

Complaint

IN THE MATTER OF

**THE GREAT ATLANTIC & PACIFIC TEA
COMPANY, INC.**

AND

PATHMARK STORES INC.

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-4209; File No. 071 0120

Complaint, November 27, 2007 B Decision, January 2, 2008

This consent order addresses the \$1.3 billion acquisition by The Great Atlantic & Pacific Tea Company (“A&P”) of Pathmark Stores. The Complaint alleges that the acquisition may increase opportunities for all firms in the market for retail sale of grocery products from supermarkets in Staten Island, New York, and Shirley, Long Island, New York to engage in coordinated interaction or for A&P to exercise unilateral market power, leading to higher prices or decreases in services. The order requires that A&P sell four Waldbaum’s supermarket stores and one Pathmark supermarket store in Staten Island and a Waldbaum’s store in Shirley, Long Island, together with their related assets. The one Pathmark store and four Waldbaum’s stores in Staten Island are required to be divested to King Kullen Grocery Co., Inc., and the Waldbaum’s store in Shirley is required to be divested to The Stop & Shop Supermarket Company LLC, a subsidiary of Koninklijke Ahold NV.

Participants

For the Commission: *Joseph Brownman, Benjamin Gris, Grace H. Kwon, Mazor Matzkevich, Susan E. Raitt, Anthony R. Saunders, Jan Tran, and Nancy Turnblacer.*

For the Respondents: *Manfred Gabriel, Hanno Kaiser, and Bruce Prager, Latham & Watkins LLP; Michael L. Keeley, William Rubenstein, Michelle Seagull, and Adam Strayer, Axinn, Veltrop & Harkrider LLP.*

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COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by said Act, the Federal Trade Commission (“Commission”), having reason to believe that The Great Atlantic and Pacific Tea Company, Inc. (“A&P”), a corporation, and Pathmark Stores Inc. (“Pathmark”), a corporation, have entered into an agreement for A&P to acquire all of the voting securities of Pathmark, 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, and that the terms of such agreement, were they to be satisfied, would result in a violation of Section 5 of the Federal Trade Commission Act, and Section 7 of the Clayton Act, 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. Definition

1. For purposes of this complaint, the term “supermarket” means a full-line retail grocery store with annual sales of at least \$2 million 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, 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.

II. Respondent The Great Atlantic & Pacific Tea Company, Inc.

2. Respondent A&P is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2

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Paragon Drive, Montvale, New Jersey 07645. A&P had revenues from all operations in 2006 of \$6.9 billion.

3. A&P is, and at all times relevant herein has been, engaged in the operation of supermarkets in the states of Connecticut, Delaware, Maryland, New Jersey, New York, and in the District of Columbia. A&P operates supermarkets under the A&P, A&P Super Foodmart, Food Basics, Food Emporium, Super Fresh, and Waldbaum's banners.

4. A&P owns and operates about 316 supermarkets in the United States.

5. A&P 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.

III. Respondent Pathmark Stores, Inc.

6. Respondent Pathmark 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 200 Milik Street, Carteret, New Jersey 07008. Pathmark had revenues in 2006 of about \$4.1 billion.

7. Pathmark is, and at all times relevant herein has been, engaged in the operation of supermarkets in the states of Delaware, New York, New Jersey, and Pennsylvania.

8. Pathmark owns and operates about 141 supermarkets in the United States.

9. Pathmark 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

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Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

IV. The Proposed Acquisition

10. On or about March 4, 2007, Respondents A&P and Pathmark entered into an agreement for A&P to acquire all of the voting securities of Pathmark. The purchase price is approximately \$1.3 billion in cash and stock, a figure that includes the assumption of Pathmark's debt.

V. Nature of Trade and Commerce

11. Supermarkets provide a distinct set of products and services for consumers who desire to one-stop shop for food and grocery products. Supermarkets carry a full line and wide selection of both food and nonfood products (typically 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 nonfood products necessary for one-stop shopping, supermarkets are large stores that typically have at least 10,000 square feet of selling space.

12. 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 price-check 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.

13. Retail stores other than supermarkets that sell food and grocery products, including neighborhood "mom & pop" grocery stores, convenience stores, specialty food stores, club stores, military commissaries, 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 enable consumers to do their one-stop shopping for

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food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to shop elsewhere in response to a small price increase by supermarkets.

VI. Relevant Product Markets

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

VII. Relevant Geographic Markets

15. The relevant sections of the country (*i.e.*, the geographic markets) in which to analyze the acquisition are:

- (a) Staten Island (Richmond County), New York, and
- (b) Shirley, Long Island, New York.

VIII. Concentration

16. The relevant markets are highly concentrated, and the proposed acquisition will substantially increase concentration, whether concentration is measured by the Herfindahl Hirschman Index (“HHI”) or the number of competitively significant firms remaining in the market.

IX. Entry Conditions

17. Entry would not be timely, likely, or sufficient to prevent anticompetitive effects.

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X. Effects of the Acquisition

18. The acquisition may substantially lessen competition in the relevant markets in the following ways, among others:

(a) by eliminating direct competition between Respondents Great A&P and Pathmark;

(b) by increasing the likelihood of, or facilitating, coordinated interaction among the remaining competitively significant firms; or

(c) by increasing the likelihood that A&P will unilaterally exercise market power;

each of which increases the likelihood of an increase in the price of food and other grocery products, or a decrease in the quality or selection of food, other grocery products, or services.

XI. Violations Charged

19. The agreement described in Paragraph 10 constitutes a violation of 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 FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this twenty-seventh day of November, 2007, issues its complaint against said Respondents.

By the Commission.

Order to Maintain Assets

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 Pathmark Stores, Inc. (“Pathmark”) by Respondent The Great Atlantic & Pacific Tea Company, Inc. (“A&P”), 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 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 The Great Atlantic & Pacific Tea Company, Inc. is a corporation organized, existing, and doing business under and

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by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2 Paragon Drive, Montvale, New Jersey 07645.

2. Respondent Pathmark 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 200 Milik Street, Carteret, New Jersey 07008.

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 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 the attached Decision and Order. Respondents shall conduct

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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:

- A. Any proposed dissolution of such Respondents;
- B. Any proposed acquisition, merger or consolidation of Respondents; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of this Order to Maintain Assets.

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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:

- 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 Decision and Order.

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Provided, however, that if the Commission, pursuant to Paragraph II.A. 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 Decision and Order.

By the Commission.

DECISION AND ORDER

[Public Record Version]

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition of 100% of the outstanding voting securities of Respondent Pathmark Stores Inc. by Respondent The Great Atlantic & Pacific Tea Company, 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

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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, now in further conformity with the procedure described 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 The Great Atlantic & Pacific Tea Company, Inc. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2 Paragon Drive, Montvale, New Jersey 07645.

2. Respondent Pathmark 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 200 Milik Street, Carteret, New Jersey 07008.

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.

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ORDER**I.**

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

- A. “A&P” means The Great Atlantic & Pacific Tea Company, Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by A&P and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Pathmark” means Pathmark Stores Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Pathmark and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means A&P and Pathmark, individually and collectively.
- D. “Acquisition” means A&P’s proposed acquisition of 100% of the outstanding voting securities of Pathmark pursuant to an agreement dated March 4, 2007.
- E. “Assets To Be Divested” means the Staten Island, New York Assets and the Shirley, New York Assets.
- F. “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.
- G. “Divestiture Agreement” means any agreement between the Respondents and a Commission- approved Acquirer (or a

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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 Agreements.

- H. “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.
- I. “Purchasers” means (1) The Stop & Shop Supermarket Company LLC (“Stop & Shop”), a corporation organized, existing and doing business under and by virtue of the laws of Delaware, with its offices and principal place of business located at 1385 Hancock Street, Quincy, MA 02169, and (2) King Kullen Grocery Co., Inc and King Kullen Pharmacies Corp. (“King Kullen”), a corporation organized, existing and doing business under and by virtue of the laws of New York, with its offices and principal place of business located at 185 Central Avenue, Bethpage, NY 11714-3929.
- J. “Purchaser Agreements” means (1) the Asset Purchase Agreement Dated as of October 5, 2007, among Stop & Shop and A&P and Waldbaum, Inc. (“Stop & Shop/A&P Agreement”) and all amendments, exhibits, attachments, related agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order, and (2) the Asset Purchase Agreement Dated as of November 9, 2007, among King Kullen and A&P and Waldbaum, Inc. (“King Kullen/A&P Agreement”) and all amendments, exhibits, attachments, related agreements, and schedules thereto, that have been approved by the Commission to accomplish the requirements of this Order.

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- K. “Staten Island, New York Assets” means the following Supermarkets currently operated by Respondents: (1) Waldbaum’s Super Market 219, 3251 Richmond Avenue South, Staten Island, NY; (2) Waldbaum’s Super Market 672, 778 Manor Road, Staten Island, NY; (3) Waldbaum’s Super Market 238, 4343 Amboy Road, Staten Island, NY; (4) Waldbaum’s Super Market 230, 1441 Richmond Avenue, Staten Island, NY; and (5) Pathmark Super Market 683, 2660 Rylan Boulevard, Staten Island, NY, and all assets, leases, properties, government permits (to the extent transferable), businesses and goodwill, tangible and intangible, related to or used in the Supermarket business operated at these 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.
- L. “Shirley, New York Assets” means A&P’s Waldbaum’s Super Market 604, 999 Montauk Highway, Shirley, NY, and all assets, leases, properties, government permits (to the extent transferable), 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. “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

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and grocery shopping requirements in a single shopping visit.

- N. “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.
- O. “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. Respondents shall divest, by January 10, 2008, absolutely and in good faith, the Staten Island, New York Assets and the Shirley, New York Assets, as ongoing businesses to Purchasers pursuant to and in accordance with the Purchaser Agreements (which agreements shall not vary or contradict, or be construed to vary or contradict, the terms of this Order), and such agreements, if approved by the Commission, are 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 Agreements related to the Staten Island, New

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York Assets or Shirley, New York Assets shall constitute a failure to comply with this Order.

Provided, however, that if Respondents have divested the Staten Island, New York Assets, or Shirley, New York Assets to Purchasers pursuant to the Purchaser Agreements prior to the date this Order becomes final, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that Purchasers is not an acceptable Purchasers of the Staten Island, New York Assets, or Shirley, New York Assets or that the manner in which the divestiture was accomplished is not acceptable, then Respondents shall immediately rescind the transaction with Purchasers and shall divest the Staten Island, New York Assets and Shirley, New York 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 Agreements pursuant to which the Assets To Be Divested are divested to a Commission-approved Acquirer.
- C. Any Divestiture Agreements between Respondents (or a trustee appointed pursuant to Paragraph III. of this Order) and Commission-approved Acquirers 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 Agreements shall constitute a failure to comply with this Order.
- D. The purpose of the divestitures is to ensure the continuation of the Staten Island, New York Assets and the Shirley, New York Assets as ongoing viable enterprises engaged in the Supermarket business and to remedy the lessening of

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competition resulting from the Acquisition alleged in the Commission's Complaint.

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

- A. If Respondents have not divested all of the Assets To Be Divested as required by Paragraph II. of this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the remaining Assets To Be Divested in a manner that satisfies the requirements of Paragraphs II. and III. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15 U.S.C. § 45(l), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a Divestiture Trustee in such action to divest the relevant assets in accordance with the terms of this Order. 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(1) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by Respondents to comply with this Order.
- B. 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 Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Divestiture Trustee, Respondents

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shall be deemed to have consented to the selection of the proposed Divestiture Trustee.

- C. Within ten (10) days after appointment of a Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestiture or transfer required by the Order.
- D. If a Divestiture Trustee is appointed by the Commission or a court pursuant to this Order, Respondents shall consent to the following terms and conditions regarding the Divestiture Trustee's powers, duties, authority, and responsibilities:
 - 1. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant assets that are required by this Order to be assigned, granted, licensed, divested, transferred, delivered, or otherwise conveyed.
 - 2. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described herein to accomplish the divestiture, which shall be subject to the prior approval of the Commission. If, however, at the end of the twelve (12) month 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

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facilities related to the relevant assets that are required to be assigned, granted, licensed, divested, delivered, or otherwise conveyed by this Order and to any other relevant 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. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph III. 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 best efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondents'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 as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Person, and if the Commission determines to approve more than one such acquiring Person, the Divestiture Trustee shall divest to the acquiring Person selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such Person within five (5) days of receiving notification of the Commission's approval.
5. 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

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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 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 and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of 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 relevant assets that are required to be divested by this Order.

6. 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.
7. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
8. The Divestiture Trustee shall report in writing to Respondents and to the Commission every sixty (60)

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days concerning the Divestiture Trustee's efforts to accomplish the divestiture.

9. Respondents 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 III.
- 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 assist the Divestiture Trustee in accomplishing the divestitures required by this Order.

IV.

IT IS FURTHER ORDERED that, for a period often (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 within six (6) months prior to the date of such proposed acquisition in Staten Island (Richmond County), NY and in Shirley, New York.
- B. Acquire any stock, share capital, equity, or other interest in

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any entity that owns any interest in or operates any Supermarket, or holds 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 Staten Island (Richmond County), NY and in Shirley, New York.

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 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 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

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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, any leasehold interest in any Supermarket or any interest in any retail location used as a Supermarket on or after January 1, 2007, in Staten Island (Richmond County), NY and in Shirley, New York, to operate a supermarket at that site, if such Supermarket 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 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 non-privileged written communications to and from such parties, all non-privileged internal memoranda, and all non-privileged reports and recommendations concerning completing the obligations; and

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- 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:

- A. Any proposed dissolution of such Respondents;
- B. Any proposed acquisition, merger or consolidation of Respondents; or
- C. Any other change in the Respondents, including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the 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 copy all books, ledgers, accounts, correspondence, memoranda, and all other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and

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- 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 any such matters.

IX.

IT IS FURTHER ORDERED that this Order shall terminate on January 2, 2018.

By the Commission.

NONPUBLIC APPENDIX I

[Redacted From the Public Record Version But
Incorporated By Reference]

**ANALYSIS OF THE CONSENT ORDER TO AID PUBLIC
COMMENT**

I. Introduction

The Federal Trade Commission ("Commission") has accepted for public comment, and subject to final approval, an Agreement Containing Consent Orders ("Consent Agreement") from The Great Atlantic & Pacific Tea Company, Inc. ("A&P") and Pathmark Stores, Inc. ("Pathmark"). The purpose of the Consent Agreement is

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to remedy the anticompetitive effects that likely would result from A&P's proposed \$1.3 billion acquisition (a figure that includes the assumption of debt by A&P) of Pathmark, as alleged in the Complaint the Commission has issued.

The Consent Agreement provides for relief in two markets where the Commission believes the proposed acquisition is anticompetitive. Under the terms of the Consent Agreement, A&P must divest four Waldbaum's supermarkets and one Pathmark supermarket in Staten Island, New York, and one Waldbaum's supermarket in Shirley, Long Island, New York.

The Commission, A&P, and Pathmark have also agreed to an Order to Maintain Assets. This order requires A&P and Pathmark to maintain the assets required by the Consent Agreement to be divested, pending their divestiture.

The investigation and settlement negotiations were conducted in close cooperation with the Office of the New York State Attorney General, which anticipates entering into an agreement with the parties that mirrors the proposed consent order divestitures.

II. The Parties and the Transaction

A&P is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Maryland, with its office and principal place of business located at 2 Paragon Drive, Montvale, New Jersey 07645. The company owns and operates about 316 supermarkets in the States of Connecticut, Delaware, Maryland, New York, New Jersey, and in the District of Columbia. A&P operates its supermarkets under the A&P, A&P Super Foodmart, Food Basics, Food Emporium, Super Fresh and Waldbaum's banners. A&P had revenues from all operations in 2006 of about \$6.9 billion.

Pathmark 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 200 Milik

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Street, Carteret, New Jersey 07008. The company owns and operates about 141 supermarkets in the States of Delaware, New York, New Jersey, and Pennsylvania, all operating under the Pathmark banner. Pathmark had revenues in 2006 of about \$4.1 billion.

Under the terms of their March 4, 2007, agreement, A&P will acquire all of the voting securities of Pathmark for approximately \$1.3 billion, including the assumption of debt.

III. The Complaint

According to the Commission's Complaint, A&P and Pathmark compete in the retail sale of grocery products from supermarkets. Supermarkets are 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 food and other grocery shopping requirements in a single shopping visit.

The Complaint alleges that the acquisition by A&P of Pathmark would be competitively problematic in Staten Island, New York, and Shirley, Long Island, New York, both of which are highly concentrated geographic markets. As alleged in the Complaint, the proposed acquisition may increase opportunities for all firms in these markets to engage in coordinated interaction or for A&P to exercise unilateral market power, leading to higher prices or decreases in services. The Complaint further alleges that entry would not be timely, likely, or sufficient to prevent anticompetitive effects in the geographic markets.

The Complaint alleges that 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, by lessening competition in connection with the retail sale of grocery products from supermarkets.

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IV. The Proposed Consent Order

Under the terms of the proposed Consent Order, Respondent A&P must sell four Waldbaum's supermarket stores and one Pathmark supermarket store in Staten Island and a Waldbaum's store in Shirley, Long Island, together with their related assets. The addresses of the Waldbaum's stores required to be divested are as follows:

1. 3251 Richmond Ave. South
Staten Island, NY
2. 778 Manor Road
Staten Island, NY
3. 4343 Amboy Road
Staten Island, NY
4. 1441 Richmond Ave.
Staten Island, NY
5. 999 Montauk Hwy.
Shirley, NY

The address of the one Pathmark store required to be divested is:

1. 2660 Hylan Blvd.
Staten Island, NY

The one Pathmark store and four Waldbaum's stores in Staten Island are required to be divested to King Kullen Grocery Co., Inc., headquartered in Bethpage, New York, and the Waldbaum's store in Shirley is required to be divested to The Stop & Shop Supermarket Company LLC ("Stop & Shop"). Stop & Shop is a subsidiary of Koninklijke Ahold NV, a Dutch corporation. The Commission evaluated these prospective acquirers and determined that they are well qualified to operate the divested supermarkets.

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The proposed Consent Order requires that the divestitures occur no later than January 10, 2008. If Respondents consummate the divestitures to the purchasers during the public comment period, and if, at the time the Commission determines whether to make the proposed Consent Order final, the Commission notifies Respondents that the purchasers are not acceptable acquirers, or that the asset purchase agreements with those acquirers are not acceptable manners of divestiture, then Respondents must immediately rescind those transactions and divest the five Waldbaum's stores and one Pathmark store (and their related assets) to other buyers, within three (3) months of the date the Consent Order becomes final. Under those circumstances, Respondents must divest those stores and related 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. In the event Respondents have not divested the supermarkets in a manner that satisfies the requirements of the Consent Order, the Commission may appoint a trustee to divest those assets.

The Commission has also issued an Order to Maintain Assets. Under its terms, Respondents are required to maintain the viability of the six supermarkets and their related assets pending their divestiture. More specifically, Respondents must: (1) maintain the viability, competitiveness, and marketability of the assets; (2) not cause the wasting or deterioration of those assets; (3) not sell, transfer, encumber, or otherwise impair the marketability of the assets; (4) maintain the supermarkets consistent with the parties' 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 inventories at levels consistent with past practices.

The proposed Consent Order prohibits Respondents, for a period of ten years, from acquiring, without providing the Commission with prior notice, 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 Staten Island, New York, and the

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Shirley, Long Island, New York area. The proposed Consent Order also prohibits Respondents, for a period of ten (10) years, from entering into or enforcing any agreement that restricts the ability of any person acquiring any interest in any location formerly used by Respondents as a supermarket in Staten Island or the Shirley area to operate that location as a supermarket. The proposed Consent Order does not prohibit Respondents from building new supermarkets, or leasing a facility not operated as a supermarket within the preceding six (6) months.

Under the terms of the proposed Consent Order, A&P is also required to provide the Commission with regular compliance reports demonstrating how it is complying with the terms of the Consent Agreement until it is in full compliance with that Agreement.

V. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days for the purpose of soliciting comments from the public. All comments received during this period will become part of the public record. After the thirty (30) day comment period, the Commission will again consider the Consent Agreement, together with all comments received. After that second review, the Commission may either withdraw from the Consent Agreement or make its Order final.

By accepting the Consent Agreement 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 Consent Order, including the proposed divestitures, to aid the Commission in its determination whether it should make final the Consent Agreement. This analysis is not an official interpretation of the Consent Agreement nor does it modify any of its terms.

Complaint

IN THE MATTER OF

MILLIMAN, INC.CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS
OF SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4213; File No. 062 3189**Complaint, February 6, 2008 – Decision, February 6, 2008*

This consent order relates to the failure of Milliman, Inc., to provide the *Notice To Users of Consumer Reports: Obligations of Users Under the FCRA*, as required by the Fair Credit Reporting Act. The respondent markets IntelliScript, a data aggregation service that provides individual medical profiles to health and life insurance companies. The order requires Milliman to provide the *Notice To Users* to any user or prospective user of any medical profile generated by IntelliScript that constitutes a consumer report, or of any other consumer report. The order requires the respondent to maintain reasonable procedures to limit the furnishing of consumer reports to those with a permissible purpose; to follow reasonable procedures to assure maximum possible accuracy of the information concerning the individuals about whom the reports relate; to maintain reasonable procedures to ensure compliance with Section 611 of the Fair Credit Reporting Act; to conduct a reasonable reinvestigation in cases of disputed accuracy; and to comply with the Disposal of Consumer Report Information and Records Rule. The order also requires the respondent to maintain and upon request make available to the Commission documents demonstrating compliance with the requirements of the order. In addition, the respondent is required to distribute copies of the order to various officers, directors, and managers, employees, agents, and representatives having decision-making responsibilities with respect to IntelliScript or any other consumer report; to notify the Commission of any changes in corporate structure that might affect compliance with the order; and to file reports with the Commission detailing its compliance with the order.

Participants

For the Commission: *Katherine Armstrong, Kathleen Benway, Rebecca E. Kuehn, and Joel Winston.*

For the Respondent: *Roger Longtin, DLA Piper.*

COMPLAINT