

Complaint

IN THE MATTER OF

DOLLAR TREE, INC.
AND
FAMILY DOLLAR STORES, INC.

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

Docket C-4530; File No. 141 0207

Complaint, July 2, 2015 – Decision, September 16, 2015

This consent order addresses the \$9.2 billion acquisition by Dollar Tree of certain assets of Family Dollar. 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 competitor in localized geographic markets in 222 cities nationwide. The elimination of this competition would result in significant competitive harm; specifically the Acquisition will allow the combined entity to increase prices unilaterally above competitive levels. The consent order requires the divestiture of 330 Family Dollar stores to the private equity Sycamore within 150 days from the date of the Acquisition.

Participants

For the *Commission*: Lucas Ballet, Kimberly Biagioli, Timothy Carson, Michelle Fetterman, Stephanie Greco, Amanda Lewis, David Owyang and Sean Pugh.

For the *Respondents*: David A. Schwartz, Wachtell, Lipton, Rosen & Katz; Brian Byrne, Cleary Gottlieb Steen & Hamilton LLP.

COMPLAINT

Pursuant to the Clayton Act and the Federal Trade Commission Act (“FTC Act”), and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (“Commission”), having reason to believe that Respondent Dollar Tree, Inc. (“Dollar Tree”), a corporation subject to the jurisdiction of the Commission, agreed to acquire Respondent Family Dollar Stores, Inc. (“Family Dollar”), a corporation subject to the jurisdiction of the Commission, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the

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FTC Act, as amended, 15 U.S.C. § 45, 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. RESPONDENTS

1. Respondent Dollar Tree is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia with its headquarters and principal place of business located at 500 Volvo Parkway, Chesapeake, Virginia. Respondent Family Dollar is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware with its headquarters and principal place of business located at 10401 Monroe Road, Matthews, North Carolina.

II. JURISDICTION

2. Respondents, and each of their relevant operating subsidiaries and parent entities, are, and at all times relevant herein have 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 FTC Act, 15 U.S.C. § 44.

III. THE ACQUISITION

3. Pursuant to an Agreement and Plan of Merger dated as of July 27, 2014, as amended on September 4, 2014, Dollar Tree proposes to purchase all issued and outstanding common stock of Family Dollar in a transaction valued at approximately \$9.2 billion (“the Acquisition”).

IV. THE RELEVANT PRODUCT MARKET

4. The relevant line of commerce in which to analyze the Acquisition is no narrower than discount general merchandise retail stores. “Discount general merchandise retail stores” means small-format, deep-discount retailers that sell an assortment of consumables and non-consumables, including food, home products, apparel and accessories, and seasonal items, at prices typically under \$10 (*i.e.*, dollar stores) and the retailer Walmart.

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5. In certain geographic markets the relevant line of commerce may be as broad as the sale of discounted general merchandise in retail stores (*i.e.*, discount general merchandise retail stores as well as supermarkets, pharmacies, mass merchandisers, and discount specialty merchandise retail stores).

6. Whether the relevant line of commerce is discount general merchandise retail stores or the sale of discounted general merchandise in retail stores depends on the specifics of the geographic market at issue, such as population density and the density and proximity of the Respondents' stores and competing retailers.

V. THE RELEVANT GEOGRAPHIC MARKETS

7. The relevant geographic markets in which to analyze the competitive effects of the Acquisition are local markets. The size of the geographic market depends on the specific area at issue. In highly urban areas, the geographic markets are generally no broader than a half-mile radius around a given store. In highly rural areas, the geographic market is generally no narrower than a three-mile radius around a given store. In areas neither highly urban nor highly rural, the geographic market is generally within a half-mile to three-mile radius around a given store.

VI. ENTRY CONDITIONS

8. Entry into the relevant markets that is timely and sufficient to prevent or deter the expected anticompetitive effects of the Acquisition is unlikely. Entry barriers include the time, costs, and feasibility (which may be limited by restrictive-use covenants in lease agreements) associated with identifying and potentially constructing an appropriate and available location for a discount general merchandise retail store; the resources required to support one or more new stores over a prolonged ramp-up period; and the sufficient scale to compete effectively.

VII. EFFECTS OF THE ACQUISITION

9. The Acquisition, if consummated, is likely to substantially lessen competition in the relevant line of commerce in the following ways, among others:

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- a. by eliminating direct and substantial competition between Respondents Dollar Tree and Family Dollar; and
- b. by increasing the likelihood that Respondent Dollar Tree will unilaterally exercise market power.

10. The ultimate effect of the Acquisition would be to increase the likelihood that prices of discounted general merchandise will increase, and that the quality, selection, and services associated with the sale of such merchandise will decrease, in the relevant geographic markets.

VIII. VIOLATIONS CHARGED

11. The agreement described in Paragraph 4 constitutes a violation of Section 5 of the FTC 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 FTC Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this second day of July, 2015, issues its complaint against said Respondents.

By the Commission, Commissioner Wright dissenting.

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission ("Commission") having initiated an investigation of the proposed acquisition by Respondent Dollar Tree, Inc. ("Dollar Tree") of Respondent Family Dollar Stores, Inc. ("Family Dollar"), collectively "Respondents," 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

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

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

The Commission having thereafter considered the matter and having determined 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:

1. Respondent Dollar Tree is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its headquarters and principal place of business located at 500 Volvo Parkway, Chesapeake, Virginia 23320.
2. Respondent Family Dollar is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 10401 Monroe Road, Matthews, North Carolina 28105.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

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I.

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

- A. “Confidential Business Information” means information not in the public domain that is related to or used in connection with the Assets To Be Divested, except for any information that was or becomes generally available to the public other than as a result of disclosure by Respondents, and includes, but is not limited to, marketing, promotional, and sales information.
- B. “Control Dollar Stores” means the Dollar Stores identified on Confidential Appendix A of this Order.
- C. “Decision and Order” means the:
 - 1. Proposed Decision and Order contained in the Consent Agreement in this matter until the issuance of a final and effective Decision and Order by the Commission; and
 - 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.
- D. “Orders” means the Decision and Order in this matter and this Order to Maintain Assets.

II.

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

- A. Respondents shall maintain the viability, marketability, and competitiveness of the Assets To Be Divested, and shall not cause the wasting or

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deterioration of any of the Assets To Be Divested. Respondents shall not cause the Assets To Be Divested to be operated in a manner inconsistent with applicable laws, nor shall they sell, transfer, encumber, or otherwise impair the viability, marketability, or competitiveness of the Assets To Be Divested.

- B. Respondents shall conduct or cause to be conducted the business of the Assets To Be Divested in the regular and ordinary course of business, in accordance with past practice (including regular repair and maintenance efforts) and shall use best efforts to preserve the existing relationships with suppliers, customers, employees, and others having business relations with the Assets To Be Divested in the regular and ordinary course of business, in accordance with past practice.
- C. Respondents shall not terminate the operation of any of the Assets To Be Divested.
- D. Respondents shall continue to maintain the inventory of each of the Assets To Be Divested at levels and selections in the regular and ordinary course of business, in accordance with past practice.
- E. Respondents shall maintain the organization and properties of each of the Assets To Be Divested, including current business operations, physical facilities, working conditions, staffing levels, and a work force of equivalent size, training, and expertise associated with each of the Assets To Be Divested.
- F. Included in the above obligations, Respondents shall, without limitation:
 - 1. Maintain all operations at each of the Assets To Be Divested in the regular and ordinary course of business, in accordance with past practice, including maintaining customary hours of operation and departments;

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2. Use best efforts to retain employees at each of the Assets To Be Divested; when vacancies occur, replace the employees in the regular and ordinary course of business, in accordance with past practice; and not transfer any employees from any of the Assets To Be Divested;
3. Provide each employee of the Assets To Be Divested with reasonable financial incentives, including continuation of all employee benefits and regularly scheduled raises and bonuses, to continue in his or her position pending divestiture of the Assets To Be Divested;
4. Not transfer inventory from any Asset To Be Divested, other than in the ordinary course of business, in accordance with past practice;
5. Make all payments required to be paid under any contract or lease when due, and otherwise pay all liabilities and satisfy all obligations associated with each of the Assets To Be Divested, in each case in a manner in accordance with past practice;
6. Maintain the books and records of each of the Assets To Be Divested;
7. Not display any signs or conduct any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations at any Asset To Be Divested to another location, or that indicates an Asset To Be Divested will close;
8. Not conduct any “going out of business,” “close-out,” “liquidation,” or similar sales or promotions at or relating to any Asset To Be Divested;
9. Not materially change or modify the existing pricing or advertising practices, marketing, or merchandising programs and policies, or price zones for or applicable to any of the Assets To Be

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Divested, other than changes or modifications in the regular and ordinary course of business, in accordance with past practices and business strategy, and consistent with the changes or modifications applicable to Family Dollar Dollar Stores retained by Respondents;

10. Provide each of the Assets To Be Divested with sufficient working capital to operate at least at current rates of operation, to meet all capital calls with respect to such businesses, and to carry on, at least at their scheduled pace, all capital projects, business plans, and promotional activities for each of the Assets To Be Divested;
11. Continue, at least at their scheduled pace, any additional expenditures for each of the Assets To Be Divested authorized prior to the date the Consent Agreement was signed by Respondents including, but not limited to, all repairs, renovations, distribution, marketing, and sales expenditures;
12. Provide such resources as may be necessary to respond to competition and to prevent any diminution in sales at each of the Assets To Be Divested;
13. Make available for use by each of the Assets To Be Divested funds sufficient to perform all routine maintenance and all other maintenance as may be necessary to, and all replacements of, any assets related to the operation of the Dollar Stores at each of the Assets To Be Divested; and
14. Provide support services to each of the Assets To Be Divested at least at the level as were being provided to such Assets To Be Divested by Respondents as of the date the Consent Agreement was signed by Respondents.

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- G. The purpose of this Order to Maintain Assets is to: (1) maintain and preserve the Assets To Be Divested as viable, marketable, competitive, and ongoing businesses until the divestiture required by the Decision and Order is achieved; (2) ensure that no Confidential Business Information is exchanged between Respondents and the Assets To Be Divested, except in accordance with the provisions of the Orders; (3) prevent interim harm to competition pending the divestiture and other relief; and (4) remedy any anticompetitive effects of the Acquisition.

III.

IT IS FURTHER ORDERED that, pending divestiture of the Assets To Be Divested,

- A. Respondents shall:
1. Not use, directly or indirectly, any Confidential Business Information other than as necessary to comply with the following:
 - a. The requirements of these Orders;
 - b. Respondents' obligations to the Acquirer under the terms of any related Remedial Agreement;
or
 - c. applicable law;
 2. Not disclose or convey any such Confidential Business Information, directly or indirectly, to any Person except (i) the Acquirer, (ii) other Persons specifically authorized by such Acquirer to receive such information, (iii) the Commission, or (iv) the Monitor (if any has been appointed);
 3. Not disclose or convey, directly or indirectly, any such Confidential Business Information that is exclusively related to the marketing, promotional activities, or sales of the Assets To Be Divested to

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employees with responsibilities relating to the marketing, promotional activities, or sales of those Dollar Stores that were owned or operated by Dollar Tree at the time the Consent Agreement was signed by the parties; and

4. Institute procedures and requirements to ensure that the above-described employees:
 - a. Do not disclose or convey, directly or indirectly, any Confidential Business Information in contravention of this Order to Maintain Assets; and
 - b. Do not solicit, access, or use any Confidential Business Information that they are prohibited from receiving for any reason or purpose.
- B. Not later than thirty (30) days from the earlier of (i) the Divestiture Date or (ii) the date this Order to Maintain Assets is issued by the Commission, Respondents shall provide written notification of the restrictions on the use and disclosure of the Confidential Business Information by Respondents' personnel to all of their employees who (i) may be in possession of such Confidential Business Information or (ii) may have access to such Confidential Business Information.
- C. Respondents shall give the above-described notification by e-mail with return receipt requested or similar transmission, and keep a file of those receipts for one (1) year after the Divestiture Date. Respondents shall maintain complete records of all such notifications at Respondents' registered office within the United States and shall provide an officer's certification to the Commission stating that the acknowledgment program has been implemented and is being complied with. At the request of the Acquirer, Respondents shall provide the Acquirer with copies of all certifications sent to the Commission and all notifications and reminders sent to Respondents'

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personnel related to restrictions on the use and disclosure of the Confidential Business Information.

- D. Respondents shall monitor the implementation by its employees, and other personnel, of all applicable restrictions with respect to Confidential Business Information, and take corrective actions, for the failure of such employees and personnel to comply with such restrictions, or to furnish the written agreements and acknowledgments required by this Order to Maintain Assets.

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

- A. Gary Smith shall serve as 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, including any Transition Services Agreement approved by the Commission.
- B. Respondents shall enter into the Monitor Agreement with the Monitor that is attached as Appendix B. The Monitor Agreement shall become effective on the date this Order To Maintain Assets is issued. Respondents shall transfer to, and confer upon, the Monitor all rights, powers, and authority necessary to permit the Monitor to perform his duties and responsibilities pursuant to this Order to Maintain Assets in a manner consistent with the purposes of the Orders, and in consultation with Commission staff, and shall require that the Monitor act in a fiduciary capacity for the benefit of the Commission. Respondents shall assure that, and the Monitor Agreement shall provide that:
1. The Monitor shall have the responsibility for monitoring the operations and transfer of the Assets To Be Divested; overseeing the maintenance of the Assets To Be Divested; overseeing the provision of support services;

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ensuring that the Assets To Be Divested receive continued and adequate funding by Respondents, as provided for in this Order; and monitoring Respondents' compliance with their obligations pursuant to the Orders and the Remedial Agreements.

2. The Monitor shall act in a fiduciary capacity for the benefit of the Commission.
3. Respondents shall cooperate with any reasonable request of the Monitor and shall take no action to interfere with or impede the Monitor's ability to monitor Respondents' compliance with the Orders and the Remedial Agreements.
4. The Monitor shall have full and complete access to all of Respondents' facilities, personnel, books, documents, and records relating to the Assets To Be Divested, and such other relevant information as the Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders and the Remedial Agreements.
5. The Monitor shall serve, without bond or other security, at the expense of Respondents, on such reasonable and customary terms and conditions as the Commission may set.
6. The Monitor shall have the authority to employ, at the expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor's duties and responsibilities.
7. Respondents shall indemnify the Monitor, and hold the Monitor harmless, against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor's duties, including all reasonable fees of counsel, and other reasonable expenses incurred, in connection with the preparations for, or defense of,

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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 of the Monitor.

8. Respondents shall report to the Monitor in accordance with the requirements of the Orders, and as otherwise provided in any agreement approved by the Commission. The Monitor shall evaluate the reports submitted to the Monitor by Respondents, and any reports submitted by the Acquirer with respect to the performance of Respondents' obligations under the Orders or the Remedial Agreement. Within thirty (30) days from the date the Monitor receives these reports, the Monitor shall report in writing to the Commission concerning performance by Respondents of their obligations under the Orders.
9. The Commission may, among other things, require the Monitor, and each of the Monitor's consultants, accountants, attorneys, and other representatives and assistants, to sign a customary confidentiality agreement related to Commission materials and information received in connection with the performance of the Monitor's duties.
10. Respondents may require the Monitor, and each of the 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 Monitor from providing any information to the Commission.
11. Respondents shall comply with all terms of the Monitor Agreement, and any breach by Respondents of any term of the Monitor Agreement shall constitute a violation of this Order to Maintain Assets. Notwithstanding any paragraph, section, or other provision of the

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Monitor Agreement, any modification of the Monitor Agreement, without the prior approval of the Commission, shall constitute a failure to comply with the Orders.

- C. If the Commission determines that the Monitor has ceased to act, or failed to act diligently, the Commission may appoint a substitute Monitor, subject to the consent of Respondents, which consent shall not be unreasonably withheld, as follows:
 - 1. If Respondents has not opposed in writing, including the reasons for opposing, the selection of the proposed substitute Monitor within five (5) business days after notice by the staff of the Commission to Respondents of the identity of the proposed substitute Monitor, then Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor; and
 - 2. Respondents shall, no later than five (5) business days after the Commission appoints a substitute Monitor, enter into an agreement with the substitute Monitor that, subject to the prior approval of the Commission, confers on the substitute Monitor all of the rights, powers, and authority necessary to permit the substitute Monitor to perform his or her duties and responsibilities on the same terms and conditions as provided in this Paragraph IV. of the Order to Maintain Assets.
- D. The Monitor shall serve as long as Respondents are providing Transition Services to the Acquirer pursuant to the Transition Services Agreement; *provided, however,* that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- E. The Commission may, on its own initiative, or at the request of the Monitor, issue such additional orders or directions as may be necessary or appropriate to assure

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compliance with the requirements of these Orders or the Remedial Agreement.

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

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

- A. Within thirty (30) days after this Order to Maintain Assets is issued, and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II, III., and IV. of the Decision and Order, and until Respondents are no longer required to provide Transition Services to the Acquirer pursuant to the Transition Services Agreement, Respondents shall submit to the Commission and to the Monitor, if one is appointed, verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with these Orders. 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 these Orders, including, but not limited to, documents sufficient to show that Respondents have not changed or modified pricing at, or price zones applicable to, each of the Dollar Stores included in the Assets To Be Divested, other than in the regular and ordinary course of business, consistent with the changes or modifications applicable to Dollar Stores retained by Respondents, and in accordance with past practices and business strategy; and
- B. Within thirty (30) days after this Order to Maintain Assets is issued, and every thirty (30) days thereafter until Respondents have divested the Assets To Be Divested, Respondents shall submit to the Monitor, in

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such form as required by the Monitor after consultation with Commission staff:

1. For each Dollar Store included in the Assets To Be Divested, and for each of the Control Dollar Stores, on a weekly basis, total sales and total number of transactions; and
2. For each Dollar Store included in the Assets To Be Divested, the price zone applicable to the Dollar Store at the time Respondents executed the Consent Agreement; the price zone applicable to the Dollar Store at the time of filing the report; all details regarding any changes to the price zone for the Dollar Store, including how the price zone is defined; all details regarding any plans to change the price zone of the Dollar Store; the number of Dollar Stores to be retained by Respondents in the price zone; and confirmation that the retail pricing with respect to each Dollar Store included in the Assets To Be Divested is, at the time of filing the report, the same as that of the Dollar Stores that will be retained by Respondents in that price zone;

Provided, however, that Respondents shall submit any additional information or documentation that the Commission or the Monitor requires.

VI.

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

- A. Any proposed dissolution of any Respondent;
- B. Any proposed acquisition, merger, or consolidation of any Respondent; or
- C. Any other change in 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.

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VII.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, and upon written request with reasonable notice to Respondents, with respect to any matter contained in this Order, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours and in the presence of counsel, to all facilities, and access to inspect and copy all non-privileged books, ledgers, accounts, correspondence, memoranda, and other records and documents, in the possession or under the control of Respondents, related to compliance with the Consent Agreement and/or the Orders, for which copying services shall be provided by Respondents at the request of the authorized representative of the Commission and at the expense of Respondents; and
- B. Upon five (5) days' notice to Respondents, and without restraint or interference from them, to interview officers, directors, or employees of Respondents, who may have counsel present.

VIII.

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

- A. Three (3) business days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The business day after Respondents are no longer required to provide Transition Services to the Acquirer pursuant to the Transition Services Agreement approved by the Commission.

Provided, however, that if the Commission, pursuant to Paragraph II.B. of the Decision and Order, requires the Respondents to

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rescind any Divestiture Agreement, then, upon rescission, the requirements of this Order to Maintain Assets shall again be in effect with respect to the relevant Assets To Be Divested until the day after Respondents are no longer required to provide Transition Services to the Acquirer, as described in and required by the Decision and Order.

By the Commission, Commissioner Wright dissenting.

CONFIDENTIAL APPENDIX A**CONTROL GROUP STORES**

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

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APPENDIX B**MONITOR AGREEMENT****[Redacted Public Version]**Public Version**MONITOR AGREEMENT**

This Interim Monitor Agreement ("Interim Monitor Agreement" or "Agreement") entered into this ____ day of June 2015, among Gary A. Smith ("Interim Monitor"), who has been chosen to act as Interim Monitor, and Dollar Tree, Inc. ("Respondent") (Interim Monitor and Respondent are each individually referred to herein as a "Party" and collectively referred to herein as the "Parties"), provides as follows:

WHEREAS, Family Dollar Stores, Inc. ("Family Dollar"), and Respondent have entered into an Agreement and Plan of Merger, by and among Family Dollar, Respondent, and Dime Merger Sub, Inc., a wholly-owned subsidiary of Respondent ("Dime"), dated as of July 27, 2014, as amended by amendment no. 1 on September 4, 2014 (as it may be further amended from time to time, the "Family Dollar Merger Agreement"), pursuant to which, among other things, Dime will merge with and into Family Dollar, with Family Dollar as the surviving corporation and a wholly-owned subsidiary of Respondent;

WHEREAS, the United States Federal Trade Commission (the "Commission") has entered into an Agreement containing Consent Orders with Respondent, which includes an Order to Maintain Assets and a Decision and Order (the "Consent Order", which is attached hereto as Exhibit A, and which includes the Decision and Order as accepted by the Commission for public comment and the final Decision and Order as issued by the Commission), that provides, among other things, that Respondent shall maintain the full economic viability, marketability and competitiveness of the Assets To Be Divested;

WHEREAS, the Consent Order further provides for the appointment of an Interim Monitor to assure that Respondent expeditiously complies with all of its obligations and performs all of its responsibilities required by the Decision and Order and the Remedial Agreements;

WHEREAS, the Consent Order further provides that Respondent shall execute an agreement, subject to prior approval of the Commission, conferring all the rights, powers, and authority necessary to permit the Interim Monitor to perform its duties and responsibilities pursuant to the Consent Order;

WHEREAS, this Interim Monitor Agreement, although executed by the Interim Monitor and Respondent, is not effective for any purpose, including but not limited to, imposing rights and responsibilities on Respondent or the Interim Monitor, until this Interim Monitor Agreement has been approved by the Commission;

WHEREAS, the Interim Monitor is well versed in the operation of retail establishments like Dollar Stores and wishes to accept such appointment upon the terms and conditions stated herein; and

WHEREAS, the Parties to this Interim Monitor Agreement intend to be legally bound;

NOW, THEREFORE, the Parties agree as follows:

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1. Capitalized terms used herein and not specifically defined herein shall have the respective definitions given to them in the Consent Order.

2. The Interim Monitor shall have all of the powers, authority, and responsibilities conferred upon the Interim Monitor by the Consent Order, including, without limitation, the responsibility, consistent with the Consent Order, for monitoring Respondent's compliance with its obligations under the Consent Order and the Remedial Agreements. The Interim Monitor shall have the authority, in its sole discretion, to consult with third parties in the exercise of its duties under the Consent Order and this Agreement.

3. In the performance of its functions and duties under this Agreement, the Interim Monitor warrants that he will perform his obligations hereunder in good faith, using his best efforts to perform these services in accordance with generally accepted industry standards.

4. The Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission.

5. If the Interim Monitor becomes aware during the term of this Agreement that he has or may have a conflict of interest that may affect or could have the appearance of affecting performance by the Interim Monitor of any of his duties under this Agreement, the Interim Monitor shall promptly inform Respondent and the Commission of any such conflict.

6. The Interim Monitor shall have full and complete access, subject to any legally recognized privilege of Respondent, to Respondent's personnel, books, records, documents, facilities and technical information to the extent relating to the Respondent's compliance with its obligations under the Consent Order, including its obligations related to the Assets To Be Divested, as the Interim Monitor may reasonably require to perform the services set forth herein, subject to the limitations contained in the Consent Order. Such access shall include, inter alia, access to all relevant information related to the Assets To Be Divested. Respondent shall cooperate with any reasonable request of the Interim Monitor, including but not limited to complying with Interim Monitor's requests for onsite visits and interviews with employees of Respondent. Respondent shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondent's compliance with the Consent Order and the Remedial Agreements.

7. Respondent shall designate a senior employee(s) of Respondent to be a primary contact for the Interim Monitor and to notify the Interim Monitor regarding any changes in the contact personnel. Respondent shall notify the Interim Monitor of meetings and other critical events relating to the Assets To Be Divested, the Consent Order, or the Remedial Agreements, and provide any available minutes of such meetings to the Interim Monitor.

8. Respondent shall provide and the Interim Monitor shall evaluate the reports submitted by Respondent pursuant to the Consent Order, and within thirty (30) days from the date the Interim Monitor receives the first such report, and every sixty (60) days thereafter until the end of the Interim Monitor's term, the Interim Monitor shall report in writing to the Commission concerning performance by Respondent of their obligations under the Consent Order.

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9. In response to a request by the Commission or its staff, the Interim Monitor shall report in writing to the Commission concerning Respondent's compliance with its obligations under the Consent Order.

10. The Interim Monitor shall maintain the confidentiality of all information provided by Respondent, all Confidential Business Information and all confidential aspects of the performance of its duties under this Agreement. Except as provided in this Agreement, such information may be disclosed only to (i) Persons employed by, or working with, the Interim Monitor under this Interim Monitor Agreement (provided that such Person shall execute a confidentiality agreement prior to receiving confidential information), (ii) any other Person to whom disclosure is reasonably necessary for the Interim Monitor to fulfill his duties (provided that such Person shall execute a confidentiality agreement prior to receiving confidential information), or (iii) the Commission and Commission staff. When providing such information to a third party pursuant to this Paragraph, the Interim Monitor shall label such information "Confidential." The Interim Monitor shall request confidential treatment by the Commission and Commission staff of any confidential information turned over to the Commission, including any information labeled "Confidential" by Respondent. The Interim Monitor shall use the information provided by Respondent pursuant to this Agreement or learned in connection with performing its obligations under this Agreement only in performance of the duties set forth herein. At no time shall the Interim Monitor use such information for any other purpose or for the benefit of any other Person. The confidentiality obligations of this Paragraph shall survive the termination of this Agreement.

11. Nothing in this Agreement shall require Respondent or the Interim Monitor to disclose any material or information that is subject to a legally recognized privilege or that Respondent or the Interim Monitor is prohibited from disclosing by reason of law.

12. Respondent will pay the Interim Monitor fees for time spent in the performance of its duties in the amount of [REDACTED] per hour, such amount to be increased annually on the anniversary of this Agreement by the percentage increase, if any, between the U.S. Consumer Price Index – All Urban Consumers (CPI-U), as published by the United States Department of Labor in June of the year compared to June of the immediately preceding calendar year. This rate will be reviewed annually on the anniversary of this Agreement and may be adjusted to reflect changes in the standard fee rate structure of the Interim Monitor. In addition, Respondent will pay all documented out-of-pocket expenses reasonably incurred by the Interim Monitor in the performance of the Interim Monitor's duties, including all fees and disbursements reasonably incurred by such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities. Payments under this Paragraph 11 shall be made on a monthly basis until the Interim Monitor ceases its activities under this Agreement. The Interim Monitor shall provide Respondent with monthly invoices for time and expenses that include details and an explanation of all matters for which the Interim Monitor submits an invoice to Respondent. Respondent shall pay such invoices within 30 days of receipt. The Interim Monitor and Respondent shall submit any disputes about invoices to the Commission's Compliance Division for assistance in resolving such disputes. In the event that a Divestiture Trustee is required under Paragraph VI of the Decision and Order and the Interim Monitor serves as the Divestiture Trustee, a new fee schedule would be negotiated to govern that arrangement.

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13. Respondent hereby confirms its obligation to indemnify the Interim Monitor (and all Persons retained by 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 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 liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.

14. In the event of a disagreement or dispute between Respondent and the Interim Monitor, and in the event that such disagreement or dispute cannot be resolved by the Parties, either Party may seek the assistance of the Assistant Director of the Commission's Compliance Division, to resolve the issue. In the event that such disagreement or dispute cannot be resolved by the Parties, the Parties shall submit the matter to binding arbitration before the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof. Binding arbitration shall not be available, however, to resolve any disagreement or dispute concerning Respondent's obligations pursuant to any Consent Order entered by the Commission.

15. The term of this Agreement shall commence on the Closing Date, and shall continue until the latter of (i) the completion of all divestitures required by the Consent Order, and (ii) the end of any Transition Services Agreement in effect with any Acquirer; provided further, however, that the Commission may extend or modify this period as may be necessary or appropriate to accomplish the purposes of the Consent Order. In the event that Interim Monitor is no longer able to perform the duties described in this Agreement, Interim Monitor may terminate this Agreement by providing Respondent thirty (30) days written notice. In the event of such termination, Interim Monitor shall cooperate with Respondent pursuant to Paragraph 17.

16. Upon termination of the Monitor's duties under this Monitor Agreement, the Monitor shall consult with the Commission's staff regarding disposition of any written and electronic materials (including materials that Respondent provided to the Monitor) in the possession or control of the Monitor that relate to the Monitor's duties, and the Monitor shall dispose of such materials, which may include sending such materials to the Commission's staff, as directed by the staff. In response to a request by Respondent to return or destroy materials that Respondent provided to the Monitor, the Monitor shall inform the Commission's staff of such request and, if the Commission's staff do not object, shall comply with the Respondents' request. Nothing herein shall abrogate the Monitor's duty of confidentiality, which includes an obligation not to disclose any non-public information that was obtained while acting as a Monitor.

17. Should the Commission appoint a substitute monitor pursuant to the Order to Maintain Assets or should the Interim Monitor terminate this Agreement pursuant to Paragraph 15, the Interim Monitor shall cooperate with Respondent and the substitute monitor in order to effect a prompt transition to the substitute monitor. Such cooperation shall include, but is not limited to, (i) the prompt return to Respondent of all confidential materials as required by the preceding Paragraph of this Agreement, and (ii) the provision of access to the Interim Monitor and any personnel hired by the Interim Monitor for interviews by Respondent and/or the

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substitute monitor for purposes of gathering relevant information relating the performance by the Interim Monitor of its duties.

18. Any notices or other communication required to be given hereunder shall be deemed to have been properly given if sent by mail, e-mail, or fax (with acknowledgment of receipt of such having been received), to the applicable Party at its address below (or to such other address as to which such Party shall hereafter notify the other party):

If to the Interim Monitor, to:

Gary A. Smith
3824 Timberline Way
Vestavia Hills, Alabama 35243
Home Phone: (205) 969-3399
Mobile Phone: (205) 500-1824
Email: gsmith828@charter.net

If to Respondent, to:

William A. Old, Jr., Esq.
Chief Legal Officer and Corporate Secretary
Dollar Tree, Inc.
500 Volvo Parkway
Chesapeake, VA 23320
Phone: (757) 321-5419
Fax: (757) 321-5111
Email: wold@dollartree.com

19. The Interim Monitor Agreement may not be assigned by Respondent or the Interim Monitor without the prior written consent of the other Party and the Commission.

20. It is understood and agreed that the Interim Monitor shall act as an independent contractor in the undertaking of this Agreement and the Interim Monitor shall exercise control over and employ its own means and methods of accomplishing the projects and tasks in performing services hereunder.

21. This Agreement may be executed in any number of counterparts, each of which shall be deemed to be an original and all of which together shall be deemed to be one and the same instrument.

22. This Interim Monitor Agreement contains the entire agreement between the Parties relating to the subject matter hereof and supersedes all previous negotiations, agreements, undertakings and representations, documents, minutes of meetings, letters or notices (whether oral or written) between the Parties and/or their respective affiliates with respect to the subject matter.

23. This Interim Monitor Agreement shall not become binding until it has been approved by the Commission and the Consent Order has been accepted for public comment. The Consent Order shall govern this Interim Monitor Agreement and any provisions herein that conflict or are inconsistent with such orders may be declared void by the Commission.

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and any provision not in conflict shall survive and remain a part of this Interim Monitor Agreement.

24. This Agreement shall be deemed to have been entered into and shall be construed and enforced in accordance with the laws of New York.

IN WITNESS WHEREOF, the parties hereto have executed this Interim Monitor Agreement as of the date first above written.

Dollar Tree, Inc.

Interim Monitor: Gary A. Smith

By: _____

Name: William A. Old, Jr., Esq.

Title: Chief Legal Officer and Corporate Secretary

Name: Gary A. Smith

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed acquisition by Respondent Dollar Tree, Inc. (“Dollar Tree”) of Respondent Family Dollar Stores, Inc. (“Family Dollar”), collectively “Respondents,” and Respondents and Sycamore Partners II, L.P. (“Sycamore”), 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, Sycamore, and their respective attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it has reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having thereupon issued its Complaint and Order to Maintain Assets, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments received from interested persons, 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”):

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1. Respondent Dollar Tree is a corporation organized, existing, and doing business under and by virtue of the laws of the Commonwealth of Virginia, with its headquarters and principal place of business located at 500 Volvo Parkway, Chesapeake, Virginia 23320.
2. Respondent Family Dollar is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 10401 Monroe Road, Matthews, North Carolina 28105.
3. Sycamore is a limited partnership and is organized, existing, and doing business under and by virtue of the laws of the Cayman Islands, with its office and principal place of business located at 9 West 57th Street, 31st Floor, New York, New York, 10019.
4. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents and of Sycamore, 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. “Dollar Tree” means Dollar Tree, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Dollar Tree, Inc. (including Dime Merger Sub, Inc.), and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Family Dollar” means Family Dollar Stores, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Family

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Dollar Stores, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.

- C. “Respondents” means Dollar Tree and Family Dollar, individually and collectively.
- D. “Acquirer” means Sycamore or any entity approved by the Commission to acquire the Assets To Be Divested pursuant to this Order.
- E. “Acquisition” means Dollar Tree’s proposed acquisition of Family Dollar pursuant to the Acquisition Agreement.
- F. “Acquisition Agreement” means the Agreement and Plan of Merger by and among Family Dollar, Dollar Tree, and Dime Merger Sub, Inc., a Delaware corporation and a wholly owned subsidiary of Dollar Tree, dated as of July 27, 2014, as amended on September 4, 2014.
- G. “Assets To Be Divested” means the Dollar Stores identified on Schedule A of this Order, and all rights, title, and interest in and to all assets, tangible and intangible, relating to, used in, and/or reserved for use in, the operation of the Dollar Store at each of those locations, including but not limited to all properties, leases, leasehold interests, equipment and fixtures, inventory as of the Divestiture Date, books and records, government approvals and permits (to the extent transferable), and telephone and fax numbers;

provided, however, that the Assets To Be Divested shall not include (1) those assets consisting of or pertaining to any of the Respondents’ trademarks, trade dress, service marks, or trade names, except with respect to any purchased inventory (including private label inventory) or as may be allowed pursuant to any Remedial Agreement(s), and (2) assets used in the distribution of inventory that are not located at the Dollar Stores identified on Schedule A;

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provided, further, that in cases in which books or records included in the Assets To Be Divested contain information (a) that relates both to the Assets To Be Divested and to other retained businesses of Respondents or (b) that Respondents have a legal obligation to retain the original copies, then Respondents shall be required to provide only copies of the materials containing such information. In instances where such copies are provided to an Acquirer, the Respondents shall provide to such Acquirer access to original materials under circumstances where copies of materials are insufficient for regulatory or evidentiary purposes.

- H. “Direct Costs” means costs not to exceed the actual cost of labor, goods and material, travel, third party vendors, and other expenditures that are directly incurred to provide and fulfill the Transition Services provided pursuant to the Transition Services Agreement.
- I. “Divestiture Agreement” means any agreement between Respondents and an Acquirer (or between a Divestiture Trustee appointed pursuant to Paragraph IV. of this Order and an Acquirer) and all amendments, exhibits, attachments, agreements, and schedules thereto, related to any of the Assets To Be Divested that have been approved by the Commission to accomplish the requirements of this Order.
- J. “Divestiture Date” means the closing date of the divestitures required by this Order.
- K. “Divestiture Trustee” means any person or entity appointed by the Commission pursuant to Paragraph IV. of this Order to act as a trustee in this matter.
- L. “Dollar Store” means a small-format, deep-discount retailer that sells an assortment of consumables and non-consumables, including food, home products, apparel and accessories, and seasonal items, at prices typically under \$10.

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- M. “Dollar Tree Dollar Store” means a Dollar Store that was owned or operated by Dollar Tree at the time the Consent Agreement was signed by Respondents.
- N. “Family Dollar Dollar Store” means a Dollar Store that was owned or operated by Family Dollar at the time the Consent Agreement was signed by Respondents.
- O. “Monitor” means the person appointed as monitor pursuant to Paragraph IV. of the Order to Maintain Assets.
- P. “Person” means any individual, partnership, firm, corporation, association, trust, unincorporated organization, or other business entity.
- Q. “Proposed Acquirer” means any proposed acquirer of the Assets To Be Divested that Respondents or the Divestiture Trustee intend to submit or have submitted to the Commission for its approval under this Order; “Proposed Acquirer” includes Sycamore.
- R. “Remedial Agreement” means the Sycamore Divestiture Agreement if approved by the Commission, or
1. Any other Divestiture Agreement; and
 2. Any other agreement between Respondents and an Acquirer (or between a Divestiture Trustee and an Acquirer), including any Transition Services Agreement, and all amendments, exhibits, attachments, agreements, and schedules thereto, related to the Assets To Be Divested, that have been approved by the Commission to accomplish the requirements of this Order.
- S. “Sycamore” means Sycamore Partners II, L.P., a limited partnership organized, existing, and doing business under and by virtue of the laws of the Cayman Islands, with its offices and principal place of business located at 9 West 57th Street, 31st Floor, New

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York, NY 10019; its directors, officers, partners, employees, agents, representatives, successors, and assigns; its joint ventures, subsidiaries, divisions, groups, and affiliates controlled by Sycamore, including Dollar Express LLC, a limited liability company organized and doing business under and by virtue of the laws of Delaware, with its offices and principal place of business located at 1209 Orange Street, Wilmington, Delaware 19801, and the respective directors, officers, partners, employees, agents, representatives, successors, and assigns of each.

- T. “Sycamore Divestiture Agreement” means the Asset Purchase Agreement dated as of May 28, 2015, by and between Respondents and Sycamore, attached as non-public Appendix I, for the divestiture of the Assets To Be Divested.
- U. “Third Party Consents” means all consents from any Person other than the Respondents, including all landlords, that are necessary to effect the complete transfer to the Acquirer(s) of the Assets To Be Divested.
- V. “Transition Services” means services related to payroll, employee benefits, accounting, information technology systems, distribution, warehousing, use of trademarks or trade names for transitional purposes, and other logistical and administrative support, as required by the Acquirer and approved by the Commission.
- W. “Transition Services Agreement” means an agreement that receives the prior approval of the Commission between one or more Respondents and the Acquirer to provide, at the option of the Acquirer, Transition Services (or training for an Acquirer to provide services for itself) necessary to transfer the Assets To Be Divested to the Acquirer in a manner consistent with the purposes of this Order.

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

- A. No later than one hundred and fifty (150) days after the date on which the Acquisition is consummated, Respondents shall divest the Assets To Be Divested, absolutely and in good faith, as ongoing Dollar Store businesses, to Sycamore pursuant to and in accordance with the Sycamore Divestiture Agreement.
- B. *Provided, however*, that if, prior to the date this Order becomes final, Respondents have divested the Assets To Be Divested to Sycamore pursuant to Paragraph II.A. of this Order and if, at the time the Commission determines to make this Order final, the Commission notifies Respondents that:
 - 1. Sycamore is not an acceptable Acquirer, then Respondents shall, within five (5) days of notification by the Commission, rescind such transaction with Sycamore and shall divest the Assets To Be Divested as ongoing Dollar Store businesses, absolutely and in good faith, at no minimum price, to an Acquirer and in a manner that receives the prior approval of the Commission, within ninety (90) days of the date the Commission notifies Respondents that Sycamore is not an acceptable Acquirer; or
 - 2. The manner in which the divestiture identified in Paragraph II.A. was accomplished is not acceptable, the Commission may direct the Respondents, or appoint a Divestiture Trustee pursuant to Paragraph IV. of this Order, to effect such modifications to the manner of divesting the Assets To Be Divested to Sycamore (including, but not limited to, entering into additional agreements or arrangements, or modifying the relevant Remedial Agreements) as may be necessary to satisfy the requirements of this Order.

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- C. Respondents shall obtain at their sole expense all required Third Party Consents relating to the divestiture of all Assets To Be Divested prior to the Divestiture Date; *provided, however*, that for each of the Dollar Stores identified in Schedule A, Part III, that require landlord consent in order to effectuate the required divestiture, for each Dollar Store for which Respondents are unable to obtain the necessary landlord consent, Respondents may, in consultation with the Monitor and Commission staff, substitute the corresponding Dollar Tree Dollar Store that is identified in Schedule A, Part III, in a manner specified by the Acquirer, but exclusive of the “Dollar Tree” name and any variation thereof, including similar trade names, symbols, trademarks, service marks, and logos.
- D. At the option of the Acquirer, and subject to the prior approval of the Commission, Respondents shall provide Transition Services to the Acquirer pursuant to a Transition Services Agreement for up to eighteen (18) months following the Divestiture Date, with an opportunity to extend for up to an additional six (6) months at the option of the Acquirer. The Transition Services provided pursuant to the Transition Services Agreement shall be provided at no more than Respondents’ Direct Costs and shall enable the Acquirer to operate Dollar Stores at least at the same level of quality and service as they were operated prior to the divestiture.
- E. The purpose of the divestiture is to ensure the continuation of the Assets To Be Divested as ongoing, viable enterprises engaged in the Dollar Store business and to remedy the lessening of competition resulting from the Acquisition as alleged in the Commission’s Complaint.

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III.

IT IS FURTHER ORDERED that Respondents shall:

- A. No later than ten (10) days after a request from the Proposed Acquirer, provide the Proposed Acquirer with the following information for each employee of the Assets To Be Divested, as requested by the Proposed Acquirer, and to the extent permitted by law:
1. Name, job title or position, date of hire, and effective service date;
 2. Specific description of the employee's responsibilities;
 3. The base salary or current wages;
 4. Most recent bonus paid, aggregate annual compensation for Respondents' last fiscal year, and current target or guaranteed bonus, if any;
 5. Employment status (*i.e.*, active or on leave or disability; full-time or part-time);
 6. Any other material terms and conditions of employment in regard to such employee that are not otherwise generally available to similarly situated employees; and
 7. At the Proposed Acquirer's option, copies of all employee benefit plans and summary plan descriptions (if any) applicable to the employee.
- B. Within a reasonable time after a request from a Proposed Acquirer, provide to the Proposed Acquirer an opportunity to meet personally and outside the presence or hearing of any employee or agent of any Respondent, with any one, or all, of the employees of the Assets To Be Divested, and to make offers of employment to any one, or more, of the employees of the Assets To Be Divested.

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- C. Not interfere, directly or indirectly, with the hiring or employing by the Proposed Acquirer of any employee of the Assets To Be Divested, not offer any incentive to such employees to decline employment with the Proposed Acquirer, and not otherwise interfere with the recruitment or employment of any employee by the Proposed Acquirer.
- D. Remove any impediments within the control of Respondents that may deter employees of the Assets To Be Divested from accepting employment with the Proposed Acquirer, including, but not limited to, removal of any non-compete or confidentiality provisions of employment, or other contracts with Respondents that may affect the ability or incentive of those individuals to be employed by the Proposed Acquirer, and shall not make any counteroffer to an employee who has an outstanding offer of employment from the Proposed Acquirer or has accepted an offer of employment from the Proposed Acquirer.
- E. Provide all employees with reasonable financial incentives to continue in their positions until the Divestiture Date. Such incentives shall include, but are not limited to, a continuation, until the Divestiture Date, of all employee benefits, including the funding of regularly scheduled raises and bonuses, and the vesting as of the Divestiture Date of any unvested qualified 401(k) plan account balances (to the extent permitted by law, and for those employees covered by a 401(k) plan), offered by Respondents.
- F. Not, for a period of one (1) year following the Divestiture Date, directly or indirectly, solicit, or otherwise attempt to induce any of the employees who have accepted offers of employment with the Acquirer to terminate his or her employment with the Acquirer; *provided, however*, that Respondents may:
 - 1. Advertise for employees in newspapers, trade publications, or other media, or engage recruiters to conduct general employee search activities, in

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either case not targeted specifically at employees of the Assets To Be Divested; or

2. Hire employees of the Assets To Be Divested who apply for employment with Respondents, as long as such employees were not solicited by Respondents in violation of this Paragraph; *provided further, however*, that this Paragraph shall not prohibit Respondents from making offers of employment to, or employing, any such employees if the Acquirer has notified Respondents in writing that the Acquirer does not intend to make an offer of employment to that employee, or where such an offer has been made and the employee has declined the offer, or where the employee's employment has been terminated by the Acquirer.

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

- A. If Respondents have not divested the Assets To Be Divested in the time and manner required by Paragraph II. of this Order, the Commission may appoint a Divestiture Trustee to divest the Assets To Be Divested in a manner that satisfies the requirements of this Order. 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. Neither the appointment of a Divestiture Trustee nor a decision not to appoint a Divestiture Trustee under this Paragraph IV. shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed Divestiture Trustee, pursuant to § 5(l) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

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- B. 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. 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.
 2. Subject to the prior approval of the Commission, the Divestiture Trustee shall have the exclusive power and authority to assign, grant, license, divest, transfer, contract, deliver, or otherwise convey the relevant assets or rights that are required to be assigned, granted, licensed, divested, transferred, contracted, delivered, or otherwise conveyed by this Order.
 3. Within ten (10) days after appointment of the Divestiture Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, transfers to the Divestiture Trustee all rights and powers necessary to permit the Divestiture Trustee to effect the relevant divestitures or transfers required by the Order.
 4. The Divestiture Trustee shall have twelve (12) months from the date the Commission approves the trust agreement described in Paragraph IV.B.3. to accomplish the divestiture(s), which shall be subject to the prior approval of the Commission.

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If, however, at the end of the twelve-month period, the Divestiture Trustee has submitted a plan of divestiture or believes that the divestiture(s) can be achieved within a reasonable time, the divestiture period may be extended by the Commission; *provided, however*, the Commission may extend the divestiture period only two (2) times.

5. Subject to any demonstrated legally recognized privilege, the Divestiture Trustee shall have full and complete access to the personnel, books, records, and facilities relating to the assets that are required to be assigned, granted, licensed, divested, transferred, contracted, delivered, or otherwise conveyed by this Order or 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(s). Any delays in divestiture caused by Respondents shall extend the time for divestiture under this Paragraph IV. in an amount equal to the delay, as determined by the Commission or, for a court-appointed Divestiture Trustee, by the court.
6. The Divestiture Trustee shall use 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 at no minimum price. The divestiture(s) shall be made in the manner and to an Acquirer as required by this Order; *provided, however*, if the Divestiture Trustee receives bona fide offers from more than one acquiring entity for any of the relevant Assets To Be Divested, and if the Commission determines to approve more than one such acquiring entity for such assets, the Divestiture Trustee shall divest

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such assets to the acquiring entity selected by Respondents from among those approved by the Commission; *provided further, however*, that Respondents shall select such entity within five (5) days of receiving notification of the Commission's approval.

7. The Divestiture Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The Divestiture Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, investment bankers, business brokers, appraisers, and other representatives and assistants as are necessary to carry out the Divestiture Trustee's duties and responsibilities. The Divestiture Trustee shall account for all monies derived from the divestiture(s) and all expenses incurred. After approval by the Commission and, in the case of a court-appointed Divestiture Trustee, by the court, of the account of the Divestiture Trustee, including fees for his or her services, all remaining monies shall be paid at the direction of 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 required to be divested by this Order.
8. Respondents shall indemnify the Divestiture Trustee and hold the Divestiture Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Divestiture Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of, any claim, whether or not resulting in any liability, except to the extent

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that such losses, claims, damages, liabilities, or expenses result from malfeasance, gross negligence, willful or wanton acts, or bad faith by the Divestiture Trustee.

9. If the Commission determines that the 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 IV.
10. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the Divestiture Trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the divestiture(s) required by this Order.
11. The Divestiture Trustee shall have no obligation or authority to operate or maintain the relevant assets required to be divested by this Order.
12. The Divestiture Trustee shall report in writing to the Commission and Respondents every thirty (30) days concerning the Divestiture Trustee's efforts to accomplish the divestiture(s).
13. 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.
14. The Commission may, among other things, require the Divestiture Trustee and each of the Divestiture Trustee's consultants, accountants, attorneys, representatives, and assistants to sign an appropriate confidentiality agreement relating to Commission materials and information received in

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connection with the performance of the Divestiture Trustee's duties and responsibilities.

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

- A. No Remedial Agreement shall 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 Acquirer or to reduce any obligations of Respondents under such agreements.
- B. Each Remedial Agreement shall be incorporated by reference into this Order and made a part hereof.
- C. Respondents shall comply with all terms of each Remedial Agreement, and any failure by Respondents to comply with the terms of any Remedial Agreement shall constitute a violation of this Order. If any term of any 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.

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

- A. Shall not, for a period of three (3) years from the Divestiture Date, sell, or otherwise convey, directly or indirectly, without the prior approval of the Commission:
 - 1. Any of the Assets To Be Divested to Dollar Tree;
or
 - 2. All or substantially all of the Assets To Be Divested to any Person; and

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- B. Shall, within sixty (60) days after the Divestiture Date, and every sixty (60) days thereafter, for a period of two (2) years from the Divestiture Date, submit to the Commission verified written reports identifying any Dollar Stores included in the Assets To Be Divested that have been, or will be, sold or closed, setting forth in detail the reasons why the Dollar Stores have been, or will be, sold or closed.

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

- A. Within thirty (30) days after the date this Order is issued and every thirty (30) days thereafter until Respondents have fully complied with the provisions of Paragraphs II., III., and IV. of this Order, Respondents shall submit to the Commission and the Monitor verified written reports setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with 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 this Order; and
- B. One (1) year from the date this Order is issued, annually for the next nine (9) years on the anniversary of the date this Order is issued, and at other times as the Commission may require, Respondents shall file verified written reports with the Commission setting forth in detail the manner and form in which they have complied and are complying with this Order.

VIII.

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

- A. Any proposed dissolution of Respondents;

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

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request and upon five (5) days' notice to Respondents made to their principal United States office, Respondents shall permit any duly authorized representative of the Commission:

- A. Access, during office hours of Respondents and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondents relating to compliance with this Order, for which copying services shall be provided by such Respondents at the request of the authorized representative(s) of the Commission and at the expense of Respondents; and
- B. To interview officers, directors, or employees of Respondents, who may have counsel present, regarding any such matters.

X.

IT IS FURTHER ORDERED that this Order shall terminate on September 16, 2025.

By the Commission.

Statement of the Commission

STATEMENT OF THE FEDERAL TRADE COMMISSION

The Federal Trade Commission has accepted a proposed settlement to resolve the likely anticompetitive effects of Dollar Tree, Inc.'s proposed \$9.2 billion acquisition of Family Dollar Stores, Inc.¹ We have reason to believe that, absent a remedy, the proposed acquisition is likely to substantially lessen competition between Dollar Tree and Family Dollar in numerous local markets. Under the terms of the proposed consent order, Dollar Tree and Family Dollar are required to divest 330 stores to a Commission-approved buyer. As we explain below, we believe the proposed divestitures preserve competition in the markets adversely affected by the acquisition and are therefore in the public interest.

Dollar Tree operates over 5,000 discount general merchandise retail stores across the United States under two banners which follow somewhat different business models. In its Dollar Tree banner stores, Dollar Tree sells a wide selection of everyday basic, seasonal, closeout, and promotional merchandise all for \$1 or less. At its Deals banner stores, Dollar Tree sells an expanded assortment of this merchandise at prices that may go above the \$1 price point but are generally less than \$10. Family Dollar operates over 8,000 discount general merchandise retail stores. Family Dollar sells an assortment of consumables, home products, apparel and accessories, seasonal items, and electronic merchandise at prices generally less than \$10, including items priced at or under \$1.

Dollar Tree and Family Dollar compete head-to-head in numerous local markets across the United States. They are close competitors in terms of format, pricing, customer service, product offerings, and location. When making competitive decisions regarding pricing, product assortment, and other salient aspects of their businesses, Dollar Tree and Family Dollar focus most directly on the actions and responses of each other and other "dollar store" chains, while also paying close attention to Walmart. In many local markets, Dollar Tree and Family Dollar

¹ This statement reflects the views of Chairwoman Ramirez and Commissioners Brill, Ohlhausen, and McSweeney.

Statement of the Commission

operate stores in close proximity to each other, often representing the only or the majority of conveniently located discount general merchandise retail stores in a neighborhood.

To evaluate the likely competitive effects of this transaction and identify the local markets where it may likely harm competition, the Commission considered multiple sources of quantitative and qualitative evidence. One component of the investigation involved a Gross Upward Pricing Pressure Index (“GUPPI”) analysis. As described in the 2010 Horizontal Merger Guidelines, this mode of analysis can serve as a useful indicator of whether a merger involving differentiated products is likely to result in unilateral anticompetitive effects.² Such effects can arise “when the merger gives the merged entity an incentive to raise the price of a product previously sold by one merging firm” because the merged entity stands to profit from any sales that are then diverted to products that would have been “previously sold by the other merging firm.”³ Using the value of diverted sales as an indicator of the upward pricing pressure resulting from the merger, a GUPPI is defined as the value of diverted sales that would be gained by the second firm measured in proportion to the revenues that would be lost by the first firm. If the “value of diverted sales is proportionately small, significant unilateral price effects are unlikely.”⁴

The Commission’s investigation involved thousands of Dollar Tree and Family Dollar stores with overlapping geographic markets. A GUPPI analysis served as a useful initial screen to flag those markets where the transaction might likely harm competition and those where it might pose little or no risk to competition. As a general matter, Dollar Tree and Family Dollar stores with relatively low GUPPIs suggested that the transaction was unlikely to harm competition, unless the investigation uncovered specific reasons why the GUPPIs may have

² U.S. DEPT. OF JUSTICE AND FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 6.1 (2010), *available at* <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

³ *Id.*

⁴ *Id.*

Statement of the Commission

understated the potential for anticompetitive effects. Conversely, Dollar Tree and Family Dollar stores with relatively high GUPPIs suggested that the transaction was likely to harm competition, subject to evidence or analysis indicating that the GUPPIs may have overstated the potential for anticompetitive effects.

While the GUPPI analysis was an important screen for the Commission's inquiry, it was only a starting point. The Commission considered several other sources of evidence in assessing the transaction's likely competitive effects, including additional detail regarding the geographic proximity of the merging parties' stores relative to each other and to other retail stores, ordinary course of business documents and data supplied by Dollar Tree and Family Dollar, information from other market participants, and analyses conducted by various state attorneys general who were also investigating the transaction. After considering all of this evidence, the Commission identified specific local markets where the acquisition would be likely to harm competition and arrived at the list of 330 stores slated for divestiture.

In his statement, Commissioner Wright criticizes the way that the Commission used the GUPPI analysis in this case and argues that GUPPIs below a certain threshold should be treated as a "safe harbor."⁵ We respectfully disagree.

As an initial matter, Commissioner Wright mischaracterizes the way that the GUPPI analysis was used in this case. Contrary to his suggestion, GUPPIs were not used as a rigid presumption of harm. As explained above, they were used only as an initial screen to identify those markets where further investigation was warranted. The Commission then proceeded to consider the results of the GUPPI analysis in conjunction with numerous other sources of information.⁶ Based on this complete body of

⁵ Statement of Commissioner Joshua D. Wright Dissenting in Part and Concurring in Part, *Dollar Tree, Inc. and Family Dollar Stores, Inc.*, File No. 141-0207.

⁶ As Joseph Farrell and Carl Shapiro have noted, "[r]eal-world mergers are complex, and our proposed test, like the concentration-based test, is consciously oversimplified. . . . In the end, the evaluation of any merger that is thoroughly investigated or litigated may come down to the fullest feasible

Statement of the Commission

evidence, we have reason to believe that, without the proposed divestitures, the acquisition would substantially lessen competition in each of the relevant local markets.

Our market-by-market review showed that the model of competition underlying the GUPPI analysis was largely consistent with other available evidence regarding the closeness of competition between the parties' stores in each local market. For example, stores with high GUPPIs were generally found in markets in which there were few or no other conveniently located discount general merchandise retail stores. The GUPPI analysis did have some limitations, however. For example, there were Family Dollar stores with relatively low GUPPIs in markets that were nevertheless price-zoned to Dollar Tree stores, which meant that if Dollar Tree stores were removed as competition, then the prices of certain items at those Family Dollar stores would likely go up. The GUPPI analysis also was not sufficiently sensitive to differentiate between Dollar Tree and Family Dollar stores that were in the same shopping plaza from those that were almost a mile away from each other. For these situations, we appropriately relied on other evidence to reach a judgment about the closeness of competition.⁷

More broadly, Commissioner Wright's view that the Commission should identify and treat GUPPIs below a certain threshold as a "safe harbor" ignores the reality that merger analysis is inherently fact-specific. The manner in which GUPPI analysis is used will vary depending on the factual circumstances, the available data, and the other evidence gathered during an investigation. Moreover, whether the value of diverted sales is considered "proportionately small" compared to lost revenues will

analysis of effects." Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON. 1, 26 (2010).

⁷ Commissioner Wright cites the Albertson's/Safeway transaction as another recent case in which a GUPPI analysis was used. See Wright Statement at 2 n.6. To be precise, the Commission analyzed that transaction using diversion ratios, not GUPPI scores, but in any event, Commissioner Wright himself voted to accept the consent order in that case.

Statement of the Commission

vary from industry to industry and firm to firm.⁸ For example, intense competition between merging firms may cause margins to be very low, which could produce a low GUPPI even in the presence of very high diversion ratios. Such conditions could produce a false negative implying that the merger is not likely to harm competition when in fact it is.⁹

Indeed, we agree with Commissioner Wright that “a GUPPI-based presumption of competitive harm is inappropriate at this stage of economic learning.”¹⁰ We think that a GUPPI-based safe harbor is equally inappropriate. In antitrust law, bright-line rules and presumptions rest on accumulated experience and economic learning that the transaction or conduct in question is likely or unlikely to harm competition.¹¹ We do not believe there is a basis for the recognition of a GUPPI safe harbor.

⁸ Marginal cost efficiencies, as well as pass-through rates, also will vary from industry to industry and from firm to firm. The pass-through rate will determine the magnitude of the post-merger unilateral price effects.

⁹ Joseph Farrell & Carl Shapiro, *Upward Pricing Pressure and Critical Loss Analysis: Response*, CPI ANTITRUST J. 1, 6–7 & n.15 (Feb. 2010); Farrell & Shapiro, *Antitrust Evaluation of Horizontal Mergers*, *supra* note 6, at 13–14.

¹⁰ Wright Statement, *supra* note 5, at 8 & nn.23 & 24 (citing commentators’ concerns and criticisms regarding the use of GUPPI analysis generally). Such concerns and criticisms, if valid, would apply equally to the wisdom of using GUPPIs to recognize a safe harbor.

¹¹ See, e.g., *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886–87 (2007) (“As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason, . . .”); *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 781 (1999) (“The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.”); *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559, 570, 571 (6th Cir. 2014) (noting that “the strong correlation between market share and price, and the degree to which this merger would further concentrate markets that are already highly concentrated—converge in a manner that fully supports the Commission’s application of a presumption of illegality” but also noting that “the Commission did not merely rest upon the presumption, but instead discussed a wide range of evidence that buttresses it”).

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Accordingly, in any case where a GUPPI analysis is used, the Commission will consider the particular factual circumstances and evaluate other sources of quantitative and qualitative evidence.¹² As with other quantitative evidence such as market shares and HHIs, we believe that GUPPIs should be considered in the context of all other reasonably available evidence. The 2010 Horizontal Merger Guidelines do not instruct otherwise.¹³ For all of these reasons, we believe it is appropriate to use GUPPIs flexibly and as merely one tool of analysis in the Commission's assessment of unilateral anticompetitive effects.

¹² See Carl Shapiro, *The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years*, 77 ANTITRUST L.J. 701, 729 (2010) (“The value of diverted sales is an excellent simple measure for *diagnosing or scoring* unilateral price effects, but it cannot capture the full richness of competition in real-world industries. Indeed, as stressed above, all of the quantitative methods discussed here must be used in conjunction with the broader set of qualitative evidence that the Agencies assemble during a merger investigation.”); Farrell & Shapiro, *Upward Pricing Pressure*, *supra* note 8, at 6 (“Whatever measure is used for screening purposes, it is important that the full analysis give proper weight to all the available evidence.”). Notwithstanding Commissioner Wright’s suggestion to the contrary, we do not believe that the Commission’s use of GUPPIs as a tool for assessing unilateral effects differs materially from their use by the Department of Justice.

¹³ Recognizing in the 2010 Horizontal Merger Guidelines that when the “value of diverted sales is proportionately small, significant unilateral price effects are unlikely” does not necessarily mean that “proportionately small” should be reduced to some numerical value that applies in all cases. See Merger Guidelines, *supra* note 2, § 1 (“These Guidelines should be read with the awareness that merger analysis does not consist of uniform application of a single methodology.”).

Concurring and Dissenting Statement

**Statement of Commissioner Joshua D. Wright Dissenting in
Part and Concurring in Part**

The Commission has voted to issue a Complaint and a Decision & Order against Dollar Tree, Inc. (“Dollar Tree”) and Family Dollar Stores, Inc. (“Family Dollar”) to remedy the allegedly anticompetitive effects of the proposed acquisition by Dollar Tree of Family Dollar. I dissent in part from and concur in part with the Commission’s decision. I dissent in part because in 27 markets I disagree with the Commission’s conclusion that there is reason to believe the proposed transaction violates the Clayton Act.

The record evidence includes a quantitative measure of the value of diverted sales as well as various forms of qualitative evidence. The value of diverted sales is typically measured as the product of the diversion ratio between the merging parties’ products – the diversion ratio between two products is the percentage of unit sales lost by one product when its price rises, that are captured by the second product – and the profit margin of the second product. When the value of diverted sales is measured in proportion to “the lost revenues attributable to the reduction in unit sales resulting from the price increase,”¹ it is the “gross upward pricing pressure index,” or “GUPPI.” The GUPPI is an economic tool used to score or rank the incentives for potential unilateral price effects. In the markets where I depart from the Commission’s decision the GUPPI is below 5 percent, indicating insignificant upward pricing pressure even before efficiencies or entry are taken into account, and weak incentives for unilateral price increases. In my view, the available quantitative and qualitative evidence are insufficient to support a reason to believe the proposed transaction will harm competition in these markets. I write separately to explain more fully the basis for my dissent in these markets.

I also write to address an important merger policy issue implicated by today’s decision – that is, whether the FTC should adopt a safe harbor in unilateral effects merger investigations by

¹ U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 6.1 n.11 (2010) [hereinafter MERGER GUIDELINES].

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defining a GUPPI threshold below which it is presumed competitive harm is unlikely. The *Merger Guidelines* clearly contemplate such a safe harbor. The *Merger Guidelines* explain that “[i]f the value of diverted sales is *proportionately small*, significant unilateral price effects are unlikely.”² In other words, the *Merger Guidelines* recognize that if the GUPPI is small, significant unilateral price effects are unlikely.

Without more, one might reasonably conclude it is unclear whether the *Merger Guidelines* merely offer a truism about the relationship between the GUPPI and likely unilateral price effects or invite the agencies to take on the task of identifying a safe harbor of general applicability across cases. But there is more. A principal drafter of the *Merger Guidelines* has explained the *Merger Guidelines*’ reference to a “proportionately small” value of diverted sales was intended to establish a GUPPI safe harbor. The Department of Justice’s Antitrust Division (“Division”), consistent with this interpretation of the *Merger Guidelines*, publicly announced precisely such a safe harbor when the GUPPI is less than 5 percent.³ Further, there is significant intellectual support for a GUPPI-based safe harbor among economists⁴ once again including the principal drafters of the *Merger Guidelines*.⁵ The Commission, however, has rejected the safe harbor approach both in practice – indeed, the Commission has recently entered into another consent involving divestitures in markets with

² *Id.* § 6.1 (emphasis added); see Steven C. Salop, Serge X. Moresi & John Woodbury, CRA Competition Memo, Scoring Unilateral Effects with the GUPPI: The Approach of the New Horizontal Merger Guidelines 2 (Aug. 31, 2010), available at http://crai.com/sites/default/files/publications/Commentary-on-the-GUPPI_0.pdf.

³ Carl Shapiro, Deputy Ass’t Att’y Gen. for Econ., Antitrust Div., U.S. Dep’t of Justice, Update from the Antitrust Division, Remarks as Prepared for the ABA Antitrust Law Fall Forum 24 (Nov. 18 2010).

⁴ See, e.g., Salop, Moresi & Woodbury, *supra* note 2, at 2 (explaining that “a GUPPI of less than 5% would be reasonably treated as evidence that ‘the value of diverted sales is proportionately small’ and hence that the proposed merger is unlikely to raise unilateral effects concerns”).

⁵ See Joseph Farrell & Carl Shapiro, *Antitrust Evaluation of Horizontal Mergers: An Economic Alternative to Market Definition*, 10 B.E. J. THEORETICAL ECON. 1 (2010).

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GUPPI scores below 5 percent⁶ and as a matter of the policy announced in the Commission's statement today.⁷

This is unfortunate. The legal, economic, and policy case for the GUPPI-based safe harbor contemplated by the *Merger Guidelines* is strong.⁸ There are a number of reasons why such a

⁶ See *Cerberus Institutional Partners V, L.P.*, FTC File No. 141-0108 (July 2, 2015). There, though one could not possibly infer this from the public-facing documents in the case, the Commission applied a diversion ratio threshold to identify stores for divestiture. To be accurate, a GUPPI threshold could be implied from the Commission's analysis and, as algebraically mindful readers will note, setting a diversion ratio threshold given profit margin data and a predicted price increase is not analytically distinguishable from the analysis in this matter. The Commission rightly points out that I voted in favor of the consent in *Cerberus*. As to whether I am merely being inconsistent in my views on the role of GUPPIs in merger analysis or, alternatively, there is some other more reasonable explanation for my votes, I can provide the explanation and let readers decide. In *Cerberus*, I voted for the consent on the basis that the use of diversion or GUPPI-based analysis was a step forward relative to relying exclusively upon structural analysis. The fact that there were stores identified for divestiture with implied GUPPIs less than 5 percent was unique. It is now a trend reinforced by a Commission decision to reject a GUPPI-based safe harbor – a decision I do not believe is in the public interest.

Regarding *Cerberus*, it is worth pointing out further that even a careful reader of the public documents in that case would come away with the impression that the Commission's analysis was largely structural, and concluded a number of six-to-five mergers were presumptively anticompetitive. See Analysis of Agreement Containing Consent Order to Aid Public Comment Exhibit A, *id.* An ancillary benefit of the transparency reluctantly generated by today's Commission statement is that the antitrust community is now on notice that more sophisticated economic tools were used in that matter, how they were used, and that the potential structural policy change signaled by those public documents does not appear to describe accurately the Commission's complete analysis in that case.

⁷ Statement of the Federal Trade Commission at 3, *Dollar Tree, Inc.*, FTC File No. 141-0207 (July 13, 2015) [hereinafter Majority Statement] (“[A] GUPPI-based safe harbor is . . . inappropriate.”).

⁸ A second question is whether a presumption of competitive harm should follow, as a matter of economic theory and empirical evidence, from a demonstration of a GUPPI above a certain threshold value. There appears to be a consensus that the answer to this question, at this point, is no. I agree. See, e.g., Thomas A. Lambert, *Respecting the Limits of Antitrust: The Roberts Court Versus the Enforcement Agencies* 13 (Heritage Foundation Legal Memorandum No. 144, Jan. 28, 2015) (the GUPPI “has not been empirically verified as a means of identifying anticompetitive mergers”); Steven C. Salop, *The*

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safe harbor might be desirable as a matter of antitrust policy if sufficiently supported by economic theory and evidence. Efficient resource allocation expending agency resources on the transactions most likely to raise serious competitive concerns and quickly dispensing with those that do not is one such goal.

A second reason a safe harbor for proportionately small diversion might be desirable antitrust policy is to compensate for the sources of downward pricing pressure not measured by the GUPPI but expected with most transactions, including efficiencies, entry, or repositioning. Some have argued that as a GUPPI attempts a rough measure of upward pricing pressure without a full blown analysis a symmetrical approach would include a standard efficiencies deduction which would be applied to account for the downward pricing pressure from the marginal-cost efficiencies that can typically be expected to result from transactions.⁹ This approach would permit the identification of a gross-upward-pricing-pressure threshold that triggers additional scrutiny.¹⁰

Yet a third reason a safe harbor might be desirable is to compensate the well-known feature of GUPPI-based scoring methods to predict harm for any positive diversion ratio that is, even for distant substitutes by distinguishing *de minimis* GUPPI levels from those that warrant additional scrutiny.¹¹ The *Merger Guidelines* contemplate a “safe harbor” because it “reflects that a

Evolution and Vitality of Merger Presumptions: A Decision-Theoretic Approach 40-41 (Georgetown Law Faculty Publications and Other Works, Working Paper No. 1304, 2014), available at <http://scholarship.law.georgetown.edu/facpub/1304/> (“The 2010 Merger Guidelines do not adopt an anticompetitive enforcement presumption based on high values of the GUPPI score. This was a practical policy decision at this time because the use of the *GUPPI* was new to much of the defense bar and the courts.”).

⁹ Farrell & Shapiro, *supra* note 5, at 10-12.

¹⁰ See *id.* at 12.

¹¹ James A. Keyte & Kenneth B. Schwartz, “Tally-Ho!”: *UPP and the 2010 Horizontal Merger Guidelines*, 7 ANTITRUST L.J. 587, 628 (2010) (“an uncalibrated tool cannot have predictive value as a screen if it always indicates postmerger price pressure”).

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small amount of upward pricing pressure is unlikely . . . to correspond to any actual post-merger price increase.”¹² Carl Shapiro explained shortly after adoption of the *Merger Guidelines*, on behalf of the Division, that “Current Division practice is to treat the value of diverted sales as proportionately small if it is no more than 5% of the lost revenues.”¹³

Against these benefits of adopting a GUPPI-based safe harbor, the Commission must weigh the cost of reducing its own flexibility and prosecutorial discretion. This begs the question: how likely are mergers within the proposed safe harbor to be anticompetitive? The benefits of this flexibility are proportional to the probability that the Commission’s economic analysis leads them to conclude that mergers with a GUPPI of less than 5 percent are anticompetitive. I am not aware of any transactions since the *Merger Guidelines* were adopted other than the two already mentioned that meet these criteria. The domain in which flexibility would be reduced with adoption of a reasonable safe harbor is small and the costs of doing so correspondingly low.

The Commission rejects a GUPPI safe harbor on the grounds that such an approach “ignores the reality that merger analysis is inherently fact-specific.”¹⁴ The Commission appears especially concerned that a GUPPI-based safe harbor might result in a false negative that is, it is possible that a merger with a GUPPI less than 5 percent harms competition. This objection to safe harbors and bright-line rules and presumptions is both conceptually misguided and is in significant tension with antitrust doctrine and

¹² Shapiro, *supra* note 3, at 24. Shapiro further cautioned that, although a GUPPI analysis “can be highly informative, the Agencies understand full well that measuring upward pricing pressure . . . typically is not the end of the story Repositioning, entry, innovation, and efficiencies must also be considered.” *Id.* at 26.

¹³ *Id.* at 24. Others have interpreted this speech as clearly announcing Division policy. See Salop, *supra* note 8, at 43 & n.105 (“In a speech while he was Deputy AAG, Carl Shapiro also specified a GUPPI safe harbor of 5%. As a speech by the Deputy AAG, this statement appeared to reflect DOJ policy.” (citing Shapiro, *supra* note 3)). Other economists agree that a GUPPI safe harbor should apply. *E.g.*, Farrell & Shapiro, *supra* note 5, at 10; Salop, Moresi & Woodbury, *supra* note 2, at 2.

¹⁴ Majority Statement, *supra* note 7, at 3.

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agency practice. Merger analysis is, of course, inherently fact specific. One can accept that reality, as well as the reality that evidence is both imperfect and can be costly to obtain, and yet still conclude that the optimal legal test from a consumer welfare perspective is a rule rather than a standard. This is a basic insight of decision theory, which provides a lens through which economists and legal scholars have long evaluated antitrust legal rules, burdens, and presumptions.¹⁵ The Commission's assertion that the mere possibility of false negatives undermines in the slightest the case for a safe harbor reveals a misunderstanding of the economic analysis of legal rules. The relevant question is not which legal rule drives false positives or false negatives to zero, but rather which legal rule minimizes the sum of the welfare costs associated with false negatives, false positives, and the costs of obtaining evidence and otherwise administering the law.

Existing antitrust law regularly embraces bright-line rules and presumptions rejecting the flexibility of a case-by-case standard taking full account of facts that vary across industries and firms. A simple example is the application of *per se* rules in price-fixing cases.¹⁶ This presumption of illegality is not based upon a belief that it is impossible for a horizontal restraint among competitors to increase welfare. Rather, the *per se* prohibition on naked price fixing "reflects a judgment that the costs of identifying exceptions to the general rule so far outweigh the costs of occasionally

¹⁵ See, e.g., C. Frederick Beckner III & Steven C. Salop, *Decision Theory and Antitrust Rules*, 67 ANTITRUST L.J. 41 (1999); James C. Cooper, Luke M. Froeb, Dan O'Brien & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Isaac Ehrlich & Richard A. Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); David S. Evans & A. Jorge Padilla, *Designing Antitrust Rules for Assessing Unilateral Practices: A Neo-Chicago Approach*, 72 U. CHI. L. REV. 27 (2005); Keith N. Hylton & Michael Salinger, *Tying Law and Policy: A Decision Theoretic Approach*, 69 ANTITRUST L.J. 469 (2001); Geoffrey A. Manne & Joshua D. Wright, *Innovation and the Limits of Antitrust*, 6 J. COMP. L. & ECON. 153 (2010).

¹⁶ See *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) ("More generally, in characterizing this conduct under the *per se* rule, our inquiry must focus on . . . whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output.").

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condemning conduct that might upon further inspection prove to be acceptable, that it is preferable not to entertain defenses to the conduct at all.”¹⁷ Similar decision-theoretic logic explains, for example, the presumption that above-cost prices are lawful.¹⁸ A GUPPI-based presumption would be based upon the same economic logic not that small-GUPPI mergers can *never* result in anticompetitive effects, but rather that mergers involving small GUPPIs are sufficiently unlikely to result in unilateral price increases such that incurring the costs of identifying exceptions to the safe harbor is less efficient than simply allowing mergers within the safe harbor to move forward.¹⁹

¹⁷ Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective: Cases, Concepts and Problems in Competition Policy* 104-05 (2d ed. 2008); see *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983) (“Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve. Thus, despite the theoretical possibility of finding instances in which horizontal price fixing, or vertical price fixing, are economically justified, the courts have held them unlawful per se, concluding the administrative virtues of simplicity outweigh the occasional ‘economic’ loss.”); HERBERT HOVENKAMP, *THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION* 50 (2005) (“[N]ot every anticompetitive practice can be condemned.”); Thomas A. Lambert, Book Review, *Tweaking Antitrust’s Business Model*, 85 TEX. L. REV. 153, 172 (2006) (“Hovenkamp’s discussion of predatory and limit pricing reflects a key theme that runs throughout *The Antitrust Enterprise*: that antitrust rules should be easily administrable, even if that means they must permit some anticompetitive practices to go unpunished.”).

¹⁸ See *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993); see also *Barry Wright Corp.*, 724 F.2d at 234 (“Conversely, we must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition. . . . [A] price cut that ends up with a price exceeding total cost in all likelihood a cut made by a firm with market power is almost certainly moving price in the ‘right’ direction (towards the level that would be set in a competitive marketplace). The antitrust laws very rarely reject such ‘birds in hand’ for the sake of more speculative (future low-price) ‘birds in the bush.’ To do so opens the door to similar speculative claims that might seek to legitimate even the most settled unlawful practices.”).

¹⁹ The Commission asserts that a GUPPI safe harbor cannot be justified by economic theory and evidence unless a presumption of liability can also be supported. I appreciate the Commission clarifying its view, but I believe it to be based upon a false equivalence. The Commission appears to misunderstand

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Whether the Commission should adopt a GUPPI-based safe harbor is particularly relevant in the instant matter, as the FTC had data sufficient to calculate GUPPIs for Dollar Tree, Deals,²⁰ and Family Dollar stores. The sheer number of stores owned and operated by the parties rendered individualized, in-depth analysis of the competitive nuances of each and every market difficult, if not impossible, to conduct. GUPPI calculations provided an efficient and workable alternative to identifying the small fraction of markets in which the transaction may be anticompetitive. This was a tremendous amount of work and I want to commend staff on taking this approach. Staff identified a GUPPI threshold such that stores with GUPPIs greater than the threshold were identified for divestiture. About half of the 330 stores divested as part of the Commission's Order were identified through this process.

What about the other stores? The Commission asserts I “mischaracterize” its use of GUPPIs and that “GUPPIs were not used as a rigid presumption of harm.”²¹ It claims that GUPPIs were used only as “an initial screen” to identify markets for further analysis, and that the Commission “proceeded to consider the results of the GUPPI analysis in conjunction with numerous other sources of information.”²² The evidence suggests otherwise. One might reasonably hypothesize that further

the difference between evidence sufficient to conclude harm is *likely* and evidence sufficient to conclude harm is *unlikely*. These are two very different economic propositions and it should not be surprising that one might be substantiated while the other is not. For example, one might rationally be uncomfortable pointing to the economic literature for support that mergers above a certain level of concentration are sufficiently likely to harm competition to support a presumption of antitrust liability, but also recognize the same body of economic theory and evidence would indeed support a safe harbor for mergers involving markets with thousands of competitors. To the extent the Commission appeals to academics who have raised concerns with GUPPI-based merger screens, my view clearly differs from the Commission. The Commission's more important dispute, in my view, is with the *Merger Guidelines* and its principal drafters, who clearly contemplated such a safe harbor.

²⁰ Deals is a separate banner under which Dollar Tree operates. See Majority Statement, *supra* note 7, at 1.

²¹ *Id.* at 2.

²² *Id.*

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consideration and analysis of “numerous sources of information” should result in both the identification of some stores *above* the GUPPI threshold that were ultimately determined unlikely to harm competition as well as some stores with GUPPIs *below* the threshold that nonetheless did create competitive problems that is, further scrutiny might reveal both false negatives and false positives.

The number of stores with GUPPIs exceeding the identified threshold that, after evaluation in conjunction with the qualitative and other evidence described by the Commission, were not slated for divestiture is nearly zero. This outcome is indistinguishable from the application of a presumption of competitive harm. The additional stores with GUPPIs below the threshold that were then identified for divestiture based upon additional qualitative factors included a significant number of stores with GUPPIs below 5 percent. The ratio of stores falling below the GUPPI threshold but deemed problematic after further qualitative evidence is taken into account to stores with GUPPIs above the threshold but deemed not to raise competitive problems after qualitative evidence is accounted for is unusual and remarkably high. It is difficult to conceive of a distribution of qualitative and other evidence occurring in real-world markets that would result in this ratio. Qualitative evidence should not be a one-way ratchet confirming the Commission’s conclusion of likely anticompetitive effects when GUPPIs are high and providing an independent basis for the same conclusion when GUPPIs are low.

I applaud the FTC for taking important initial steps in applying more sophisticated economic tools in conducting merger analysis where the data are available to do so. Scoring metrics for evaluating incentives for unilateral price increases are no doubt a significant improvement over simply counting the number of firms in markets pre- and post-transaction. To be clear, it bears repeating that I agree that a GUPPI-based presumption of *competitive harm* is inappropriate at this stage of economic learning.²³ There is no empirical evidence to support the use of

²³ Joseph J. Simons & Malcolm B. Coate, *Upward Pressure on Price Analysis: Issues and Implications for Merger Policy*, 6 EUR. COMPETITION J. 377, 389 (2010) (the upward pricing pressure screen “identifies as potentially problematic far more mergers than would be challenged or even investigated

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GUPPI calculations in merger analysis on a standalone basis, let alone the use of a particular GUPPI threshold to predict whether a transaction is likely to substantially harm competition.²⁴ I also agree that in the context of a full-scale evaluation of whether a proposed transaction is likely to harm competition, GUPPI-based analysis can and should be interpreted in conjunction with all other available quantitative and qualitative evidence. The relevant policy question is a narrow one: whether there exists a GUPPI threshold below which the Commission should presumptively conclude a proposed transaction is unlikely to violate the antitrust laws.

The FTC has not publicly endorsed a GUPPI-based safe harbor of 5 percent and disappointingly, has rejected the concept in its statement today. The Commission's interpretation is that what is a "proportionately small" value of diverted sales should vary according to the industry and even the individual firms in a given investigation.²⁵ As discussed, I believe this interpretation contradicts the letter and spirit of the *Merger Guidelines*.²⁶

under the enforcement standards that have existed for more than twenty years"); Lambert, *supra* note 8, at 13 ("In the end, the agencies' reliance on the difficult-to-administer, empirically unverified, and inherently biased GUPPI is likely to generate many false condemnations of mergers that are, on the whole, beneficial.").

²⁴ See Dennis W. Carlton, *Revising the Horizontal Merger Guidelines*, 10 J. COMPETITION L. & ECON. 1, 7 (2010) ("Perhaps most importantly, UPP [as described in the 2010 *Merger Guidelines*] is new and little empirical analysis has been performed to validate its predictive value in assessing the competitive effects of mergers."); Keyte & Schwartz, *supra* note 11, at 590 (discussing the 2010 *Merger Guidelines*' inclusion of the GUPPI and opining that "in light of the [its] extremely light judicial record, as well as the absence of demonstrated reliability in predicting real-world competitive effects, we think it is premature, at best, to embrace [it] as a screening tool for merger review"); Simons & Coate, *supra* note 23 ("Because screening mechanisms [such as the GUPPI] purport to highlight general results, they need empirical support to show the methodology actually predicts concerns relatively well. This empirical support is not available at this time."); Lambert, *supra* note 8, at 13 (the GUPPI "has not been empirically verified as a means of identifying anticompetitive mergers").

²⁵ Majority Statement, *supra* note 7, at 3.

²⁶ See *supra* text accompanying note 12.

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Moreover, the Commission's apparent discomfort with safe harbors on the grounds that they are not sufficiently flexible to take into account the fact-intensive nature of antitrust analysis in any specific matter is difficult to reconcile with its ready acceptance of presumptions and bright-line rules that trigger liability.²⁷

Once it is understood that a safe harbor should apply, it becomes obvious that, for the safe harbor to be effective, the threshold should not move. As the plane crash survivors in *LOST* can attest, a harbor on an island that cannot be found and that can be moved at will is hardly "safe."²⁸

In my view, the Commission should adopt a GUPPI-based safe harbor in unilateral effects investigations where data are available. While reasonable minds can and should debate the optimal definition of a "small" GUPPI, my own view is that 5 percent is a reasonable starting point for discussion. Furthermore, failure to adopt a safe harbor could raise concerns about the potential for divergence between Commission and Division policy

²⁷ For example, the Commission regularly applies such presumptions of liability involving the number of firms in a market, or presumptions based upon increased market concentration as articulated by the *Merger Guidelines* or the courts. See, e.g., Statement of the Federal Trade Commission, Holcim Ltd., FTC File No. 141-0129 (May 8, 2015) (finding liability based upon, alternatively, changes in concentration and number of firms pre- and post-merger); Statement of the Federal Trade Commission, ZF Friedrichshafen AG, FTC File No. 141-0235 (May 8, 2015) (finding liability based upon number of firms pre- and post-merger); Mem. in Supp. of Pl. Federal Trade Commission's Mot. for T.R.O. and Prelim. Inj. at 23, *FTC, v. Sysco Corp.*, 2015 WL 1501608, No. 1:15-cv-00256 (D.D.C. 2015) (arguing that the proposed merger was presumptively unlawful based upon the holding of *United States v. Phila. Nat'l Bank*, 374 U.S. 321 (1963)). That the Commission's tolerance of presumptions that satisfy its own *prima facie* burden does not extend to safe harbors raises basic questions about the symmetry of the burdens applied in its antitrust analysis. See Dissenting Statement of Commissioner Joshua D. Wright 6, *Ardagh Group S.A.*, FTC File No. 131-0087 (June 18, 2014) ("[S]ymmetrical treatment in both theory and practice of evidence proffered to discharge the respective burdens of proof facing the agencies and merging parties is necessary for consumer-welfare based merger policy.").

²⁸ Move the Island, *LOST – Move the Island*, YOUTUBE (Nov. 17, 2008), <https://www.youtube.com/watch?v=Fa57rVkJal4>.

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in unilateral effects merger investigations.²⁹ What would be most problematic, however, is if, rather than moving toward a GUPPI-based safe harbor, the FTC were to use GUPPI thresholds to employ a presumption of competitive harm.³⁰

For these reasons, I dissent in part from and concur in part with the Commission's decision.

²⁹ I do not take a position as to how the Division currently uses the GUPPI analysis. *But see* Majority Statement, *supra* note 7, at 4 n.12. However, public statements by the Division and the Commission – the only sources upon which business firms and the antitrust bar can rely – suggest there are material differences. *Compare id.* at 3 (“[W]hether the value of diverted sales is considered ‘proportionately small’ compared to lost revenues will vary from industry to industry and firm to firm.”) *with* Shapiro, *supra* note 3, at 24 (“Current Division practice is to treat the value of diverted sales as proportionately small if it is no more than 5% of the lost revenues.”).

³⁰ A GUPPI-based safe harbor of the type endorsed by the *Merger Guidelines* implies a GUPPI above the threshold is necessary but not sufficient for liability. A GUPPI-based presumption of harm implies a GUPPI above the threshold is sufficient but not necessary for liability. Unfortunately, the use of GUPPIs here is more consistent with the latter than the former.

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, subject to final approval, an Agreement Containing Consent Order (“Consent Order”) from Dollar Tree, Inc. (“Dollar Tree”) and Family Dollar Stores, Inc. (“Family Dollar”), (collectively, the “Respondents”). On July 27, 2014, Dollar Tree and Family Dollar entered into an agreement whereby Dollar Tree would acquire Family Dollar for approximately \$9.2 billion (the “Acquisition”). The purpose of the proposed Consent Order is to remedy the anticompetitive effects that otherwise would result from Dollar Tree’s acquisition of Family Dollar. Under the terms of the proposed Consent Order, Respondents are required to divest 330 stores in local geographic markets (collectively, the “relevant markets”) in 35 states to the Commission-approved buyer. The divestitures must be completed within 150 days from the date of the Acquisition. The Commission and Respondents have agreed to an Order to Maintain Assets to maintain the viability of Respondents’ assets until they are transferred to the Commission-approved buyer.

The proposed Consent Order 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 Order and any comments received, and decide whether the Consent Order should be withdrawn, modified, or made final.

The Commission’s Complaint alleges that 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, by removing an actual, direct, and substantial competitor in localized geographic markets in 222 cities nationwide.¹ The elimination of this

¹ The list of cities in which stores will be divested is attached as Appendix A. The list of stores to be divested is attached to the Decision and Order as Schedule A.

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competition would result in significant competitive harm; specifically the Acquisition will allow the combined entity to increase prices unilaterally above competitive levels. Similarly, absent a remedy, there is significant risk that the merged firm may decrease the quality and service aspects of its stores. The proposed Consent Order would remedy the alleged violations by requiring divestitures to replace competition that otherwise would be lost in these markets because of the Acquisition.

II. THE RESPONDENTS

As of January 31, 2015, Dollar Tree operated 5,157 discount general merchandise retail stores across the United States under the Dollar Tree and Deals banners. Presently, Dollar Tree banner stores are located in 48 states and the District of Columbia, while Deals banner stores are currently located in 18 states and the District of Columbia. In the Dollar Tree banner stores, Dollar Tree sells a wide selection of everyday basic, seasonal, closeout, and promotional merchandise for \$1 or less. At its Deals banner stores, Dollar Tree offers an expanded assortment of this merchandise at prices generally less than \$10. Dollar Tree and Deals banner stores range in size from 8,000 to 12,000 square feet of selling space and typically carry between 6,600 to 7,000 stock keeping units (“SKUs”).

As of February 28, 2015, Family Dollar operated approximately 8,184 discount general merchandise retail stores nationwide. Family Dollar sells an assortment of consumables, home products, apparel and accessories, seasonal items, and electronic merchandise at prices generally less than \$10. Currently, Family Dollar stores are located in 46 states and the District of Columbia. Stores typically have 7,150 square feet of selling space and carry approximately 6,500 to 7,000 SKUs.

III. COMPETITION IN THE RELEVANT MARKETS

Dollar stores are small-format, deep-discount retailers that sell an assortment of consumables and non-consumables, including food, home products, apparel and accessories, and seasonal items, at prices typically under \$10. Dollar stores differentiate themselves from other retailers on the basis of both convenience and value by offering a broad assortment but limited variety of

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general merchandise items at discounted prices in stores with small footprints (*i.e.*, approximately 7,000 to 10,000 square feet of selling space), located relatively close to consumers' homes or places of work.² Customers often shop at dollar stores as part of a "fill-in" shopping trip. Dollar stores typically compete most closely with other dollar stores that provide the same kind of convenient shopping trip for discounted general merchandise.

Walmart competes closely with dollar stores and offers a wide assortment of products at deeply-discounted prices. Although Walmart does not provide the same kind of convenience as that of dollar stores given its less-accessible locations, larger store footprints, and greater assortment of products, Walmart nevertheless competes closely with dollar stores by offering a comparable or better value to consumers in terms of pricing. For purposes of this matter, "discount general merchandise retail stores" refers to dollar stores and the retailer Walmart.

Although other retail stores (*i.e.*, supermarkets, pharmacies, mass merchandisers, and discount specialty merchandise retail stores) often sell discounted merchandise similar to that offered by dollar stores and Walmart, these other retailers generally are not as effective at constraining Respondents as are other discount general merchandise retail stores.³ These other retailers do not offer the same value as Walmart or the same combination of convenience and value offered by dollar stores, which tends to make them less effective substitutes for discount general merchandise retail stores. As a result, consumers shopping at discount general merchandise retail stores are unlikely to significantly increase purchases of discounted merchandise at

² The term "dollar stores" as used here includes stores operated by Respondents, Dollar General, 99 Cents Only, and Fred's Super Dollar. Independently-owned retailers that sell discounted merchandise at the \$1 or multi-price point in substantially smaller stores are not included.

³ The term "supermarkets" as used here includes traditional supermarkets such as Kroger and Publix, as well as supermarkets included within hypermarkets such as SuperTarget or Kroger's Fred Meyer banner. The term "pharmacies" includes national retail drug stores such as CVS, Rite Aid, and Walgreens. The term "mass merchandisers" includes retailers such as Target and K-Mart. The term "discount specialty merchandise retail stores" includes retailers such as Big Lots and Aldi.

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other retailers in response to a small but significant price increase at discount general merchandise retail stores. However, in certain geographic markets, typically characterized by high population density, where the number and geographic proximity of these other retailers is substantial relative to the competing discount general merchandise retail stores, the collective presence of these other retailers acts as a more significant price constraint on the discount general merchandise retail stores operating in the area.⁴

Thus, the relevant line of commerce in which to analyze the Acquisition is no narrower than discount general merchandise retail stores. In certain geographic markets, the relevant line of commerce may be as broad as the sale of discounted general merchandise in retail stores (*i.e.*, discount general merchandise retail stores as well as supermarkets, pharmacies, mass merchandisers, and discount specialty merchandise retail stores). Whether the relevant line of commerce is discount general merchandise retail stores or discounted general merchandise in retail stores depends on the specifics of the geographic market at issue, such as population density and the density and proximity of the Respondents' stores and competing retailers.

The relevant geographic market varies depending on the unique characteristics of each market, including the local road network, physical boundaries, and population density. A strong motivation of consumers shopping at discount general merchandise retail stores is convenience. As with grocery shopping, the vast majority of consumers who shop for discounted general merchandise do so at stores located very close to where they live or work. The draw area of a dollar store, which varies depending on whether it is located in an urban, suburban, or rural area, may range from a couple of city blocks to several miles. Other market participants, such as supermarkets and retail pharmacies, may have similar, although somewhat broader draw areas. Walmart's stores, particularly Walmart Supercenters, tend to have a considerably broader draw area. In highly urban areas,

⁴ Online retailers are not participants in the relevant product market. The primary appeal of dollar stores is the combination of value and convenience they offer consumers. Given the time required to process and ship items ordered online, Internet retailers are less convenient shopping options for consumers looking to make an immediate purchase on a fill-in trip.

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the geographic markets are generally no broader than a half-mile radius around a given store. In highly rural areas, the geographic market is generally no narrower than a three-mile radius around a given store. In areas neither highly urban nor highly rural, the geographic market is generally within a half-mile to three-mile radius around a given store.

Respondents are close competitors in terms of format, customer service, product offerings, and location in the relevant geographic markets. With regard to pricing, product assortment, and a host of other competitive issues, Respondents typically focus most directly on the actions and responses of each other and other dollar stores, while also paying close attention to Walmart. In many of the relevant geographic markets, Dollar Tree and Family Dollar operate the only dollar stores in the area or the vast majority of conveniently-located discount general merchandise retail stores. Absent relief, the Acquisition would increase the incentive and ability of Dollar Tree to raise prices unilaterally post-Acquisition in the relevant geographic markets. The Acquisition would also decrease incentives to compete on non-price factors, including product selection, quality, and service.

Entry into the relevant geographic markets that is timely and sufficient to prevent or counteract the expected anticompetitive effects of the Acquisition is unlikely. Entry barriers include the time, costs, and feasibility associated with identifying and potentially constructing an appropriate and available location for a discount general merchandise retail store, the resources required to support one or more new stores over a prolonged ramp-up period, and the sufficient scale to compete effectively. An entrant's ability to secure a viable competitive location may be hindered by restrictive-use commercial lease covenants, which can limit the products sold, or even the type of retailer that can be located, at a particular location.

IV. THE PROPOSED CONSENT ORDER

The proposed remedy, which requires the divestiture of 330 Family Dollar stores in the relevant markets to Sycamore Partners ("Sycamore"), will restore fully the competition that otherwise would be eliminated in these markets as a result of the Acquisition. Sycamore is a private equity firm specializing in

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consumer and retail investments. The proposed buyer appears to be a highly suitable purchaser and is well positioned to enter the relevant geographic markets and prevent the likely competitive harm that otherwise would result from the Acquisition. Sycamore's proposed executive team has extensive experience operating discount general merchandise retail stores.

The proposed Consent Order requires Respondents to divest 330 stores to Sycamore within 150 days from the date of the Acquisition. If, at any time before the proposed Consent Order is made final, the Commission determines that Sycamore is not an acceptable buyer, Respondents must immediately rescind the divestitures and divest the assets to a different buyer that receives the Commission's prior approval.

The proposed Consent Order contains additional provisions to ensure the adequacy of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will be issued at the time the proposed Consent Order is accepted for public comment. The Order to Maintain Assets requires Family Dollar to operate and maintain each divestiture store in the normal course of business through the date the store is ultimately divested to Sycamore. Because the divestiture schedule runs for an extended period of time, the proposed Consent Order appoints Gary Smith as a Monitor to oversee Respondents' compliance with the requirements of the proposed Consent Order and Order to Maintain Assets. Mr. Smith has the experience and skills to be an effective Monitor, no identifiable conflicts, and sufficient time to dedicate to this matter through its conclusion.

* * *

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

Complaint

IN THE MATTER OF

PINGER, INC.CONSENT ORDER, ETC. IN REGARD TO ALLEGED VIOLATION OF
SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT*Docket C-4550; File No. 152 3137**Complaint, September 29, 2015 – Decision, September 29, 2015*

This consent order addresses Pinger, Inc.'s misleading representation of their participation in the Safe Harbor privacy framework agreed upon by the U.S. and the European Union ("EU"). Pinger, Inc. develops apps for mobile phones and devices. 'Textfree', is the proposed defendant's most popular application. The Commission's complaint alleges that Pinger, Inc. falsely represented that it was a "current" participant in the Safe Harbor Frameworks when, in fact, from March 2014 until April 2015, Pinger, Inc. was not a "current" participant in the Safe Harbor Frameworks. The Commission's complaint alleges that in March 2011, Pinger, Inc. submitted its self-certification to the Safe Harbor Frameworks. Pinger, Inc. did not renew its self-certification in March 2014 and Commerce subsequently updated Pinger, Inc.'s status to "not current" on its public website. In May 2015, Pinger, Inc. recertified with Commerce and is now a current participant in the Safe Harbor Frameworks. The consent order prohibits Pinger, Inc. from making misrepresentations about its membership in any privacy or security program sponsored by the government or any other self-regulatory or standard-setting organization, including, but not limited to, the U.S.-EU Safe Harbor Framework. As well as, requiring Pinger, Inc. to supply and retain documents relating to their compliance with the Order for a five-year period. The proposed order mandates that Pinger, Inc. submit an initial compliance report to the FTC, and make available to the FTC subsequent reports.

*Participants**For the Commission: Monique Einhorn**For the Respondent: Lydia Parnes, Wilson, Sonsini, Goodrich
& Rosati***COMPLAINT**

The Federal Trade Commission, having reason to believe that Pinger, Inc., a corporation, has violated the Federal Trade Commission Act ("FTC Act"), and it appearing to the Commission that this proceeding is in the public interest, alleges: