

Complaint

**IN THE MATTER OF
TOPS MARKETS LLC, MORGAN STANLEY CAPITAL
PARTNERS V U.S. HOLDCO LLC, AND THE PENN
TRAFFIC COMPANY**

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

*Docket No. C-4295; File No. 101 0074
Filed August 4, 2010 – Decision June 30, 2011*

This consent order addresses the allegations regarding the proposed \$85 million acquisition by Tops Markets LLC (“Tops”) of substantially all supermarkets owned by The Penn Traffic Company (“Penn”), as part of Penn’s petition for bankruptcy pursuant to Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 301, *et seq.* The complaint alleges that the acquisition of Penn’s supermarkets by Tops would eliminate direct competition in parts of New York and Pennsylvania, resulting in higher grocery prices for consumers. The consent order requires the parties to divest seven Penn supermarkets, together with their related assets, to a Commission-approved buyer and to allow the Commission-approved buyer to operate these supermarkets at their respective locations. The consent order further requires the parties to maintain the competitive viability of these assets pending divestiture. In the event the parties fail to divest the assets within the time period prescribed by the Commission, the consent order permits the Commission to appoint a divestiture trustee to effectuate the divestiture.

Participants

For the *Commission*: Michelle Fetterman, Jeanne Liu, David von Nirschl, and Anthony Saunders.

For the *Respondents*: Kathleen Beasley and Jim Wade, Haynes & Boone LLP; and Kevin Arquit, Evan Cohen, Aimee Goldstein, and Jayma Meyer, Simpson Thacher & Bartlett LLP.

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COMPLAINT

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

I. RESPONDENT TOPS

1. Respondent Tops is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at 6363 Main Street, Williamsville, New York 14221.
2. Tops is, and at all times relevant herein has been, engaged in the operation of supermarkets in the State of New York and the Commonwealth of Pennsylvania. Tops operates supermarkets under the Tops banner.
3. Prior to its acquisition of substantially all Penn Traffic assets, Tops owned and operated 71 supermarkets in the United States. In addition, five supermarkets with the Tops banner are owned and operated by franchisees in the United States.
4. Tops is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce within the meaning of

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Section 1 of the Clayton Act, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, 15 U.S.C. § 44.

II. RESPONDENT HOLDCO

5. Respondent Holdco is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1585 Broadway, Floor 39, New York, New York 10036.

6. Holdco 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 PENN TRAFFIC

7. Respondent Penn Traffic is a corporation organized, existing, and doing business under and by virtue of the laws of state of Delaware, with its office and principal place of business located at 1200 State Fair Boulevard, Syracuse, New York 13221.

8. Prior to the acquisition, Penn Traffic was engaged in the operation of supermarkets in the Commonwealth of Pennsylvania and the states of New York, Vermont, and New Hampshire. Penn Traffic operated supermarkets under the banners P&C Foods, Quality Markets, and Bi-Lo.

9. Prior to the acquisition by Tops, Penn Traffic owned and operated 79 supermarkets in the United States.

10. Penn Traffic was, 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.

IV. THE ACQUISITION

11. On or about January 7, 2010, Respondents Tops, Holdco, and Penn Traffic entered into an agreement for Tops to acquire substantially all of Penn Traffic's assets, including all 79 supermarkets and certain assets related to the operation of the supermarkets. The purchase price was approximately \$85 million. In addition, Tops agreed to the assumption of liabilities and the reduction of approximately \$70 million in claims.

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

V. NATURE OF TRADE AND COMMERCE

13. For purposes of this complaint, the term "supermarket" means a full-line grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products, refrigerated and frozen food and beverage products, fresh and prepared meats and poultry, produce, including fresh fruits and vegetables, shelf-stable food and beverage products, including canned and other types of packaged products, staple foodstuffs, and other grocery products, including non-food items, household products, and health and beauty aids.

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

15. Supermarkets compete primarily with other supermarkets that provide one-stop shopping opportunities for food and grocery

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products. Supermarkets primarily base their food and grocery prices on the prices of food and grocery products sold at other supermarkets. Supermarkets do not regularly conduct price checks of food and grocery products sold at other types of stores and do not significantly change their food and grocery prices in response to prices at other types of stores.

16. Retail stores other than supermarkets that sell food and grocery products, including neighborhood “mom & pop” grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores, and mass merchants, do not, individually or collectively, effectively constrain prices at supermarkets. Those retail stores do not offer a supermarket’s distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. The vast majority of consumers shopping for food and grocery products at supermarkets are not likely to start shopping elsewhere, or significantly increase grocery purchases elsewhere, in response to a small price increase by supermarkets.

VI. RELEVANT PRODUCT MARKET

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

VII. RELEVANT GEOGRAPHIC MARKETS

18. The relevant geographic markets in which to analyze the likely competitive effects of the acquisition are:

- (a) Bath, New York;
- (b) Cortland, New York;
- (c) Ithaca, New York;

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- (d) Lockport, New York; and
- (e) Sayre, Pennsylvania.

VIII. MARKET CONCENTRATION

19. The relevant markets are highly concentrated, and the acquisition has substantially increased concentration, whether concentration is measured by the Herfindahl Hirschman Index (“HHI”) or the number of competitively significant firms remaining in the market. Post-acquisition HHIs in the relevant geographic markets range from 5,000 to 10,000, and the acquisition increased HHI levels by between 1,145 and 4,996 points. These market concentration levels give rise to a presumption that the acquisition is unlawful in each of the affected markets.

IX. ENTRY CONDITIONS

20. Entry would not be timely, likely, or sufficient to deter or prevent anticompetitive effects. The affected markets are insulated from new entry or expansion by significant entry barriers, including the time and costs associated with the need to conduct market research, select an appropriate location for the supermarket, obtain necessary permits and approvals, construct a new supermarket or convert an existing structure to a supermarket, and generate sufficient sales to have a meaningful impact on the market.

X. EFFECTS OF THE ACQUISITION

21. The acquisition has substantially lessened competition in the relevant markets in the following ways, among others:

- (a) by eliminating direct competition between Respondents Tops and Penn Traffic;
- (b) by increasing the likelihood that Tops will unilaterally exercise market power; and

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

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

XI. VIOLATIONS CHARGED

23. The agreement described in Paragraph 11 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the acquisition described in Paragraph 12 constitutes a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

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

By the Commission.

DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition of The Penn Traffic Company (“Penn Traffic”) by Tops Markets LLC (“Tops”), a subsidiary of Morgan Stanley Capital Partners V U.S. Holdco LLC (“Holdco”), (collectively, “Respondents”), and Respondents having been furnished with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration, and that, if issued by the Commission, would charge

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Respondents with violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), 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 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 had reason to believe that the Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and an Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having modified the Decision and Order in certain respects, now in further conformity with the procedure prescribed in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order (“Order”):

1. Respondent Tops is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of New York, with its office and principal place of business located at 6363 Main Street, Williamsville, New York 14221.
2. Respondent Penn Traffic is a corporation organized, existing and doing business under and by virtue of the laws of state of Delaware, with its office and principal

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place of business located at 1200 State Fair Boulevard, Syracuse, New York 13221.

3. Respondent Holdco is a limited liability company organized, existing, and doing business under and by virtue of the laws of the state of Delaware, with its office and principal place of business located at 1585 Broadway, Floor 29, New York, New York 10036.
4. The Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “Tops” means Tops Markets LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Tops Markets LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Penn Traffic” means The Penn Traffic Company, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by The Penn Traffic Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

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- C. “Holdco” means Morgan Stanley Capital Partners V U.S. Holdco LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Morgan Stanley Capital Partners V U.S. Holdco LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Respondents” mean Tops, The Penn Traffic Company, and Holdco, individually and collectively.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquirer(s)” means an Entity(ies) that receives the prior approval of the Commission to acquire any or all of the Penn Traffic Supermarket Business Assets pursuant to this Order.
- G. “Acquisition” means the acquisition contemplated by the Asset Purchase Agreement by and between Tops Markets, LLC and The Penn Traffic Company dated as of January 7, 2010, (“Asset Purchase Agreement”).
- H. “Agency(ies)” means any government regulatory authority or authorities responsible for granting approval(s), clearance(s), qualification(s), license(s), or permit(s) for any aspect of the operations of a Supermarket.
- I. “Closing Date” means the date on which Respondent(s) (or a Divestiture Trustee) consummates a transaction to assign, grant, license, divest, transfer, deliver, or otherwise convey the relevant Penn Traffic Supermarket Business Assets to an Acquirer pursuant to this Order.

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- J. “Divestiture Trustee” means the trustee appointed by the Commission pursuant to Paragraph VI of this Order.
- K. “Effective Date” means the date on which the Respondents close on the Acquisition pursuant to the Asset Purchase Agreement.
- L. “Entity(ies)” means any individual, partnership, joint venture, firm, corporation, association, trust, unincorporated organization, joint venture, or other business or Government Entity, and any subsidiaries, divisions, groups or affiliates thereof.
- M. “Governmental Approval(s)” mean any approvals, registrations, permits, licenses, consents, authorizations, and other approvals, and pending applications and requests thereof, required by applicable Agencies related to the operation of a Supermarket.
- N. “Government Entity” means any Federal, state, local or non-U.S. government, or any court, legislature, government agency, or government commission, or any judicial or regulatory authority of any government.
- O. “Interim Monitor” means any monitor appointed pursuant to Paragraph V of this Order or Paragraph III of the related Order to Maintain Assets.
- P. “Law” means all laws, statutes, rules, regulations, ordinances, and other pronouncements by any Government Entity having the effect of law.
- Q. “Order Date” means the date that this Decision and Order becomes final.
- R. “Penn Traffic Supermarket Business Assets” means all Respondents’ rights, title and interest in and to all assets

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used in, and or reserved for use in, the Penn Traffic Supermarket Businesses to the extent legally transferable, including, without limitation:

1. all real property;
2. all leasehold interests;
3. all equipment and fixtures;
4. all Governmental Approvals;
5. at the relevant Acquirer's option, all Trademarks for transitional purposes of up to one (1) year from the Closing Date;
6. at the relevant Acquirer's option, all Trade Dress for transitional purposes of up to one (1) year from the Closing Date;
7. at the relevant Acquirer's option, all inventory in existence as of the Closing Date;
8. all of the Respondents' books and records, customer files, customer lists and records, vendor files, vendor lists and records, cost files and records, credit information, distribution records, business records and plans, studies, surveys, and files related to the foregoing.

provided however, that in cases in which documents or other materials included in the relevant assets to be divested contain information: (1) that relates both to the Penn Traffic Supermarket Businesses and to other businesses of the Respondents and cannot be segregated in a manner that preserves the usefulness of the information as it relates to the Penn Traffic Supermarket

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Businesses; or (2) for which the relevant party has a legal obligation to retain the original copies, the relevant party shall be required to provide only copies or relevant excerpts of the documents and materials containing this information. In instances where such copies are provided to the Acquirer, the relevant party shall provide such Acquirer access to original documents under circumstances where copies of documents are insufficient for evidentiary or regulatory purposes. The purpose of this proviso is to ensure that Respondents provide the Acquirer with the above-described information without requiring Respondents completely to divest themselves of information that, in content, also relates to businesses that Respondent Tops is not required to divest pursuant to this Order.

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

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2. any agreement between Respondents and a Third Party (or between a Divestiture Trustee and a Third Party) to effect the assignment of the the Penn Traffic Supermarket Business Assets to the benefit of an Acquirer that has been approved by the Commission to accomplish the requirements of this Order, including all amendments, exhibits, attachments, agreements, and schedules thereto.
- V. “Supermarket” means a full-line retail grocery store that carries a wide variety of food and grocery items in particular product categories, including bread and dairy products; frozen and refrigerated 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; other grocery products, including nonfood items such as soaps, detergents, paper goods, other household products, health and beauty aids; pharmaceutical products and pharmacy services (where provided); and, to the extent permitted by Law, wine, beer, and distilled spirits.
- W. “Supermarket Employee(s)” means all employees of Respondents who are currently working at the relevant Penn Traffic Supermarket Business(es), or who have, within the twelve (12) months prior to the Order Date, worked at the relevant Penn Traffic Supermarket Business(es).
- X. “Trade Dress” means the current trade dress of products marketed or sold at the Penn Traffic Supermarket Businesses including, without limitation, product packaging, and the lettering of the product trade name or

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brand name that are or were owned by Respondent Penn Traffic and that were used in or are used in the Penn Traffic Supermarket Businesses.

- Y. “Trademark(s)” means all proprietary names or designations, trademarks (whether registered or unregistered), service marks (whether registered or unregistered), trade names, product names, and brand names, including registrations and applications for registration therefor (and all renewals, modifications, and extensions thereof) and all common law rights, and the goodwill symbolized thereby and associated therewith, for the Penn Traffic Supermarket Businesses that are or were owned by Respondent Penn Traffic and that were used in, or are used in, the Penn Traffic Supermarket Businesses.
- Z. “Third Party(ies)” means any Entity other than the following: Respondents or the Acquirer for the particular Penn Traffic Supermarket Business Assets.

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

- A. Not later than ninety (90) days after the Order Date, Respondent Tops shall divest the Penn Traffic Supermarket Business Assets, absolutely and in good faith, at no minimum price, to an Acquirer or Acquirers in a manner that receives the prior approval of the Commission, pursuant to and as required by the terms of this Paragraph II or Paragraph VI of this Order, as applicable.
- B. Respondents shall secure all consents and waivers from all Third Parties (including, without limitation, all landlords) that are necessary to permit Respondent Tops

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to divest the Penn Traffic Supermarket Business Assets to the relevant Acquirer(s), and/or to permit such Acquirer(s) to continue the operations of the Penn Traffic Supermarket Businesses at the respective locations;

provided, however, Respondents may satisfy this requirement by certifying that the Acquirer has executed all such agreements directly with each of the relevant Third Parties.

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

provided, however, that this Paragraph shall not prohibit Respondents from continuing to employ any Supermarket Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee.

- D. The purpose of the divestiture of the Penn Traffic Supermarket Business Assets and the related obligations imposed on the Respondents by this Order is:

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1. to ensure the continued use of the Penn Traffic Supermarket Business Assets in the operation of Supermarkets at the respective locations;
2. to provide for the future use of the Penn Traffic Supermarket Business Assets in the operation of Supermarkets at the respective locations;
3. to create a viable and effective competitor, who is independent of the Respondents, in the operation of Supermarkets at each of the respective locations; and
4. to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint in a timely and sufficient manner.

III.

IT IS FURTHER ORDERED that until the Closing Date for each respective Penn Traffic Supermarket Business, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of such Penn Traffic Supermarket Business(es), to minimize any risk of loss of competitive potential for such Penn Traffic Supermarket Business(es), and to prevent the destruction, removal, wasting, deterioration, or impairment of the Penn Traffic Supermarket Business Assets except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Penn Traffic Supermarket Business Assets (other than in the manner prescribed in this Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Penn Traffic Supermarket Businesses. Respondents' responsibilities shall include each of the responsibilities enumerated in Paragraph II.B. of the Order to Maintain Assets.

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IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years from the Order Date, Respondent Tops 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 the Relevant Geographic Markets; or
- B. Acquire any stock, share capital, equity, or other interest in any entity that owns any interest in or operates any Supermarket, or owned any interest in or operated any Supermarket within six (6) months prior to such proposed acquisition, in the Relevant Geographic Markets;

provided, however, that advance written notification shall not apply to the construction of new facilities by Respondent Tops or the acquisition of or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondent Top's offer to purchase or lease.

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 (hereinafter referred to as "the Notification"), 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 Respondent Tops and not of any other party to the transaction. Respondent Tops 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

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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), Respondent Tops shall not consummate the transaction until twenty (20) 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 the provisions of this Paragraph IV shall not apply to any 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:

- A. At any time after Respondent Tops sign the Consent Agreement in this matter, the Commission may appoint a monitor (“Interim Monitor”) to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Tops, which consent shall not be unreasonably withheld. If Respondent Tops has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Tops of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent Tops shall execute an agreement that, subject to the prior approval of the

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Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.

- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
1. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;
 2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and
 3. the Interim Monitor shall serve until the date of completion by Respondent Tops of the divestiture of all of the Penn Traffic Supermarket Business Assets in a manner that fully satisfies the requirements of the Decision and Order; *provided further*, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information

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as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.

- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent Tops, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent Tops, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondent Tops shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by each Respondent, and any reports submitted by the Acquirer

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with respect to the performance of each Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders.

- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.

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- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same Entity appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

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

- A. The Commission hereby appoints The Food Partners LLC as a trustee (“Divestiture Trustee”) to divest, assign, grant, license, transfer, deliver or otherwise convey, in a manner that satisfies the requirements of this Order, all of the Penn Traffic Supermarket Business Assets for which, prior to the Order Date, Respondent Tops has not filed a petition for prior approval of divestiture pursuant to Paragraph II.A of this Order. Such divestiture (or divestitures) shall be accomplished exclusively by the Divestiture Trustee;

provided however, that any of the Penn Traffic Supermarket Business Assets (i) that are subject to a petition for prior approval to divest that has been filed by Respondent Tops prior to the Order Date and that is subsequently withdrawn by Respondent Tops or denied by the Commission, or (ii) that are not divested by Respondent Tops following Commission approval of that petition and in the manner approved by the Commission, shall become a part of the assets to be divested exclusively by the Divestiture Trustee.

- B. Not later than ten (10) days after the appointment of a Divestiture Trustee, Respondent Tops 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 each divestiture as described in Paragraph VI.A.

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and as is required by this Order.

- C. Respondent Tops 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 divest, assign, grant, license, transfer, deliver or otherwise convey the Penn Traffic Supermarket Business Assets as described in Paragraph VI.A.;
 2. the Divestiture Trustee shall have ninety (90) days after the date the Commission approves the trust agreement described herein to accomplish the divestitures, which shall be subject to the prior approval of the Commission. If, however, at the end of the ninety (90) day period, the Divestiture Trustee has submitted a plan of divestiture or the Commission believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission for an additional ninety (90) days; *provided, however*, the Commission may extend the divestiture period only two (2) times; *provided further, however*, that upon the expiration of the divestiture period, including as it may be extended, the Divestiture Trustee's power and any further obligations herein to divest shall terminate, except to the extent such power must continue to accomplish the Divestiture Trustee's accounting and payment of fees, pursuant to Paragraph VI.C.5.;
 3. subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records and facilities related to the Penn Traffic Supermarket

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Business Assets and to any other relevant information, as the Divestiture Trustee may request. Respondent Tops shall develop such financial or other information as the Divestiture Trustee may request and shall cooperate with the Divestiture Trustee. Respondents shall take no action to interfere with or impede the Divestiture Trustee's accomplishment of the divestiture. Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court;

4. the Divestiture Trustee shall use commercially reasonable efforts to negotiate the most favorable price and terms available in each contract that is submitted to the Commission, subject to Respondent Top's absolute and unconditional obligation to divest expeditiously and at no minimum price. Each divestiture shall be made in the manner and to an Acquirer(s) as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring Entity, and if the Commission determines to approve more than one such acquiring Entity, the Divestiture Trustee shall divest to the acquiring Entity selected by Respondent Tops from among those approved by the Commission; and, *provided further, however*, that Respondent Tops shall select such Entity within five (5) days after receiving notification of the Commission's approval;
5. the Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondent Tops, on such reasonable and customary terms and conditions as the Commission or a court may set.

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The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondent Tops, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture and all expenses incurred. After approval by the Commission of the account of the Divestiture Trustee, including fees for the Divestiture Trustee's services, all remaining monies shall be paid at the direction of Respondent Tops, 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. Respondent Tops 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 gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee;
7. the Divestiture Trustee shall have no obligation or authority to operate or maintain the Penn Traffic Supermarket Business Assets; *provided, however,* that the Divestiture Trustee appointed pursuant to

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this Paragraph may be the same Entity appointed as Interim Monitor pursuant to the relevant provisions of the Order to Maintain Assets in this matter;

8. the Divestiture Trustee shall report in writing to Respondent Tops and to the Commission every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish each divestiture; and
 9. Respondent Tops may require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, such agreement shall not restrict the Divestiture Trustee from providing any information to the Commission.
- D. 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.
- E. The Commission or, in the case of a court-appointed Divestiture Trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish each divestiture required by this Order.

VII.

IT IS FURTHER ORDERED that:

- A. Not later than thirty (30) days after the Order Date, and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II.A. and III of this Order, Respondents shall submit to the

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Commission verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with Paragraphs II.A. and III of this Order. Respondents shall include in their compliance 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 the Order, including a description of all substantive contacts or negotiations for divestitures and the identity of all parties contacted. Respondents shall include in their compliance reports copies of all written communications to and from such parties, all internal memoranda, and all reports and recommendations concerning divestiture.

- B. One (1) year from the Order Date, annually for the next nine (9) years on the anniversary of the Order Date, and at other times as the Commission may require, Respondent Tops shall file verified written reports with the Commission setting forth in detail the manner and form in which it has complied and is complying with this Order.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger or consolidation of a Respondent; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

Decision and Order

IX.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Decision and Order, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to a Respondent made to its principal United States offices or headquarter's address, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of Respondent 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 Respondent related to compliance with the Orders, which copying services shall be provided by Respondent at the request authorized representative(s) of the Commission and at the expense of the Respondent; and
- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that:

- A. Any Remedial Agreement shall be deemed incorporated into this Order.
- B. Any failure by Respondents to comply with any term of such Remedial Agreement shall constitute a failure to comply with this Order.
- C. Respondent Tops shall include in each Remedial Agreement related to each of the Penn Traffic

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Supermarket Businesses a specific reference to this Order, the remedial purposes thereof, and provisions to reflect the full scope and breadth of Respondent Top's obligations to the Acquirer(s) pursuant to this Order.

- D. Respondent Tops shall also include in each Remedial Agreement a representation that Respondent Tops shall use commercially reasonable efforts to assist the Acquirer to secure the Governmental Approval(s) necessary to operate the relevant Penn Traffic Supermarket Business.
- E. Respondent Tops shall not seek, directly or indirectly, pursuant to any dispute resolution mechanism incorporated in any Remedial Agreement, or in any agreement related to any of the Penn Traffic Supermarket Businesses a decision the result of which would be inconsistent with the terms of this Order and/or the remedial purposes thereof.
- F. Respondent Tops shall not modify or amend any of the terms of any Remedial Agreement without the prior approval of the Commission.

XI.

IT IS FURTHER ORDERED that this Order shall terminate on June 30, 2021.

By the Commission.

Decision and Order

SCHEDULE A

The Supermarkets at the following locations:

1. Penn Traffic Store No. 3115 operating under the P&C trade name, located at 404 W. Morris St., Bath, NY;
2. Penn Traffic Store No. 3095 operating under the P&C trade name, located at 160 Clinton Ave., Cortland, NY;
3. Penn Traffic Store No. 3107 operating under the P&C trade name, located at 315 Pine Tree Rd., Ithaca, NY;
4. Penn Traffic Store No. 3123 operating under the P&C trade name, located at 2309 N. Triphammer Rd., Ithaca, NY;
5. Penn Traffic Store No. 6643 operating under the Quality Markets trade name, located at 7134 Rochester Rd., Lockport, NY;
6. Penn Traffic Store No. 3139 operating under the P&C trade name, located at 448 N. Keystone Ave., Sayre, PA; and
7. Penn Traffic Store No. 3195 operating under the P&C trade name, located at 1730 Elmira St., Sayre, PA.

Order to Maintain Assets

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Tops Markets LLC (“Tops”), a subsidiary of Morgan Stanley Capital Partners V U.S. Holdco LLC (“Holdco”), of certain assets of Respondent The Penn Traffic Company (“Penn Traffic”), and Respondents having been furnished thereafter with a copy of a draft of 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 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 had 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 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 issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

Order to Maintain Assets

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

ORDER**I.**

IT IS ORDERED that, as used in this Order to Maintain Assets, the following definitions and the definitions used in the Consent Agreement and the proposed Decision and Order (and when made final, the Decision and Order), which are incorporated herein by reference and made a part hereof, shall apply:

- A. “Tops” means Tops Markets LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Tops Markets LLC, and the respective directors, officers,

Order to Maintain Assets

employees, agents, representatives, successors, and assigns of each.

- B. “Penn Traffic” means The Penn Traffic Company, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by The Penn Traffic Company, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Holdco” means Morgan Stanley Capital Partners V U.S. Holdco LLC, its directors, officers, employees, agents, representatives, successors, and assigns; and its joint ventures, subsidiaries, divisions, groups and affiliates in each case controlled by Morgan Stanley Capital Partners V U.S. Holdco LLC, and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- D. “Respondents” mean Tops, The Penn Traffic Company, and Holdco, individually and collectively.
- E. “Commission” means the Federal Trade Commission.
- F. “Acquired Supermarkets” means the Supermarkets acquired by Respondent Tops pursuant to the Acquisition that (1) are not subject to divestiture pursuant to the Decision and Order and (2) are continuing to be operated by Respondent Tops.
- G. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final Decision and Order by the Commission; and

Order to Maintain Assets

2. Final Decision and Order issued by the Commission following the issuance and service of a final Decision and Order by the Commission in this matter.
- H. “Interim Monitor” means any monitor appointed pursuant to Paragraph III of this Order to Maintain Assets or Paragraph V of the Decision and Order.
- I. “Orders” means the Decision and Order and this Order to Maintain Assets.

II.

IT IS FURTHER ORDERED that from the date this Order to Maintain Assets becomes final:

- A. Until the Closing Date for each respective Penn Traffic Supermarket Business, Respondents shall take such actions as are necessary to maintain the full economic viability, marketability and competitiveness of such Penn Traffic Supermarket Business(es), to minimize any risk of loss of competitive potential for such Penn Traffic Supermarket Business(es), and to prevent the destruction, removal, wasting, deterioration, or impairment of such Penn Traffic Supermarket Business(es) except for ordinary wear and tear. Respondents shall not sell, transfer, encumber or otherwise impair the Penn Traffic Supermarket Business Assets (other than in the manner prescribed in the Decision and Order) nor take any action that lessens the full economic viability, marketability or competitiveness of the Penn Traffic Supermarket Businesses.
- B. Until the Closing Date, Respondents shall maintain the operations of the Penn Traffic Supermarket Businesses in the regular and ordinary course of business and consistent with past practice (including regular repair and

Order to Maintain Assets

maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Penn Traffic Supermarket Businesses and shall use their best efforts to preserve goodwill and appropriate business relationships with the following: suppliers; vendors and distributors; customers; Agencies; employees; and others having business relations with the Penn Traffic Supermarket Businesses. Respondents' responsibilities shall include, but are not limited to, the following:

1. providing each of the Penn Traffic Supermarket Businesses with sufficient working capital to operate at least at current rates of operation and to meet all capital calls with respect to such business to carry on, at least at their scheduled pace, all critical infrastructure replacement and repair projects and all ordinary course activities for each of the Penn Traffic Supermarket Businesses;
2. providing such resources as may be necessary to respond to competition and/or to prevent any diminution in sales of each of the Penn Traffic Supermarket Businesses after the Acquisition process and prior to the complete divestiture, transfer and delivery of the related Penn Traffic Supermarket Business Assets to an Acquirer;
3. providing such resources and funding as may be necessary to maintain the competitive strength and positioning of each of the Penn Traffic Supermarket Businesses including such funds as are sufficient to:
 - a. perform all routine maintenance and all other maintenance as may be necessary to maintain or replace the assets related to such Penn Traffic Supermarket Business; and

Order to Maintain Assets

- b. provide appropriate levels of distribution, marketing and advertising (including, without limitation, circulars, newspaper advertisements, direct mailers, checkout reward coupons), marketing, promotion and sales expenditures for each of the Penn Traffic Supermarket Businesses;
- 4. providing such support services to the Penn Traffic Supermarket Businesses as were being provided to such businesses by Respondent Penn Traffic as of the date the Consent Agreement was signed by Respondents; and
- 5. maintaining a work force at least as equivalent in size, training, and expertise to what has been associated with each of the Penn Traffic Supermarket Businesses for the relevant supermarket location's last fiscal year including, without limitation, maintaining at current levels all full time equivalent employee hours, and where necessary, increasing such full time equivalent employee hours at each of the Penn Traffic Supermarket Businesses;
- 6. maintaining the inventory of each of the Penn Traffic Supermarket Businesses at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained at such business by Respondent Penn Traffic and as may be necessary to accommodate all advertising and promotions offered by Respondent Tops within the Relevant Geographic Market and not transferring inventory from any of the Penn Traffic Supermarket Businesses other than in the ordinary course of business consistent with past practices;
- 7. maintaining the Trademarks, Trade Dress, service marks, or trade names of Respondent Penn Traffic at each of the Penn Traffic Supermarket Businesses;

Order to Maintain Assets

8. keeping the organization and properties of each of the Penn Traffic Supermarket Businesses intact, including current business operations (including regular hours of operation of the Supermarket and its individual departments), physical facilities, and working conditions;
9. maintaining all operations, programs (including customer loyalty and continuity, reward coupons, discounts, or such similar programs) and departments at each of the Penn Traffic Supermarket Businesses in a manner equivalent to the Acquired Supermarkets;
10. making any payment required to be paid under any contract or lease when due, and otherwise paying all liabilities and satisfy all obligations, for each of the Penn Traffic Supermarket Businesses, in each case in a manner consistent with the practices for the Acquired Supermarkets;
11. maintaining the books and records (including customer loyalty data) of each of the Penn Traffic Supermarket Businesses;
12. not displaying any signs or conducting any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations to another location, or that indicates any of the Penn Traffic Supermarket Businesses will close;
13. not conducting any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any of the Penn Traffic Supermarket Businesses; and

Order to Maintain Assets

14. not terminating the operation of any of the Penn Traffic Supermarket Businesses.

- C. Until Respondent Tops fully and finally divests, transfers and delivers a particular Penn Traffic Supermarket Business Asset to an Acquirer, Respondents shall maintain the full economic viability, marketability and competitiveness of such Penn Traffic Supermarket Business Asset, shall prevent its destruction, removal, wasting, deterioration, or impairment and shall maintain such Penn Traffic Supermarket Business Asset in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance).
- D. Until the Closing Date, Respondents shall provide all management level employees that are associated with each of the Penn Traffic Supermarket Businesses with reasonable financial incentives to continue in their positions and to manage, market, and promote each of the Penn Traffic Supermarket Businesses consistent with such practices at the Acquired Supermarkets and/or as may be necessary to preserve the marketability, viability and competitiveness of each Penn Traffic Supermarket Business pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Tops until the Closing Date, including regularly scheduled raises, bonuses, and additional incentives as may be necessary to prevent any diminution of each of the Penn Traffic Supermarket Businesses's competitiveness.
- E. For a period of one (1) year from the Closing Date, Respondents shall not interfere with the hiring or employing by the Acquirer of the particular Penn Traffic Supermarket Business of the related Supermarket Employees, and shall remove any impediments within the

Order to Maintain Assets

control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Supermarket Employee who receives a written offer of employment from the Acquirer;

provided, however, that this Paragraph shall not prohibit Respondents from continuing to employ any Supermarket Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee.

- F. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Penn Traffic Supermarket Businesses through the divestiture, transfer and delivery of the related Penn Traffic Supermarket Business Assets to an Acquirer or Acquirers, to minimize any risk of loss of competitive potential for the Penn Traffic Supermarket Businesses and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Penn Traffic Supermarket Business Assets except for ordinary wear and tear.

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

- A. At any time after Respondent Tops sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and

Order to Maintain Assets

perform all of their responsibilities as required by the Orders and the Remedial Agreements.

- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Tops, which consent shall not be unreasonably withheld. If Respondent Tops has not opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Tops of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.
- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent Tops shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;

Order to Maintain Assets

2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and
 3. the Interim Monitor shall serve until the date of completion by Respondent Tops of the divestiture of all of the Penn Traffic Supermarket Business Assets in a manner that fully satisfies the requirements of the Decision and Order; *provided further*, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.
- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent Tops, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent Tops, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.
- G. Respondent Tops shall indemnify the Interim Monitor and

Order to Maintain Assets

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

- H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by each Respondent, and any reports submitted by the Acquirer with respect to the performance of such Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders.
- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however,* that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate

Order to Maintain Assets

confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.

- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same Entity appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that not later than thirty (30) days after the Respondents sign the Agreement Containing Consent Order, and every thirty (30) days thereafter until Respondent Tops has fully complied with its obligations to divest, assign, grant, license, transfer, deliver or otherwise convey the Penn Traffic Supermarket Business Assets as required by Paragraph II.A. of the Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order to Maintain Assets and the related Decision and Order; *provided, however,* that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VII of the Decision and Order.

Order to Maintain Assets

V.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to:

- A. any proposed dissolution of a Respondent;
- B. any proposed acquisition, merger or consolidation of a Respondent; or
- C. any other change in a Respondent including, but not limited to, assignment and the creation or dissolution of subsidiaries, if such change might affect compliance obligations arising out of the Orders.

VI.

IT IS FURTHER ORDERED that, for purposes of determining or securing compliance with this Order to Maintain Assets, and subject to any legally recognized privilege, and upon written request and upon five (5) days notice to a Respondent made to its principal United States offices or headquarter's address, such Respondent shall, without restraint or interference, permit any duly authorized representative of the Commission:

- A. access, during business office hours of Respondent 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 Respondent related to compliance with the Orders, which copying services shall be provided by Respondent at the request authorized representative(s) of the Commission and at the expense of the Respondent; and

Order to Maintain Assets

- B. to interview officers, directors, or employees of such Respondent, who may have counsel present, regarding such matters.

VII.

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

- A. Three (3) 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. The later of:
 - 1. The day after the divestiture of all of the Penn Traffic Supermarket Business Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or
 - 2. Three (3) days after the related Decision and Order becomes final.

By the Commission.

Analysis to Aid Public Comment

**ANALYSIS OF AGREEMENT CONTAINING CONSENT
ORDERS TO AID PUBLIC COMMENT****Introduction and Background**

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

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

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

Analysis to Aid Public Comment

operated competing supermarkets. In light of this extraordinary set of circumstances, the Commission determined that this unique remedy would best serve the interests of consumers.

In particular, before the Acquisition was consummated, Respondents agreed in writing to divest all of the Penn Traffic stores in each local geographic market in which the transaction presented potential competitive concerns. Respondents further agreed to maintain the viability of the acquired stores and to cooperate fully with staff's investigation, which continued after the Acquisition was consummated. As a result of this agreement, even before a meaningful investigation could be completed, Respondents had committed themselves in writing to the broadest relief that might ultimately be necessary, thereby preserving completely the Commission's ability to protect consumers through remedial action, while at the same time enabling Tops to consummate the Acquisition and prevent the mass shuttering of Penn Traffic stores.

In accordance with the agreement reached between Respondents and staff, early termination of the HSR waiting period was granted on January 25, 2010. A few days later, Respondents closed on the Acquisition.

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

The Parties

Tops is a New York limited liability company with its office and principal place of business in Williamsville, New York. Prior to the

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

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

The Proposed Complaint

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

As alleged in the proposed Complaint, supermarkets compete principally with other supermarkets and base their prices primarily on the prices of food and grocery products sold in other supermarkets. Other types of retail stores, including neighborhood “mom & pop” grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores (*e.g.*, ALDI, Save-A-Lot), and mass merchants, do not, individually or collectively, effectively constrain the prices of food and grocery products in supermarkets because they

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do not offer a supermarket's distinct set of products and services that provide consumers with the convenience of one-stop shopping for food and grocery products. Although stores such as limited assortment stores do sell food and certain other grocery items, they do not offer the breadth of services and products sold at supermarkets and thus do not provide an effective constraint on prices in supermarkets. The evidence and the Commission's conclusions on these issues are consistent with its prior supermarket investigations.

The relevant geographic markets in which to analyze the likely competitive effects of the Acquisition are: Bath, New York; Cortland, New York; Ithaca, New York; Lockport, New York; and Sayre, Pennsylvania. All of these relevant markets were already highly concentrated before the Acquisition, and the Acquisition has substantially increased concentration in each of these markets, as measured by the Herfindahl Hirschman Index ("HHI"). Post-Acquisition HHIs in the relevant geographic markets range from 5,000 to 10,000, and the Acquisition has increased HHI levels by between 1,145 and 4,996 points. The high concentration levels and staff's ultimate conclusions regarding the competitive harm likely to result from the acquisition are not sensitive to changes in the precise contours of the relevant geographic markets. Indeed, the transaction would be presumptively unlawful in the geographic areas at issue even if the relevant geographic markets were defined by radii as large as fifteen to twenty miles.

According to the proposed Complaint, the Acquisition has substantially lessened competition in the relevant markets by eliminating direct competition between Tops and Penn Traffic, by increasing the likelihood that Tops will unilaterally exercise market power, and by increasing the likelihood of successful coordinated interaction among the remaining firms. Absent relief, the ultimate effect of the Acquisition would be to increase the likelihood that prices of food and other grocery products would rise above competitive levels, or that there would be a decrease in the quality or selection of food, other grocery products, or services.

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For the entry of a new competitor or the expansion of an existing competitor to deter or counteract the anticompetitive effects of an acquisition, entry must be timely, likely, and sufficient. According to the proposed Complaint, new entry or expansion by supermarket competitors in the relevant geographic markets is unlikely to deter the alleged anticompetitive effects of the Acquisition. The affected markets are insulated from new entry or expansion by significant entry barriers, including the time and costs associated with the need to conduct market research, select an appropriate location for the supermarket, obtain necessary permits and approvals, construct a new supermarket or convert an existing structure to a supermarket, and generate sufficient sales to have a meaningful impact on the market. Commission staff evaluated and considered pending and potential future entry by supermarket competitors in each of the affected geographic markets, as well as entry by other retailers such as mass merchants. In many of the markets, there is unlikely to be any entry in a time period that would prevent the anticompetitive effects. And, in those markets where entry may occur in the near future, the acquisition, despite new entry, still would result in highly concentrated markets, and that entry would not eliminate the anticompetitive harm of the acquisition.

The Proposed Consent Agreement

The proposed Consent Agreement includes two proposed orders: a Decision and Order and an Order to Maintain Assets (collectively “Consent Orders”). The purpose of the proposed Consent Agreement is to: (1) ensure the continued use, and provide for the future use, of the Penn Traffic supermarket assets, subject to divestiture, in the operation of supermarkets at the respective locations; (2) create a viable and effective competitor that is independent of the Respondents in the operation of supermarkets in the relevant geographic markets; and (3) remedy the lessening of competition that has resulted from the Acquisition.

To achieve the above goals, the proposed Consent Agreement requires the divestiture of seven Penn Traffic supermarkets, together

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

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

Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for thirty (30) days to solicit comments from interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will again

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review the proposed Consent Agreement, as well as the comments received, and will decide whether to withdraw its acceptance of the proposed Consent Agreement or issue its final Consent Orders.

The sole purpose of this analysis is to facilitate public comment on the proposed Consent Agreement. This analysis does not constitute an official interpretation of the proposed Consent Agreement, nor does it modify its terms in any way.

INTERLOCUTORY, MODIFYING,
VACATING, AND MISCELLANEOUS
ORDERS

THE NORTH CAROLINA BOARD OF DENTAL EXAMINERS

Docket No. 9343. Order, January 21, 2011

Order denying respondent's request to postpone the commencement of the administrative trial pending the Commission's consideration of the parties' dispositive motions.

ORDER DENYING EXPEDITED MOTION FOR A LATER HEARING
DATE

The Federal Trade Commission issued the Administrative Complaint in the above-captioned matter on June 17, 2010, and it provides -- consistent with Commission Rule 3.11(b)(4), 16 C.F.R. § 3.11(b)(4) -- that the administrative hearing in this matter shall begin on February 17, 2011. On November 2, 2010, Complaint Counsel filed a Motion For Partial Summary Decision ("Summary Decision Motion"), and on November 3, 2010, Respondent filed a Motion To Dismiss. Respondent has now filed an Expedited Motion For A Later Hearing Date ("Expedited Motion"), requesting that the Commission postpone the beginning of the administrative hearing until May 18, 2011. Counsel for Respondent advise that Complaint Counsel intend to oppose the Expedited Motion.

On November 15, 2010, the Commission issued an Order denying Respondent's Motion to stay the proceedings until Respondent's Motion To Dismiss had been determined on the merits. As the Commission noted in that Order, Commission Rule 3.22(b) provides:

A motion under consideration by the Commission shall not stay proceedings before the Administrative Law Judge unless the Commission so orders.¹

¹ Order Denying Motion For Stay of Proceeding at 1 (Nov. 15, 2010) (hereinafter November 15 Order) (quoting 16 C.F.R. § 3.22(b)).

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Thus, when the Commission promulgated the current version of Commission Rule 3.22(b), it stated:

The purpose of proposed paragraph [3.22](b) was to ensure that discovery and other prehearing proceedings continue while the Commission deliberates over the dispositive motions²

Commission Rules 3.21(c)(1) and 3.41(b) provide that the Commission may, “upon a showing of good cause,” postpone the commencement of the evidentiary hearing. Respondent argues that good cause exists “when a scheduling order deadline ‘cannot be met despite the diligence of the party seeking the extension.’” Expedited Motion at 3 (citations omitted). Respondent argues further that the following developments support a finding of good cause: (1) discovery is ongoing; (2) the Summary Decision Motion, the Motion To Dismiss, and Respondent’s January 14, 2011 Motion To Disqualify the Commission are pending; and (3) Respondent’s Motion For An Order Compelling Discovery is pending. Expedited Motion at 3-7.

None of these circumstances provides any support for the requisite showing of good cause, and in particular, Respondent has not established that it cannot meet the deadlines at issue. With respect to discovery, Chief Administrative Law Judge Chappell issued the Scheduling Order in this matter on July 15, 2010; the Order provides a detailed set of deadlines for all components of the discovery process; and Respondent has thus been aware of that schedule for more than five months. With respect to pending Motions, the Commission has already determined that the pendency of the Summary Decision Motion and the Motion To Dismiss does

² Federal Trade Commission, 16 C.F.R. Parts 3 and 4: Rules of Practice: Interim Final Rules With Request For Comment, 74 Fed. Reg. 1804, 1810 (Jan. 13, 2009), *adopted as final*, 74 Fed. Reg. 20205 (May 1, 2009). The amendments thus effected govern all Commission adjudicatory proceedings commenced after January 13, 2009, such as this proceeding. *See* 74 Fed. Reg. at 1804.

Interlocutory Orders, Etc.

not warrant staying the proceedings,³ and the filing of the Motion To Disqualify provides no support for a different conclusion. With respect to the Motion To Compel, the ALJ has now issued an order denying that motion.⁴

As this discussion establishes, Respondent has not given the Commission any reason to depart from our preference to move Part 3 matters expeditiously. Accordingly,

IT IS ORDERED THAT Respondent's Expedited Motion For A Later Hearing Date be, and it hereby is, denied.

By the Commission, Commissioner Brill recused.

³ November 15 Order at 2.

⁴ Order Denying Respondent's Motion To Compel (Jan. 20, 2011).