliminating direct competition between supercenters and club stores owned or controlled by Wal-Mart and supermarkets owned and controlled by Amigo; by increasing the likelihood that Wal-Mart will unilaterally exercise market power; and by increasing the likelihood of, or facilitating, collusion or coordinated interaction, each of which increases the likelihood that the prices of food, groceries, or services will increase, and that the quality and selection of food, groceries or services will decrease, in the relevant geographic markets of Puerto Rico.

IV. The Terms of the Agreement Containing Consent Orders

The proposed consent order will remedy the Commission's competitive concerns about the proposed acquisition. Under the terms of the proposed consent order, Proposed Respondents must divest four Amigo supermarkets, in Cidra, Ponce, Manati, and Vega Baja, Puerto Rico. In each region, Wal-Mart owns or plans to open at least one supercenter or club store. The divestitures are to an up-front newly-formed entity founded by experienced supermarket owners which would be a new entrant in the relevant geographic markets and which the Commission has evaluated for competitive and financial viability. The Commission's evaluation process consisted of analyzing the financial condition of the proposed acquirer to determine that it is well qualified to operate the divested stores.

Analysis

Proposed Respondents will sell the four Amigo stores to Supermercados Maximo, Inc. (“Purchaser”), which is headquartered in Hato Rey, Puerto Rico. Purchaser includes as its founders and management two former long-time members of Amigo’s board of directors. All of the managers at the four stores are expected to remain in place (and each store is headed by management teams that have worked together for over three years).

The proposed consent order requires that the divestitures occur no later than ten business days after the acquisition is consummated. However, if Proposed Respondents consummate the divestitures to Purchaser during the public comment period, and if, at the time the Commission decides to make the order final, the Commission notifies Proposed Respondents that Purchaser is not an acceptable acquirer or that the asset purchase agreement with Purchaser is not an acceptable manner of divestiture, then Proposed Respondents must immediately rescind the transaction in question and divest those assets to another buyer within three months of the date the order becomes final. At that time, Proposed Respondents must divest those assets only to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission.

The proposed consent order also enables the Commission to appoint a trustee to divest any supermarkets or sites identified in the order that Proposed Respondents have not divested to satisfy the requirements of the order. In addition, the order enables the Commission to seek civil penalties against Proposed Respondents for non-compliance with the order.

The proposed consent order further requires Proposed Respondents to maintain the viability of the supermarkets identified for divestitures. Among other requirements related to maintaining operations at these supermarkets, the proposed consent order specifically requires Proposed Respondents to: (1) maintain the viability, competitiveness, and marketability of the assets to be divested; (2) not cause the wasting or deterioration of

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the assets to be divested; (3) not sell, transfer, encumber, or otherwise impair the supermarkets' marketability or viability; (4) maintain the supermarkets consistent with past practices; (5) use best efforts to preserve the supermarkets' existing relationships with suppliers, customers, and employees; and (6) keep the supermarkets open for business and maintain the inventory at levels consistent with past practices.

The proposed consent order prohibits Proposed Respondents from acquiring, without providing the Commission with prior notice, any supermarket, supercenter, or club store, or any interest in any supermarket, supercenter, or club store located in the municipalities that include Cayey, Cidra, Ponce, Juana Diaz, Barceloneta, Manati, and Vega Baja for ten years. These are the areas from which the supermarkets to be divested draw customers. The provisions regarding prior notice are consistent with the terms used in prior Orders. The proposed consent order does not restrict the Proposed Respondents from constructing new supermarkets, supercenters, or club stores in the above areas; nor does it restrict the Proposed Respondents from leasing facilities not operated as supermarkets, supercenters, or club stores within the previous six months.

The proposed consent order further prohibits Proposed Respondents, for a period of ten years, from entering into or enforcing any agreement that restricts the ability of any person acquiring any location or interest in any location used as a supermarket, supercenter, or club store in Puerto Rico, to operate a supermarket, supercenter, or club store at that site, if that site is or was formerly owned or operated by Proposed Respondents in any of the above areas.

The Proposed Respondents are required to file compliance reports with the Commission, the first of which is due within thirty days of the date on which Proposed Respondents signed the proposed consent order, and every thirty days thereafter until the divestitures are completed, and annually for ten years.

Analysis

V. Opportunity for Public Comment

The proposed consent order has been placed on the public record for thirty days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the proposed consent order and the comments received and will decide whether it should withdraw from the agreement or make the proposed consent order final.

By accepting the proposed consent order subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the proposed consent order, including the proposed sale of the supermarkets to Purchaser, in order to aid the Commission in its determination of whether to make the proposed consent order final. This analysis is not intended to constitute an official interpretation of the proposed consent order nor is it intended to modify the terms of the proposed consent order in any way.

Endnotes

1. The HHI is a measurement of market concentration calculated by summing the squares of the individual market shares of all the participants.

Complaint

IN THE MATTER OF

DAINIPPON INK AND CHEMICALS, INCORPORATED

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE FEDERAL TRADE
COMMISSION ACT

*Docket C-4073; File No. 0210100
Complaint, January 31, 2003--Decision, March 13, 2003*

This consent order addresses the acquisition by Respondent Dainippon Ink and Chemicals, Incorporated – a diversified global chemicals company based in Tokyo, Japan that manufactures and sells a full range of organic pigments, primarily through its wholly-owned U.S. subsidiary, Sun Chemical Corporation – of the high performance pigments business of Bayer Corporation, headquartered in Pittsburgh, Pennsylvania. The order, among other things, requires the respondent to divest the portion of Sun Chemical that produces perylenes – a class of high performance organic pigments that impart unique shades of red, such as maroon and violet; offer a particularly high degree of transparency; and are primarily used in automotive coatings, plastics, and carpet fibers – to Ciba Specialty Chemicals Inc. and Ciba Specialty Chemicals Corporation, or to another acquirer approved by the Commission. The order also requires the respondent, through its Sun Chemical subsidiary, to permit Ciba to hire one or more Sun Chemical employees who have key responsibilities in connection with the company's perylene business, and to provide technical assistance to Ciba for a period of one year following the divestiture, to help Ciba successfully take over Sun Chemical's perylene product line.

Participants

For the Commission: *Katherine A. Havelly, Jay C. Campbell, Sean G. Dillon, Stephanie A. Parks, Robert Pickett, Ann Malester, Kenneth A. Libby, Daniel P. Ducore, Shawn W. Ulrick, Louis Silvia, Jr., and Mary T. Coleman.*

For the Respondent: *Steven Newborn and John E. Scribner, Clifford Chance US LLP.*