

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Jon Leibowitz, Chairman**
 William E. Kovacic
 J. Thomas Rosch
 Edith Ramirez
 Julie Brill

In the Matter of)	
)	
Tops Markets LLC,)	
a limited liability company,)	
)	
Morgan Stanley Capital Partners V U.S. Holdco LLC,)	Docket No. C-4295
a limited liability company,)	
)	
and)	
)	
The Penn Traffic Company,)	
a corporation.)	
)	

ORDER TO MAINTAIN ASSETS

The Federal Trade Commission (“Commission”), having initiated an investigation of the proposed acquisition by Respondent Tops Markets LLC (“Tops”), a subsidiary of Morgan Stanley Capital Partners V U.S. Holdco LLC (“Holdco”), of certain assets of Respondent The Penn Traffic Company (“Penn Traffic”), and Respondents having been furnished thereafter with a copy of a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45; and

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

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated the said Acts, and that a Complaint should issue stating its charges in that respect, and having determined to accept the executed Consent Agreement and to place such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission hereby issues its Complaint, makes the following jurisdictional findings and issues this Order to Maintain Assets:

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

ORDER

I.

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

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

each.

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

II.

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

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

competitiveness of the Penn Traffic Supermarket Businesses.

- B. Until the Closing Date, Respondents shall maintain the operations of the Penn Traffic Supermarket Businesses in the regular and ordinary course of business and consistent with past practice (including regular repair and maintenance of the assets of such business) and/or as may be necessary to preserve the marketability, viability, and competitiveness of such Penn Traffic Supermarket Businesses and shall use their best efforts to preserve goodwill and appropriate business relationships with the following: suppliers; vendors and distributors; customers; Agencies; employees; and others having business relations with the Penn Traffic Supermarket Businesses. Respondents' responsibilities shall include, but are not limited to, the following:
1. providing each of the Penn Traffic Supermarket Businesses with sufficient working capital to operate at least at current rates of operation and to meet all capital calls with respect to such business to carry on, at least at their scheduled pace, all critical infrastructure replacement and repair projects and all ordinary course activities for each of the Penn Traffic Supermarket Businesses;
 2. providing such resources as may be necessary to respond to competition and/or to prevent any diminution in sales of each of the Penn Traffic Supermarket Businesses after the Acquisition process and prior to the complete divestiture, transfer and delivery of the related Penn Traffic Supermarket Business Assets to an Acquirer;
 3. providing such resources and funding as may be necessary to maintain the competitive strength and positioning of each of the Penn Traffic Supermarket Businesses including such funds as are sufficient to:
 - a. perform all routine maintenance and all other maintenance as may be necessary to maintain or replace the assets related to such Penn Traffic Supermarket Business; and
 - b. provide appropriate levels of distribution, marketing and advertising (including, without limitation, circulars, newspaper advertisements, direct mailers, checkout reward coupons), marketing, promotion and sales expenditures for each of the Penn Traffic Supermarket Businesses;
 4. providing such support services to the Penn Traffic Supermarket Businesses as were being provided to such businesses by Respondent Penn Traffic as of the date the Consent Agreement was signed by Respondents; and
 5. maintaining a work force at least as equivalent in size, training, and expertise to what has been associated with each of the Penn Traffic Supermarket Businesses for the relevant supermarket location's last fiscal year including, without limitation, maintaining at current levels all full time equivalent employee hours, and where necessary, increasing such full time equivalent employee hours at each of the Penn

Traffic Supermarket Businesses;

6. maintaining the inventory of each of the Penn Traffic Supermarket Businesses at levels and selections (*e.g.*, stock-keeping units) consistent with those maintained at such business by Respondent Penn Traffic and as may be necessary to accommodate all advertising and promotions offered by Respondent Tops within the Relevant Geographic Market and not transferring inventory from any of the Penn Traffic Supermarket Businesses other than in the ordinary course of business consistent with past practices;
 7. maintaining the Trademarks, Trade Dress, service marks, or trade names of Respondent Penn Traffic at each of the Penn Traffic Supermarket Businesses;
 8. keeping the organization and properties of each of the Penn Traffic Supermarket Businesses intact, including current business operations (including regular hours of operation of the Supermarket and its individual departments), physical facilities, and working conditions;
 9. maintaining all operations, programs (including customer loyalty and continuity, reward coupons, discounts, or such similar programs) and departments at each of the Penn Traffic Supermarket Businesses in a manner equivalent to the Acquired Supermarkets;
 10. making any payment required to be paid under any contract or lease when due, and otherwise paying all liabilities and satisfy all obligations, for each of the Penn Traffic Supermarket Businesses, in each case in a manner consistent with the practices for the Acquired Supermarkets;
 11. maintaining the books and records (including customer loyalty data) of each of the Penn Traffic Supermarket Businesses;
 12. not displaying any signs or conducting any advertising (*e.g.*, direct mailing, point-of-purchase coupons) that indicates that any Respondent is moving its operations to another location, or that indicates any of the Penn Traffic Supermarket Businesses will close;
 13. not conducting any “going out of business,” “close-out,” “liquidation” or similar sales or promotions at or relating to any of the Penn Traffic Supermarket Businesses; and
 14. not terminating the operation of any of the Penn Traffic Supermarket Businesses.
- C. Until Respondent Tops fully and finally divests, transfers and delivers a particular Penn Traffic Supermarket Business Asset to an Acquirer, Respondents shall maintain the full economic viability, marketability and competitiveness of such Penn Traffic Supermarket Business Asset, shall prevent its destruction, removal, wasting, deterioration, or impairment and shall maintain such Penn Traffic Supermarket Business Asset in the regular and ordinary course of business and in accordance with past practice (including regular repair and maintenance).

- D. Until the Closing Date, Respondents shall provide all management level employees that are associated with each of the Penn Traffic Supermarket Businesses with reasonable financial incentives to continue in their positions and to manage, market, and promote each of the Penn Traffic Supermarket Businesses consistent with such practices at the Acquired Supermarkets and/or as may be necessary to preserve the marketability, viability and competitiveness of each Penn Traffic Supermarket Business pending divestiture. Such incentives shall include a continuation of all employee benefits offered by Respondent Tops until the Closing Date, including regularly scheduled raises, bonuses, and additional incentives as may be necessary to prevent any diminution of each of the Penn Traffic Supermarket Businesses's competitiveness.
- E. For a period of one (1) year from the Closing Date, Respondents shall not interfere with the hiring or employing by the Acquirer of the particular Penn Traffic Supermarket Business of the related Supermarket Employees, and shall remove any impediments within the control of Respondent(s) that may deter these employees from accepting employment with such Acquirer, including, but not limited to, any noncompete provisions of employment or other contracts with Respondent(s) that would affect the ability or incentive of those individuals to be employed by such Acquirer. In addition, Respondents shall not make any counteroffer to a Supermarket Employee who receives a written offer of employment from the Acquirer;
- provided, however,* that this Paragraph shall not prohibit Respondents from continuing to employ any Supermarket Employee under the terms of such employee's employment with Respondent(s) prior to the date of the written offer of employment from the Acquirer to such employee.
- F. The purpose of this Order to Maintain Assets is to maintain the full economic viability, marketability and competitiveness of the Penn Traffic Supermarket Businesses through the divestiture, transfer and delivery of the related Penn Traffic Supermarket Business Assets to an Acquirer or Acquirers, to minimize any risk of loss of competitive potential for the Penn Traffic Supermarket Businesses and to prevent the destruction, removal, wasting, deterioration, or impairment of any of the Penn Traffic Supermarket Business Assets except for ordinary wear and tear.

III.

IT IS FURTHER ORDERED that:

- A. At any time after Respondent Tops sign the Consent Agreement in this matter, the Commission may appoint a monitor ("Interim Monitor") to assure that Respondents expeditiously comply with all of their obligations and perform all of their responsibilities as required by the Orders and the Remedial Agreements.
- B. The Commission shall select the Interim Monitor, subject to the consent of Respondent Tops, which consent shall not be unreasonably withheld. If Respondent Tops has not

opposed, in writing, including the reasons for opposing, the selection of a proposed Interim Monitor within ten (10) days after notice by the staff of the Commission to Respondent Tops of the identity of any proposed Interim Monitor, Respondents shall be deemed to have consented to the selection of the proposed Interim Monitor.

- C. Not later than ten (10) days after the appointment of the Interim Monitor, Respondent Tops shall execute an agreement that, subject to the prior approval of the Commission, confers on the Interim Monitor all the rights and powers necessary to permit the Interim Monitor to monitor Respondents' compliance with the relevant requirements of the Orders in a manner consistent with the purposes of the Orders.
- D. If an Interim Monitor is appointed, Respondents shall consent to the following terms and conditions regarding the powers, duties, authorities, and responsibilities of the Interim Monitor:
 - 1. the Interim Monitor shall have the power and authority to monitor Respondents' compliance with the divestiture and asset maintenance obligations and related requirements of the Orders, and shall exercise such power and authority and carry out the duties and responsibilities of the Interim Monitor in a manner consistent with the purposes of the Orders and in consultation with the Commission;
 - 2. the Interim Monitor shall act in a fiduciary capacity for the benefit of the Commission; and
 - 3. the Interim Monitor shall serve until the date of completion by Respondent Tops of the divestiture of all of the Penn Traffic Supermarket Business Assets in a manner that fully satisfies the requirements of the Decision and Order; *provided further*, that the Commission may shorten or extend this period as may be necessary or appropriate to accomplish the purposes of the Orders.
- E. Subject to any demonstrated legally recognized privilege, the Interim Monitor shall have full and complete access to Respondents' personnel, books, documents, records kept in the normal course of business, facilities and technical information, and such other relevant information as the Interim Monitor may reasonably request, related to Respondents' compliance with their obligations under the Orders, including, but not limited to, their obligations related to the relevant assets. Respondents shall cooperate with any reasonable request of the Interim Monitor and shall take no action to interfere with or impede the Interim Monitor's ability to monitor Respondents' compliance with the Orders.
- F. The Interim Monitor shall serve, without bond or other security, at the expense of Respondent Tops, on such reasonable and customary terms and conditions as the Commission may set. The Interim Monitor shall have authority to employ, at the expense of Respondent Tops, such consultants, accountants, attorneys and other representatives and assistants as are reasonably necessary to carry out the Interim Monitor's duties and responsibilities.

- G. Respondent Tops shall indemnify the Interim Monitor and hold the Interim Monitor harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Interim Monitor's duties, including all reasonable fees of counsel and other reasonable expenses incurred in connection with the preparations for, or defense of, any claim, whether or not resulting in any liability, except to the extent that such losses, claims, damages, liabilities, or expenses result from gross negligence, willful or wanton acts, or bad faith by the Interim Monitor.
- H. Respondents shall report to the Interim Monitor in accordance with the requirements of the Orders and/or as otherwise provided in any agreement approved by the Commission. The Interim Monitor shall evaluate the reports submitted to the Interim Monitor by each Respondent, and any reports submitted by the Acquirer with respect to the performance of such Respondent's obligations under the Orders or the Remedial Agreement(s). Within thirty (30) days from the date the Interim Monitor receives these reports, the Interim Monitor shall report in writing to the Commission concerning performance by each Respondent of its obligations under the Orders.
- I. Respondents may require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign a customary confidentiality agreement; *provided, however*, that such agreement shall not restrict the Interim Monitor from providing any information to the Commission.
- J. The Commission may, among other things, require the Interim Monitor and each of the Interim Monitor's consultants, accountants, attorneys and other representatives and assistants to sign an appropriate confidentiality agreement related to Commission materials and information received in connection with the performance of the Interim Monitor's duties.
- K. If the Commission determines that the Interim Monitor has ceased to act or failed to act diligently, the Commission may appoint a substitute Interim Monitor in the same manner as provided in this Paragraph.
- L. The Commission may on its own initiative, or at the request of the Interim Monitor, issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of the Orders.
- M. The Interim Monitor appointed pursuant to this Order to Maintain Assets may be the same Entity appointed as a Divestiture Trustee pursuant to the relevant provisions of the Decision and Order.

IV.

IT IS FURTHER ORDERED that not later than thirty (30) days after the Respondents sign the Agreement Containing Consent Order, and every thirty (30) days thereafter until

Respondent Tops has fully complied with its obligations to divest, assign, grant, license, transfer, deliver or otherwise convey the Penn Traffic Supermarket Business Assets as required by Paragraph II.A. of the Decision and Order, Respondents shall submit to the Commission a verified written report setting forth in detail the manner and form in which they intend to comply, are complying, and have complied with this Order to Maintain Assets and the related Decision and Order; *provided, however*, that, after the Decision and Order in this matter becomes final, the reports due under this Order to Maintain Assets may be consolidated with, and submitted to the Commission at the same time as, the reports required to be submitted by Respondents pursuant to Paragraph VII of the Decision and Order.

V.

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

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

VI.

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

- A. access, during business office hours of Respondent and in the presence of counsel, to all facilities and access to inspect and copy all books, ledgers, accounts, correspondence, memoranda and all other records and documents in the possession or under the control of Respondent related to compliance with the Orders, which copying services shall be provided by Respondent at the request authorized representative(s) of the Commission and at the expense of the Respondent; and

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

VII.

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

- A. Three (3) days after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. § 2.34; or
- B. The later of:
 - 1. The day after the divestiture of all of the Penn Traffic Supermarket Business Assets, as required by and described in the Decision and Order, has been completed and the Interim Monitor, in consultation with Commission staff and the Acquirer(s), notifies the Commission that all assignments, conveyances, deliveries, grants, licenses, transactions, transfers and other transitions related to such divestitures are complete, or the Commission otherwise directs that this Order to Maintain Assets is terminated; or
 - 2. Three (3) days after the related Decision and Order becomes final.

By the Commission.

Donald S. Clark
Secretary

SEAL
ISSUED: August 4, 2010