

**ANALYSIS OF AGREEMENT CONTAINING
CONSENT ORDERS TO AID PUBLIC COMMENT**

*In the Matter of Arko Holdings Ltd.
File No. 201-0041, Docket No. C-4726*

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment, subject to final approval, an Agreement Containing Consent Orders (“Consent Agreement”) from Arko Holdings Ltd. (“Arko”), GPM Southeast, LLC, and GPM Petroleum, LLC (collectively with Arko, “GPM”) and Empire Petroleum Partners, LLC (“Empire,” and collectively “Respondents”). The Consent Agreement is designed to remedy the anticompetitive effects that likely would result from GPM’s proposed acquisition of retail fuel assets from Empire.

Under the terms of the proposed Consent Agreement, Respondents must divest certain retail fuel assets in seven local markets in Indiana, Michigan, Maryland, and Texas. Respondents must complete the divestiture within 20 days after the closing of the acquisition. The Commission and Respondents have agreed to an Order to Maintain Assets that requires Respondents to operate and maintain each divestiture outlet in the normal course of business through the date the up-front buyers acquire the divested assets.

The Commission has placed the proposed Consent Agreement on the public record for 30 days to solicit comments from interested persons. Comments received during this period will become part of the public record. After 30 days, the Commission will review the proposed Consent Agreement and the comments received, and will decide whether it should withdraw from the Consent Agreement, modify it, or make it final.

II. The Respondents

Respondent Arko is a publicly traded company headquartered in Tel Aviv, Israel. Arko, through its subsidiaries GPM Southeast, LLC, and GPM Petroleum, LLC, supplies wholesale fuel to or operates approximately 1,400 retail fuel and convenience stores in twenty-two states across the South, Mid-Atlantic, and Midwest. In 2019, GPM ranked as the sixth largest operator of retail fuel and convenience stores in the United States.

Respondent Empire is a privately held Delaware limited liability company headquartered in Dallas, Texas. Empire also distributes fuel on a wholesale basis and operates retail fuel and convenience stores in 30 states and Washington, D.C. With respect to wholesale fuel distribution, Empire is a “super jobber,” a company that supplies over one billion gallons of fuel each year. Empire has supply relationships with all major oil companies, and distributes both branded and unbranded fuel. Empire supplies fuel to 1,555 retail sites, and operates 76 retail fuel and convenience stores itself.

III. The Proposed Acquisition

On December 17, 2019, GPM entered into an agreement to acquire certain retail and wholesale fuel assets from Empire and related entities (the “Acquisition”). With the Complaint,

the Commission alleges that the Acquisition, if consummated, would violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and that the Acquisition agreement constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, by substantially lessening competition for the retail sale of gasoline in seven local markets in Indiana, Michigan, Maryland, and Texas, and by substantially lessening competition for the retail sale of diesel fuel in three local markets in Indiana, Michigan, and Texas.

IV. The Retail Sale of Gasoline and Diesel Fuel

The Commission alleges that the relevant product markets in which to analyze the Acquisition are the retail sale of gasoline and the retail sale of diesel fuel. Consumers require gasoline for their gasoline-powered vehicles and can purchase gasoline only at retail fuel outlets. Likewise, consumers require diesel fuel for their diesel-powered vehicles and can purchase diesel fuel only at retail fuel outlets. The retail sale of gasoline and the retail sale of diesel fuel constitute separate relevant markets because the two are not interchangeable. Vehicles that run on gasoline cannot run on diesel fuel, and vehicles that run on diesel fuel cannot run on gasoline.

The Commission alleges that the relevant geographic markets in which to assess the competitive effects of the Acquisition with respect to the retail sale of gasoline are seven local markets in and around the following cities: Knox, Indiana; Kokomo, Indiana; South Bend, Indiana; Stevensville, Maryland; Edmore, Michigan; Hastings, Michigan; and Arlington, Texas. The relevant geographic markets in which to assess the competitive effects of the Acquisition with respect to the retail sale of diesel fuel are three local markets in and around the following cities: South Bend, Indiana; Edmore, Michigan; and Arlington, Texas.

The geographic markets for retail gasoline and retail diesel fuel are highly localized, depending on the unique circumstances of each area. Each relevant market is distinct and fact-dependent, reflecting many considerations, including commuting patterns, traffic flows, and outlet characteristics. Consumers typically choose between nearby retail fuel outlets with similar characteristics along their planned routes. The geographic markets for the retail sale of diesel fuel are similar to the corresponding geographic markets for retail gasoline, as many diesel fuel consumers exhibit preferences and behaviors similar to those of gasoline consumers.

The Acquisition would substantially lessen competition in each of these local markets, resulting in seven highly concentrated markets for the retail sale of gasoline and three highly concentrated markets for the retail sale of diesel fuel. Retail fuel outlets compete on price, store format, product offerings, and location, and pay close attention to competitors in close proximity, on similar traffic flows, and with similar store characteristics. In each of the local gasoline and diesel fuel retail markets, the Acquisition would reduce the number of competitively constraining independent market participants to three or fewer. The combined entity would be able to raise prices unilaterally in markets where GPM and Empire are close competitors. Absent the Acquisition, GPM and Empire would continue to compete head to head in these local markets.

Moreover, the Acquisition would enhance the incentives for interdependent behavior in local markets where only two or three competitively constraining independent market participants would remain. Two aspects of the retail fuel industry make it vulnerable to such coordination. First, retail fuel outlets post their fuel prices on price signs that are visible from the

street, allowing competitors to observe each other's fuel prices without difficulty. Second, retail fuel outlets regularly track their competitors' fuel prices and change their own prices in response. These repeated interactions give retail fuel outlets familiarity with how their competitors price and how changing prices affect fuel sales.

Entry into each relevant market would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects arising from the Acquisition. Significant entry barriers include the availability of attractive real estate, the time and cost associated with constructing a new retail fuel outlet, and the time associated with obtaining necessary permits and approvals.

V. The Proposed Consent Agreement

The proposed Consent Agreement would remedy the Acquisition's likely anticompetitive effects by requiring Respondents to divest certain retail fuel assets to an independent competitor in each local market. Each buyer of divestiture assets is an experienced operator or supplier of retail fuel sites, and will be a new entrant into the local market.

The proposed Consent Agreement requires that the divestiture be completed no later than 20 days after Respondents consummate the Acquisition. The proposed Consent Agreement further requires Respondents to maintain the economic viability, marketability, and competitiveness of each divestiture asset until the divestiture is complete. For up to 15 months following the divestiture, Respondents must provide transitional services, as needed, to assist the buyers with the divestiture assets.

In addition to requiring outlet divestitures, the proposed Consent Agreement requires Respondents to provide the Commission notice before acquiring retail fuel assets within a fixed distance of any GPM outlet in a market involving a divestiture for ten years. The prior notice provision is necessary because an acquisition in close proximity to divested assets likely would raise the same competitive concerns as the Acquisition, and may fall below the Hart-Scott-Rodino Act premerger notification thresholds.

The proposed Consent Agreement contains additional provisions designed to ensure the effectiveness of the proposed relief. For example, Respondents have agreed to an Order to Maintain Assets that will issue at the time the proposed Consent Agreement is accepted for public comment. The Order to Maintain Assets requires Respondents to operate and maintain each divestiture outlet in the normal course of business, through the date Respondents complete the divestiture. The Commission may appoint an independent third party as a Monitor to oversee Respondents' compliance with the requirements of the proposed Consent Agreement.

The purpose of this analysis is to facilitate public comment on the proposed Consent agreement, and the Commission does not intend this analysis to constitute an official interpretation of the proposed Consent Agreement or to modify its terms in any way.