

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

In the Matter of ARKO Corp.

File No. 211-0087

I. Introduction

The Federal Trade Commission (“Commission”) has accepted an Agreement Containing Consent Order (“Consent Agreement”) from ARKO Corp., GPM Investments, LLC, GPM Southeast, LLC, and GPM Petroleum, LLC (collectively “Respondents”). The Consent Agreement is designed to remedy the anticompetitive effects that resulted from GPM’s acquisition of retail fuel assets from Corrigan Oil Company (“Corrigan”).

Pursuant to an Asset Purchase Agreement dated March 8, 2021, GPM Petroleum, LLC, and GPM Southeast, LLC, which are directly controlled by GPM Investments, LLC (collectively “GPM”) and indirectly controlled by ARKO Corp., acquired 60 branded Express Stop retail fuel locations in Michigan and Ohio from Corrigan (the “Acquisition”). GPM consummated the Acquisition in May 2021 for total consideration of approximately \$94 million. As part of the Asset Purchase Agreement, Corrigan agreed not to compete for a period of time and within a specified radius around approximately 190 GPM owned, operated, and leased locations, in addition to the Express Stop locations purchased by GPM.

The Commission’s Complaint alleges that the Acquisition violated 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 substantially lessening competition for the retail sale of gasoline in five local markets in Michigan, and for the retail sale of diesel fuel in one of those same local markets. The Commission’s Complaint also alleges that the noncompete agreements violated 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 unreasonably lessening potential competition for the retail sale of gasoline and diesel fuel within the noncompete territories.

Under the terms of the Decision and Order (“Order”) contained in the Consent Agreement, Respondents are required to rescind parts of an Asset Purchase Agreement with Corrigan and release back to Corrigan retail fuel assets in the five local markets in Michigan. Respondents must transfer these assets back to Corrigan no later than the Closing Date listed in the Reacquisition Agreement of June 28, 2022. In addition, the Order resolves concerns raised by the noncompete agreements in the parties’ Asset Purchase Agreement.

The Consent Agreement has been placed on the public record for thirty days to solicit comments from interested persons. The Commission issued the accompanying Order as final prior to seeking public comment, as provided in Section 2.34(c) of the Commission’s Rules. This will allow the Commission to enforce the Order if there are any violations of its provisions during the public comment period. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the Consent Agreement

and comments received and decide whether it should withdraw from the Consent Agreement or modify the accompanying Order as provided in Section 2.34(e) of the Commission's Rules.

II. The Respondents

Respondent ARKO Corp., through its wholly owned subsidiary GPM, operates or supplies stores in thirty-three states and Washington D.C. GPM is the sixth largest convenience store chain in the country, with approximately 3,000 locations comprising approximately 1,400 company-operated stores and 1,625 independent dealer locations. GPM sells fuel to retail and wholesale customers. GPM earned 2021 revenue over \$4.7 billion, with fuel sales accounting for \$3 billion.

GPM derives most of its revenue from the retail sale of fuel and products sold in its convenience stores. GPM retains control over the fuel operation at its company-operated stores and sets wholesale fuel prices on a delivered basis to its dealer-operated network.

III. The Retail Sale of Gasoline and Diesel Fuel

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 five local markets in and around the following cities: Saginaw, Chesaning, Mt. Morris, and Mason, Michigan. The relevant geographic market in which to analyze the effects of the Acquisition on the retail sale of diesel fuel include one local market in and around one of the Saginaw, Michigan retail gasoline markets.

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 substantially lessened competition in each of these local markets, resulting in five highly concentrated markets for the retail sale of gasoline and one highly concentrated market 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 where the Commission alleges harm, the Acquisition reduced the number of competitively constraining independent market participants around the locations GPM is returning to Corrigan to two or fewer. Absent the Acquisition, Respondents and Corrigan would have continued to compete directly in these local markets. Because of the Acquisition, GPM is likely able to raise prices unilaterally in markets where GPM and Corrigan were close competitors.

Moreover, the Acquisition would enhance the incentives for interdependent behavior in local markets where only two 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 easily observe each other's fuel prices. 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.

The Commission's Complaint also alleges that, absent the Consent Agreement, the agreement not to compete harms customers in local retail gasoline and retail diesel fuel markets throughout Michigan and Ohio. By prohibiting Corrigan from competing with (1) each acquired retail fuel outlet *and* (2) a list of specified GPM locations, whether those GPM locations are anywhere near an acquired Corrigan location, the noncompete provision unreasonably restricts potential competition between Corrigan and GPM that would otherwise benefit consumers.

A general desire to be free from competition following a transaction is not a legitimate business interest. First, Corrigan's agreement not to compete with the 190 GPM-identified retail fuel outlets goes well beyond what is reasonably necessary to protect GPM's investment in the 60 acquired retail Express Stop locations. Second, the Corrigan noncompete agreements around the 60 acquired Express Stop stations, based on the unique facts and conditions present in those markets, is unreasonably overbroad in geographic scope and longer than reasonably necessary to protect a legitimate business interest.

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 and uncertainty associated with obtaining necessary permits and approvals.

IV. The Consent Agreement

The Order remedies the Acquisition's likely anticompetitive effects by requiring Respondents to return to Corrigan the retail fuel outlets included in the Acquisition in each of the five local markets. Corrigan is an experienced operator of retail fuel sites and remains an active market participant by continuing to operate a retail fuel business and a wholesale fuel supply business in Michigan.

The transfer of assets must be completed no later than the Closing Date listed in the Reacquisition Agreement of June 28, 2022. The Order further requires Respondents to maintain the economic viability, marketability, and competitiveness of each retail fuel business until Corrigan reacquires the five retail fuel locations.

The Order also requires Respondents to obtain prior approval from the Commission before acquiring retail fuel assets within a 3-mile driving distance of any of the returned locations for 10 years. The prior approval provision is necessary because the purchase of a retail fuel business near any of the five retail fuel locations would likely raise the same competitive concerns as the Acquisition and may not be reportable under the Hart-Scott-Rodino Act.

The Order also resolves the competitive concerns raised by the agreements not to compete. The Order requires that Respondents amend the noncompete obligation in the Asset Purchase Agreement to (i) only apply to retail fuel businesses acquired by GPM in this Acquisition, excluding the five locations to be returned to Corrigan, and (ii) limit the noncompete terms relating to each acquired retail fuel business to no broader than 3 years in duration and no more than 3 miles from each Express Stop location. The Order further (1) requires Respondents not enter into or enforce any noncompete agreement related to acquisitions of a retail fuel business that restrict competition around a retail fuel business that GPM already owns or operates, as opposed to the acquired retail fuel business, and (2) to notify third parties subject to similar noncompete agreements of GPM's obligations under the Order.

Retail fuel competition varies based on many factors, including driving patterns, population density, and consumer demand. The reasonableness of agreements not to compete will necessarily differ with local retail fuel competition. A 3-year and 3-mile radius around each acquired location in this transaction resembles a reasonable duration and geographic scope given the local competitive conditions around each Express Stop location. Noncompete agreements affecting areas geographically distinct from acquired retail fuel outlets, and noncompete agreements untethered to protecting goodwill acquired in the acquisition, are highly suspect and warrant Commission scrutiny.

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