

**UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION**

COMMISSIONERS: **Edith Ramirez, Chairwoman**
 Julie Brill
 Maureen K. Ohlhausen
 Terrell McSweeney

In the Matter of

Cerberus Institutional Partners V, L.P.
a limited partnership;

AB Acquisition LLC,
a limited liability company;

and

Safeway Inc.,
a corporation.

Docket No. C-4504
PUBLIC VERSION

**APPLICATION FOR APPROVAL OF WAIVER AGREEMENT TO THE HAGGEN
DIVESTITURE AGREEMENT**

Pursuant to Section 2.41(f) of the Commission’s Rules of Practice, Cerberus Institutional Partners V, L.P., AB Acquisition LLC, and Safeway Inc. (“Respondents”) hereby apply for expedited Commission approval of a proposed waiver (the “Employee Waiver”) by Haggen Holdings LLC (“Haggen”) to one provision of the Asset Purchase Agreement (as amended June 16, 2015) between Albertson’s LLC, Albertson’s Holdings LLC, and Haggen (the “Haggen Divestiture Agreement” as defined in the Decision and Order in the above-referenced matter, which became final on July 2, 2015).

Haggen unilaterally proposed the Employee Wavier on September 3, 2015, a copy of which is attached as Exhibit A. The proposed Employee Waiver will enable Albertson’s LLC and Albertson’s Holdings LLC (collectively, “Albertson’s”) to solicit or hire Transferred

Employees¹ “other than any Transferred Employee who is a head pharmacist, pharmacist in charge (PIC), pharmacist, pharmacist clerk, pharmacy technician or other pharmacy employee” prior to the expiration of the non-solicitation/non-hiring time period in the Haggen Divestiture Agreement.

Actions by Albertson’s in reliance on the Employee Waiver, but otherwise inconsistent with the Haggen Divestiture Agreement as approved by the Commission, may require prior Commission approval because the Haggen Divestiture Agreement approved by the Commission prohibits Albertson’s from soliciting or hiring Transferred Employees for specified periods of time that remain in effect at this time. Section 20(b) of the Haggen Divestiture Agreement states:

For a period of twelve (12) months following the applicable Closing Date,² no Seller³ shall, and each Seller shall cause its Affiliates not to, directly or indirectly, solicit (or cause to be directly or indirectly solicited) or hire any Transferred Employee; provided that the foregoing restriction shall not apply to (i) (A) Transferred Employees (other than any such Transferred Employees who are pharmacists or store directors) who were involuntarily terminated (i.e., either laid off or terminated for cause) by Buyer or an Affiliate thereof, or (B) Transferred Employees who are pharmacists or store directors, in each case, who were laid off (as opposed to terminated for cause) by Buyer or an Affiliate thereof, or (ii) generalized searches by use of advertising or paid recruiting efforts (including the use of search firms) which are not specifically targeted at any Transferred Employees or hiring that results therefrom (provided, that the hiring exception contained in this clause (ii) shall not apply to Transferred Employees who are pharmacists or store directors). For purposes of the above, the term “laid off” shall mean any involuntary termination as a result of (a) a reduction in force at a Store Property, (b) the closure of a Store Property, (c) the sale of a Store Property, and/or (d) the sale of part or all of Buyer or an Affiliate thereof. Notwithstanding the foregoing, with respect to Transferred Employees who are pharmacists or

¹ Transferred Employees are defined in Section 20(a) of the Haggen Divestiture Agreement as former store employees at the divested Albertson’s and Safeway-owned stores that were hired by Haggen.

² The Closing Date is defined in Section 2.3.3(b) of the Haggen Divestiture Agreement as the “closing date for each Store Property”

³ Seller in the Haggen Divestiture Agreement is defined as Albertson’s Holdings LLC and Albertson’s LLC.

store directors, the foregoing restrictive covenant shall apply for twenty four (24) months following the applicable Closing Date instead of twelve (12) months.

Although the Decision and Order does not specifically prohibit Respondents from soliciting or hiring former employees currently employed by Haggen, Paragraph II.D.1 states that all Remedial Agreements, which includes the Haggen Divestiture Agreement, “[s]hall be deemed incorporated by reference into this Order, and any failure by Respondents to comply with the terms of any such Remedial Agreement(s) shall constitute a violation of this Order.” Therefore, without the Commission’s approval of Haggen’s proposed Employee Waiver, Respondents could be in violation of the Decision and Order if they solicit or hire Transferred Employees employed by Haggen at this time.

Even though Haggen unilaterally proposed and signed the Employee Waiver on September 3, 2015, Section 24.8 of the Haggen Divestiture Agreement requires all parties to agree in writing to any amendment.⁴

Since proposing the waiver, Haggen has filed for bankruptcy protection. A number of “Transferred Employees” have already lost their jobs and others may soon lose their jobs. Albertson’s would like to be able to help these people, all of whom are former Albertson’s employees, but does not want to incur the risk of being accused of violating the terms of the Haggen Divestiture Agreement or the Commission’s Order. Haggen’s proposal of the Employee Wavier would alleviate that risk.

Haggen also recently notified its employees in a memo dated September 17, 2015 that Haggen and Albertson’s are “cooperating” to obtain the waiver from the Commission. According to an article in the *Seattle Times*, the hiring restriction “was meant to protect Haggen

⁴ Section 24.8 states that “No amendment of any provision of this Agreement shall be valid unless the same shall be in writing and signed by all Parties.”

from poaching by a bigger rival. But now, with Haggen planning to shrink under Chapter 11 bankruptcy protection, the ban stands in the way of job security for thousands of grocery store employees.”⁵ The article also quotes from the September 17, 2015 Haggen memo, which says that removing the restriction preventing Albertson’s from hiring its former employees is a “priority” to “ensure our employees can take advantage of every opportunity available to them.”⁶ The article also quotes from the Haggen memo stating that the FTC staff is seeking approval of the waiver on an “expedited basis.”⁷ For additional information regarding Haggen, please contact Richard A. Feinstein at Boies, Schiller & Flexner LLP.

Given Haggen’s desire to waive the prohibition on Albertson’s from soliciting or hiring its Transferred Employees, Albertson’s desire to be able to hire these employees without incurring additional legal risk, and the pressing need of the Transferred Employees quickly to find employment, we respectfully request that the proposed Employee Waiver receive expedited approval by the Commission and that the Commission not require a public comment period.

⁵ See “Haggen seeks OK for Albertsons to rehire workers,” *Seattle Times*, September 17, 2015, available at <http://www.seattletimes.com/business/retail/haggen-seeks-ok-for-albertsons-to-rehire-staffers/>.

⁶ *Id.*

⁷ *Id.*

Dated: September 23, 2015

Respectfully submitted,

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Exhibit A

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