

Complaint

IN THE MATTER OF

**KONINKLIJKE AHOLD N.V.
AND
SAFEWAY INC.****CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATIONS OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SECTION 7 OF THE CLAYTON ACT**

*Docket No. C-4367; File No. 121 0055
Complaint, August 16, 2012 – Decision, August 16, 2012*

This consent order addresses the \$106 million acquisition by Koninklijke Ahold N.V. of certain assets of Safeway Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by removing an actual, direct, and substantial supermarket competitor from the Newtown, Pennsylvania, geographic market. The consent order requires Respondents Ahold and Safeway to divest the assets of the Genuardi's in Newtown to McCaffrey's.

Participants

For the *Commission*: Jill M. Frumin and Michelle M. Yost.

For the *Respondents*: Douglas M. Jasinski and George Paul, White & Case LLP; Richard Weisberg, Law Offices of Richard C. Weisberg.

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 Koninklijke Ahold N.V. ("Ahold"), a corporation, and Respondent Safeway Inc. ("Safeway"), 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 Ahold acquired certain assets of Safeway, 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

Complaint

a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. RESPONDENTS

1. Respondent Ahold is a corporation organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at Piet Heinkade 167-173, Amsterdam 1019-GM.

2. Respondent Safeway 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 5918 Stoneridge Mall Road, Pleasanton, California 94588. Respondent Safeway operates supermarkets under a number of different banners, including Genuardi's.

II. JURISDICTION

3. Respondent Ahold 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.

4. Respondent Safeway 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. THE PROPOSED ACQUISITION

5. On or about January 4, 2012, Respondents Ahold and Safeway entered into an agreement pursuant to which Ahold would acquire 16 Genuardi's supermarkets owned and operated by Respondent Safeway. The purchase price was approximately \$106 million.

6. Prior to its proposed acquisition, Respondent Ahold owned and operated more than 750 supermarkets in 11 states and the District of Columbia. The Giant Carlisle division of

Complaint

Respondent Ahold operates 49 supermarkets in eastern Pennsylvania, which includes the Philadelphia metropolitan area.

7. Prior to the proposed acquisition, Respondent Safeway owned and operated more than 1,775 supermarkets throughout the United States. Respondent Safeway operated 37 supermarkets in the Philadelphia metropolitan area under the Genuardi's banner.

8. The proposed acquisition would combine two of three retail sellers of food and other grocery products in supermarkets in the Newtown, Pennsylvania, area. Respondent Ahold and Respondent Safeway both own and operate supermarkets in this area and compete and promote their businesses in this area.

IV. THE RELEVANT PRODUCT MARKET

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

10. 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.

11. 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 items, typically referred to as stock-keeping units or SKUs, 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.

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

Complaint

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

13. Although retail stores other than supermarkets also sell food and grocery products, including neighborhood “mom & pop” grocery stores, convenience stores, specialty food stores, club stores, limited assortment stores, and mass merchants, these types of stores do not, individually or collectively, provide sufficient competition to 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 but significant price increase by supermarkets.

V. THE RELEVANT GEOGRAPHIC MARKET

14. Customers shopping at supermarkets are motivated by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers’ grocery shopping occurs at stores located very close to where they live.

15. Respondents operate supermarkets under the Giant and Genuardi’s banners within approximately two miles of each other in the Newtown, Pennsylvania area. The primary trade areas of the two stores overlap significantly.

16. The relevant geographic market in which to assess the competitive effects of the acquisition is a roughly three to three-and-a-half mile area surrounding Newtown, which includes Newtown Township, Newtown Borough, and the portion of Middletown Township north of the line formed by Bridgetown Pike and Langhorne-Yardley Road in Bucks County, Pennsylvania. A hypothetical monopolist controlling all

Complaint

supermarkets in this area could profitably raise prices by a small but significant amount.

VI. MARKET CONCENTRATION

17. The relevant market is already highly concentrated, and the acquisition will substantially increase concentration, whether measured by the Herfindahl Hirschman Index (“HHI”) or the number of competitively significant firms remaining in the market post-acquisition. Post-acquisition HHI in the relevant geographic market is 5,017 when measured by total square footage and 5,000 when measured by revenues. The acquisition would increase HHI levels by 1,373 points for square footage and by 1,221 points for revenues. These market concentration levels give rise to a presumption that the acquisition is unlawful in the Newtown, Pennsylvania, geographic market.

18. The acquisition reduces the number of supermarket competitors in the relevant geographic market from three to two.

VII. ENTRY CONDITIONS

19. Entry into the relevant market would not be timely, likely, or sufficient in magnitude to prevent or deter the likely anticompetitive effects of the acquisition. Significant entry barriers include the time and costs associated with conducting necessary market research, selecting an appropriate location for the supermarket, obtaining necessary permits and approvals, constructing a new supermarket or converting an existing structure to a supermarket, and generating sufficient sales to have a meaningful impact on the market.

VIII. EFFECTS OF THE ACQUISITION

20. The acquisition, if consummated, may substantially lessen competition for the retail sale of food and other grocery products in supermarkets in the relevant geographic market identified in Paragraph 16 in the following ways, among others:

- a. by eliminating rivalry and competitive initiatives between Respondents Ahold and Safeway;

Decision and Order

- b. by increasing the likelihood that Respondent Ahold will unilaterally exercise market power; or
- c. by increasing the likelihood of, or facilitating, coordinated interaction between the remaining two participants in the relevant market.

21. 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.

IX. VIOLATIONS CHARGED

22. The agreement described in Paragraph 5 constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and the acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this sixteenth day of August, 2012, issues its complaint against said Respondents.

By the Commission.

DECISION AND ORDER
[Redacted Public Version]

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Koninklijke Ahold N.V. (“Ahold”) of certain assets of Safeway Inc. (“Safeway”), hereinafter referred to as “Respondents,” and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to

Decision and Order

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

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having 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 Koninklijke Ahold N.V. is a corporation organized, existing, and doing business under and by virtue of the laws of the Netherlands, with its office and principal place of business located at Piet Heinkade 167-173, Amsterdam 1019-GM. Ahold U.S.A., Inc., a subsidiary of Koninklijke Ahold N.V., 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 1385 Hancock Street, Quincy, MA 02160.
2. Respondent Safeway Inc. is a corporation organized, existing, and doing business under and by virtue of the

Decision and Order

laws of the State of Delaware, with its office and principal place of business located at 5918 Stoneridge Mall Road, Pleasanton, CA 94588.

3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

ORDER**I.**

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

- A. “Ahold” means Koninklijke Ahold N.V, its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, subsidiaries (including, but not limited to, Ahold U.S.A. and Giant Food Stores, LLC), divisions, groups, and affiliates controlled by Ahold and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Safeway” means Safeway Inc., its directors, officers, employees, agents, representatives, predecessors, successors, and assigns; its joint ventures, partnerships (including, but not limited to, Genuardi’s Family Markets LP), subsidiaries, divisions, groups, and affiliates controlled by Safeway and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Respondents” means Ahold and Safeway, individually and collectively.
- D. “Acquisition” means Ahold’s acquisition of certain Genuardi’s supermarkets, owned and operated by Safeway, in the greater Philadelphia, PA, area pursuant to the Acquisition Agreement.

Decision and Order

- E. “Acquisition Agreement” means the Asset Purchase Agreement by and among Genuardi’s Family Markets LP, Safeway Inc., and Giant Food Stores, LLC, dated January 4, 2012, together with the Schedules and Exhibits attached thereto, as the same may be amended from time to time in accordance with the terms hereof.
- F. “Commission-approved Acquirer” means the entity approved by the Commission to acquire the Genuardi’s Supermarket Assets pursuant to this Order.
- G. “Divestiture Agreement” means any agreement between the Respondents and a Proposed Acquirer (or a trustee appointed pursuant to Paragraph III. of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to divestiture of the Genuardi’s Supermarket Assets, that have been submitted to the Commission for its approval to accomplish the requirements of this Order. The term “Divestiture Agreement” includes, as appropriate, the McCaffrey’s Divestiture Agreement.
- 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. “Genuardi’s Supermarket” means the Supermarket operated by Genuardi’s Family Markets LP at 2890 South Eagle Road, Newtown, PA 18910, and includes the distribution, marketing, promotion, and sale of all products and services offered at this location.
- J. “Genuardi’s Supermarket Assets” means all Respondents’ rights, title and interest in and to all assets, tangible and intangible, used in, and/or reserved for use in, the Genuardi’s Supermarket, including as follows:
 - 1. Leasehold interest in the premises;
 - 2. Fixtures and equipment;

Decision and Order

3. Inventory;
4. Permits other than nontransferable permits;
5. Goodwill generated by or associated with the Genuardi's Supermarket;
6. Manufacturers' warranties solely in respect of the fixtures and equipment;
7. Phone and facsimile numbers at the Genuardi's Supermarket;
8. All prepaid expenses that are adjusted pursuant to the Divestiture Agreement; and
9. All property, title, liability, casualty and other insurance proceeds received or receivable under the Acquisition Agreement in connection with the damage or destruction of any of the foregoing assets that would have been included but for such damage or destruction, less the amount paid by Safeway in repairing or replacing such assets prior to the closing.

For the avoidance of doubt, the Genuardi's Supermarket Assets shall include all assets in connection with the Genuardi's Supermarket, as defined herein, that Respondent Ahold acquires from Respondent Safeway pursuant to the Acquisition Agreement; *provided, however*, that the assets shall not include those assets consisting of or pertaining to any of the Respondents' trademarks, trade dress, service marks, or trade names.

- K. "McCaffrey's" means a chain of supermarkets organized, existing and doing business under and by virtue of the laws of Pennsylvania and New Jersey, with its offices and principal place of business located at 2200 Cabot Boulevard West, Langhorne, PA 19047-1842.

Decision and Order

- L. “McCaffrey’s Divestiture Agreement” means the Agreement of Purchase and Sale of Assets and Assignment and Assumption of Lease made and entered into April 12, 2012, by and between Giant Food Stores, LLC, and an affiliate of McCaffrey’s.
- M. “Newtown, PA,” means Newtown Township, Newtown Borough and the portion of Middletown Township north of the line formed by Bridgetown Pike and Langhorne-Yardley Road in Bucks County, Pennsylvania, as depicted in the map attached to this Order as Appendix II.
- N. “Proposed Acquirer” means any proposed acquirer of the Genuardi’s Supermarket Assets submitted to the Commission for its approval under this Order; “Proposed Acquirer” includes, as appropriate, McCaffrey’s.
- O. “Supermarket” means any store that enables consumers to purchase substantially all of their weekly food and grocery shopping requirements in a single shopping visit with 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.
- P. “Third-Party Consents” means all consents from any person other than the Respondents, including all landlords that are necessary to effectuate the complete transfer to the Commission-approved Acquirer of the Genuardi’s Supermarket Assets.

Decision and Order

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

- A. Not later than ten (10) days after the date on which the Acquisition is consummated, Respondents shall divest the Genuardi's Supermarket Assets, absolutely and in good faith, as an ongoing business to McCaffrey's, pursuant to and in accordance with the McCaffrey's Divestiture Agreement, which is attached as non-public Appendix I.
- B. *Provided, however*, that if, prior to the date this Order becomes final, Respondents have divested the Genuardi's Supermarket Assets to McCaffrey's pursuant to the McCaffrey's Divestiture Agreement, and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
 - 1. McCaffrey's is not a Commission-approved Acquirer of the Genuardi's Supermarket Assets, then Respondents shall:
 - a. immediately rescind the transaction with McCaffrey's, and
 - b. divest the Genuardi's Supermarket Assets absolutely and in good faith, at no minimum price, to an acquirer that receives the prior approval of the Commission and only in a manner that receives the prior approval of the Commission, and otherwise comply with the obligations of Paragraph II, no later than sixty (60) days from the date the Commission notifies Respondents that McCaffrey's is not a Commission-approved Acquirer; or
 - 2. The manner in which the divestiture was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph III. of

Decision and Order

this Order, to effect such modifications to the manner of divesting the Genuardi's Supermarket Assets to McCaffrey's (including, but not limited to, entering into additional agreements or arrangements, or modifying the McCaffrey's Divestiture Agreement) as may be necessary to satisfy the requirements of this Order.

- C. Pending divestiture of the Genuardi's Supermarket Assets, Respondents shall:
1. Take such actions as are necessary to maintain the full economic viability, marketability, and competitiveness of the Genuardi's Supermarket, to minimize any risk of loss of competitive potential for the Genuardi's Supermarket, and to prevent the destruction, removal, wasting, deterioration, or impairment of the Genuardi's Supermarket Assets or the Genuardi's Supermarket, except for ordinary wear and tear; and
 2. Not sell, transfer, encumber, or otherwise impair the Genuardi's Supermarket Assets or the Genuardi's Supermarket (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 Genuardi's Supermarket.
- D. The Divestiture Agreement approved by the Commission:
1. Shall not limit or contradict, or be construed to limit or contradict, the terms of this Order, it being understood that nothing in this Order shall be construed to reduce any rights or benefits of any Commission-approved Acquirer or to reduce any obligations of Respondents under such agreement; and
 2. Shall be incorporated by reference into this Order and made a part hereof. Respondents shall comply

Decision and Order

with all terms of the Divestiture Agreement, and any breach by Respondents of any term of the Divestiture Agreement shall constitute a failure to comply with this Order. If any term of the Divestiture Agreement varies from the terms of this Order (“Order Term”), then to the extent that Respondents cannot fully comply with both terms, the Order Term shall determine Respondents’ obligations under this Order.

- E. Respondents shall obtain all required Third-Party Consents prior to the Acquisition.
- F. With respect to the McCaffrey’s Divestiture Agreement, no later than fifteen (15) days after signing the Consent Agreement (or with respect to a proposed divestiture to another Proposed Acquirer pursuant to another Divestiture Agreement, no later than fifteen (15) days after signing that Divestiture Agreement), Respondents shall provide an opportunity for McCaffrey’s (or that other Proposed Acquirer):
 - 1. To meet personally, and outside of the presence or hearing of any employee or agent of any Respondents, with any one or more of the employees of Genuardi’s Supermarket; and
 - 2. To make offers of employment to any one or more of the employees of Genuardi’s Supermarket;
- G. For a period of one (1) year from the date of the divestiture of the Genuardi’s Supermarket Assets to the Commission-approved Acquirer, Respondents shall not interfere with the hiring or employing by the Commission-approved Acquirer of employees of the Genuardi’s Supermarket, and shall remove any impediments within the control of Respondents that may deter these employees from accepting employment with such Commission-approved Acquirer including, but not limited to, any non-compete or confidentiality provisions of employment or other contracts with Respondents that would affect

Decision and Order

the ability or incentive of those individuals to be employed by such Commission-approved Acquirer. In addition, Respondents shall not make any counteroffer to any employees who receive a written offer of employment from such Commission-approved Acquirer; *provided, however*, that this sub-Paragraph shall not prohibit Respondents from continuing to employ any employees of Genuardi's Supermarket under the terms of such employee's employment with Respondents prior to the date of the written offer of employment from the Commission-approved Acquirer to such employee.

- H. The purpose of the divestiture is to ensure the continuation of the Genuardi's Supermarket as an ongoing viable enterprise engaged in the Supermarket business and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission's Complaint.

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

- A. If Respondents have not divested the Genuardi's Supermarket Assets as required by Paragraph II. of this Order, the Commission may appoint a trustee ("Divestiture Trustee") to divest the Genuardi's Supermarket Assets 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,

Decision and Order

pursuant to § 5(l) 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 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

Decision and Order

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 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' 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

Decision and Order

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 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,

Decision and Order

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 malfeasance, 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) 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 II.
- F. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture required by this Order.

IV.

IT IS FURTHER ORDERED that, for a period of ten (10) years commencing on the date this Order becomes final,

Decision and Order

Respondent Ahold 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 Newtown, PA; 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 Newtown, PA;

Provided, however, that advance written notification shall not apply to the construction of new facilities by Respondent Ahold or the acquisition or leasing of a facility that has not operated as a Supermarket within six (6) months prior to Respondent Ahold's 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 Respondent Ahold and not of any other party to the transaction. Respondent Ahold 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), Respondent Ahold 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

Decision and Order

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. Within sixty (60) days after the date this Order becomes final and every sixty (60) 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 divestiture 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
- 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, Respondent Ahold 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.

VI.

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

- A. Any proposed dissolution of such Respondents;

Decision and Order

- 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.

VII.

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

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

VIII.

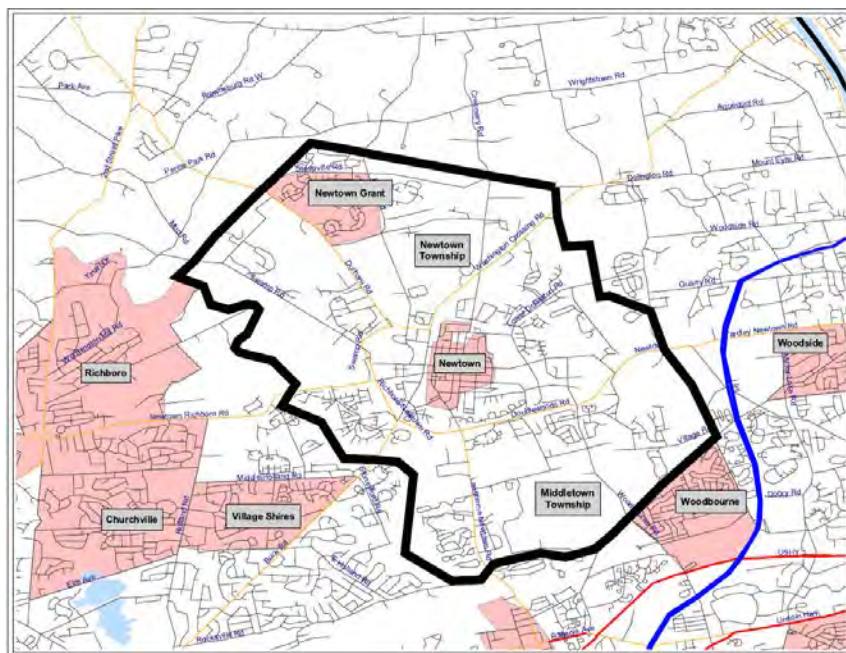
IT IS FURTHER ORDERED that this Order shall terminate on August 16, 2022.

By the Commission.

Confidential Appendix I

Appendix II

[Map of Newtown, Pennsylvania]



Analysis to Aid Public Comment

**ANALYSIS OF CONSENT ORDER TO AID PUBLIC
COMMENT****I. 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 Koninklijke Ahold N.V. (“Ahold”), its subsidiary, Giant Food Stores, LLC (“Giant”), Safeway Inc. (“Safeway”), and its subsidiary (“Genuardi’s”) (collectively “Respondents”), that is designed to remedy the anticompetitive effects that otherwise would result from Ahold’s acquisition of certain Genuardi’s supermarkets owned by Safeway. The proposed Consent Agreement requires divestiture of the Genuardi’s supermarket in Newtown, Pennsylvania, and its related assets to a Commission-approved purchaser. The proposed Consent Agreement also requires Ahold and Safeway to divest all related assets and real property necessary to ensure the buyer of the divested supermarket will be able to quickly and fully replicate the competition that would have been eliminated by the acquisition.

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission again will review the proposed Consent Agreement and comments received, and decide whether it should withdraw the Consent Agreement, modify it, or make it final without modification.

On January 4, 2012, Ahold and Safeway executed an agreement whereby Ahold would acquire 16 of the Genuardi’s supermarkets from Safeway. The Commission’s 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 removing an actual, direct, and substantial supermarket competitor from the Newtown, Pennsylvania, geographic market. The proposed Consent Agreement would remedy the alleged violations by requiring a divestiture that will replace competition that otherwise would be eliminated in this market as a result of the acquisition.

Analysis to Aid Public Comment

II. The Parties

Ahold owns or has an interest in 2,970 supermarkets and specialty stores in Europe and the United States. Net sales for 2010 were \$36.8 billion, which represents a 5.7% increase over 2009. Ahold USA is organized into four retail divisions: Giant Carlisle, Giant Landover, Stop & Shop New York Metro, and Stop & Shop New England. Peapod, a grocery delivery service, also is included within Ahold USA.

Safeway is one of the largest food-and-drug retailers in the United States. It operates over 1,700 stores across the United States under a variety of banners, including Vons in southern California and Nevada, Randalls and Tom Thumb in Texas, Carrs in Alaska, Genuardi's in suburban Philadelphia, and Safeway throughout the rest of the country. There were 36 Genuardi's stores operating in Pennsylvania, New York, and New Jersey when Safeway purchased the chain in February 2001. Safeway is exiting the Philadelphia metropolitan market by selling or closing all 24 remaining Genuardi's markets in eastern Pennsylvania (Bucks, Montgomery, Delaware, and Chester counties), as well as four stores in New Jersey.

III. Supermarket Competition in Newtown, Pennsylvania

Ahold's proposed acquisition of Genuardi's in Newtown presents antitrust concerns in the retail sale of groceries. Competition in food retailing depends on proximity in both retailing format and in geographic location. Stores with similar formats located nearby each other provide a greater competitive constraint on each other's pricing than do stores of different formats or stores located at a greater distance. Giant and Genuardi's have stores in the Newton area, and they have a very similar format.

Giant and Genuardi's compete as supermarket retailers of grocery products. Supermarkets are full-line retail grocery stores that sell thousands of food and non-food products that typical families regularly consume at home (*e.g.*, fresh meat and seafood, dairy products, frozen goods, beverages, bakery goods, dry groceries, soaps, detergents, and health and beauty aids) and offer these products in a variety of sizes and brands. Supermarkets are

Analysis to Aid Public Comment

large stores with at least 10,000 square feet of selling space and 30,000 to 60,000 different items, typically referred to as stock-keeping units or “SKUs.” This broad set of products and services provides a “one-stop shopping” experience for consumers by enabling them to shop in a single store for all of their food and grocery needs. The ability to offer consumers one-stop shopping is a critical differentiating factor between supermarkets and other food retailers.

Other types of retailers that sell food and grocery items compete less strongly with Giant and Genuardi’s. These others include “mom & pop” stores, convenience stores, specialty food stores, “premium natural and organic” markets,¹ mass merchants, and club stores. Although these types of retailers provide some level of competition to supermarkets, they do not have a supermarket’s full complement of products and services, which means that if customers elect to shop at these retailers, they also must shop at a supermarket in order to satisfy their weekly grocery needs. Because of this, shoppers at one supermarket are more likely to respond to a price increase by switching to another supermarket than to choose a store with a different format, if both are equally convenient.²

To evaluate the effects of the acquisition on market concentration levels, we define the product market to be the retail sale of grocery products in supermarkets, consistent with practice in all but one prior grocery retailing case settled by consent order.³

1 See *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869 (D.C. Cir. 2008).

2 Shoppers typically do not view these other food and grocery retailers as adequate substitutes for supermarkets and would be unlikely to switch to one of these retailers in response to a small but significant price increase or “SSNIP” by a hypothetical supermarket monopolist. See U.S. DOJ and FTC Horizontal Merger Guidelines § 4.1.1 (2010).

3 See, e.g., *Shaw’s/Star Markets*, Docket C- 3934 (June 28, 1999); *Kroger/Fred Meyer*, Docket C - 3917 (January 10, 2000); *Albertson’s/American Stores*, Docket C – 3986 (June 22, 1999); *Ahold/Giant*, Docket C - 3861 (April 5, 1999); *Albertson’s/Buttrey*, Docket C - 3838 (December 8, 1998); *Jitney-Jungle Stores of America, Inc.*, Docket C - 3784 (January 30, 1998). But see *Wal-Mart/Supermercados Amigo*, Docket C - 4066 (November 21, 2002) (the

Analysis to Aid Public Comment

Customers shopping at supermarkets are motivated primarily by convenience and, as a result, competition for supermarkets is local in nature. Generally, the overwhelming majority of consumers' grocery shopping occurs at stores located very close to where they live. Location is a critical component for closeness of competition between supermarkets. Supermarkets are a differentiated products industry with location serving as one of the primary drivers of differentiation and competition. A supermarket tends to be in most direct competition with those supermarkets located closest to it. Giant and Genuardi's are located approximately two miles from each other in the Newtown area, and the supermarkets' primary trade areas overlap significantly with each other. Acme is the only other supermarket operating in this area. The next-closest supermarket is located at least twice as far away as the Newtown supermarkets are to each other.

The relevant geographic market in which to measure concentration and analyze the competitive implications of Ahold's proposed acquisition of the Newtown Genuardi's is a roughly three to three-and-a-half mile circle measured from the center of Newtown and made up of the U.S. census tracts surrounding this area. Specifically, it consists of Newtown Township, Newtown Borough, and the portion of Middletown Township north of the line formed by Bridgetown Pike and Langhorne Yardley Road in Bucks County, Pennsylvania.

The Newtown, Pennsylvania, market for the sale of retail food and groceries in supermarkets is already highly concentrated, and would become significantly more so post-acquisition. The acquisition would reduce the number of supermarket competitors from three to two, creating a duopoly between Giant and Acme Markets. Under the Herfindal-Hirschman Index ("HHI"), which is the standard measure of market concentration under the 2010 Department of Justice and Federal Trade Commission Merger Guidelines, an acquisition is presumed to create or enhance market power or facilitate its exercise if it increases the HHI by

Commission's complaint alleged that in Puerto Rico, club stores should be included in a product market that included supermarkets because club stores in Puerto Rico enabled consumers to purchase substantially all of their weekly food and grocery requirements in a single shopping visit).

Analysis to Aid Public Comment

more than 200 points and results in a post-acquisition HHI that exceeds 2,500 points. Giant's proposed acquisition of the Newtown Genuardi's creates market concentration levels well in excess of these thresholds. The post-acquisition HHI is 5000-5017, representing an increase of between 1221-1373 from pre-acquisition levels.

Staff's investigation and analysis demonstrate that Giant and Genuardi's are close competitors that compete directly for grocery shoppers in Newtown. Because a substantial number of consumers in Newtown consider Giant's and Genuardi's stores to be close substitutes, a post-acquisition price increase at one (or both) of Giant's stores would be profitable because the other Giant-owned supermarket would likely recoup enough of the otherwise lost volume for the price increase to be profitable. Absent relief, the transaction may also facilitate tacit or express coordination since Acme would be Giant's only remaining competitor in Newtown post-acquisition. Given the transparency of pricing and promotional practices between supermarkets and the fact that supermarkets "price check" competitors in the ordinary course of business, reducing the number of nearby competitors from three to two may facilitate collusion between the remaining supermarket competitors by making coordination easier to establish and monitor.

New entry is unlikely to deter or counteract the likely anticompetitive effects of the proposed acquisition. Normally, as here, it takes two or more years for an entrant to secure a viable location, obtain the necessary permits and governmental approvals, build its retail establishment, and open to customers. Moreover, incumbent supermarkets often oppose entry efforts by competitor supermarkets, delaying further any potential entry into the relevant market. It is unlikely that entry sufficient to achieve a significant market impact would occur in a timely manner.

IV. The Proposed Consent Agreement

The proposed remedy, which requires the divestiture of the Genuardi's store in Newtown to a Commission-approved purchaser, will be sufficient to restore fully the competition that otherwise would be eliminated in the market as a result of the acquisition.

Analysis to Aid Public Comment

Respondents Ahold and Genuardi's have agreed to divest the Newtown Genuardi's supermarket to McCaffrey's. McCaffrey's appears to be a highly suitable purchaser, and is well-positioned to enter the relevant market and prevent the increase in market concentration and likely competitive harm that otherwise would have been caused by the acquisition.

All of the current McCaffrey's supermarkets are located outside the relevant geographic area. Its Yardley, Pennsylvania, store is approximately six miles, and approximately 15 minutes driving time, from the Genuardi's in Newtown. The Newtown Genuardi's is outside McCaffrey's primary service area and vice versa.

The proposed Order requires Respondents Ahold and Safeway to divest the assets of the Genuardi's to McCaffrey's no later than ten days following Ahold's acquisition of the 16 Genuardi's stores that are subject to the Asset Purchase Agreement. If McCaffrey's ultimately is not approved by the Commission to purchase the assets, Respondents must immediately rescind the divestiture and divest the Newtown Genuardi's assets to a buyer that receives the Commission's prior approval. The proposed Order contains additional provisions designed to ensure the adequacy of the proposed relief. For example, for a period of one year, the Order prohibits Respondents from interfering with the hiring of or employment of any employees currently working at the Newtown Genuardi's. Additionally, for a period of ten years, Ahold is required to give the Commission prior notice of plans to acquire a supermarket, or an interest in a supermarket, that has operated or is operating in Newtown, Pennsylvania.

V. Opportunity for Public Comment

The proposed Consent Agreement has been placed on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will again review the proposed Consent Agreement, as well as the comments received, and will decide whether to modify the proposed Consent Agreement, withdraw its acceptance of the proposed Consent Agreement, or issue its final Consent Orders.

Analysis to Aid Public Comment

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.

Complaint

IN THE MATTER OF

**COSTAR GROUP, INC.,
LONESTAR ACQUISITION SUB, INC.
AND
LOOPNET, INC.**

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

*Docket No. C-4368; File No. 111 0172
Complaint, August 29, 2012 – Decision, August 29, 2012*

This consent order addresses the \$860 million acquisition by Lonestar Acquisition Sub, Inc., a wholly-owned subsidiary of CoStar Group, Inc., of certain assets of LoopNet, Inc. The complaint alleges that the acquisition, if consummated, would violate Section 7 of the Clayton Act and Section 5 of the Federal Trade Commission Act by eliminating actual, direct, and substantial competition between CoStar and LoopNet, and between CoStar and Xceligent, Inc., increasing the likelihood that CoStar will exercise market power unilaterally in the provision of commercial real estate listings databases and information services. The consent order requires the divestiture of certain LoopNet data to Xceligent and LoopNet's interest in Xceligent to DMG Information, Inc.

Participants

For the *Commission*: Rebecca P. Dick, Jessica S. Drake, J. Thomas Greene, Mara M. Grobins, Ashley M. Masters, Jeffrey S. Oliver, Justin Stewart-Teitelbaum, and Michelle A. Wyant.

For the *Respondents*: Kevin J. Arquit and Aimee Goldstein, Simpson Thacher & Bartlett LLP; Arthur Burke and Michael N. Sohn, Davis Polk & Wardwell LLP.

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act, and by virtue of the authority vested in it by the Act, the Federal Trade Commission ("Commission"), having reason to believe that Respondents CoStar Group, Inc. and Lonestar Acquisition Sub, Inc. (collectively "CoStar"), and LoopNet, Inc. ("LoopNet") have entered into an acquisition agreement that